

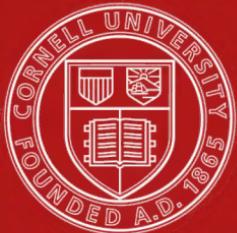
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A TREATISE
ON THE
LAW OF TORTS
OR THE
WRONGS
WHICH ARISE
INDEPENDENTLY OF CONTRACT.

BY THOMAS M. COOLEY, LL. D.
Intyre

THIRD EDITION.

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THE LAW OF TORTS.

*CHAPTER IX.

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WRONGS IN RESPECT TO CIVIL AND POLITICAL RIGHTS.

The Term Civil Rights. If we employ the term civil rights in the comprehensive sense in which it has already been made use of,¹ we might with propriety discuss under that title all classes of rights not strictly political. It has been found more convenient, however, to follow the common method, and to speak of some classes of rights separately; such, for instance, as rights in real and personal property, incorporeal rights, etc. In this regard we follow the practice of writers on general jurisprudence and constitutional law, who, in discussing sovereign powers, speak of the power to tax, the police power, etc., as if these stood apart from the general powers of government, when in fact in their exercise they are only particular manifestations of the general sovereignty. The method is well enough because it is convenient; at the same time it is desirable not to be misled by the use of so comprehensive a term in a sense comparatively narrow. The use of the term civil rights in this latter sense has been brought about within a few years in connection with legislation to preclude discrimination against colored people; and in the public mind it has not embraced some rights which are quite fundamental—such, for example, as the right to acquire property—because, as to these, there was no controversy and no occasion to legislate.

Civil liberty has also been spoken of, and an attempt made to

1—*Ante*, p. *33.

show in what it consists.² At the same time the power of the legislature to regulate civil rights and the necessity for its employment was recognized. In now directing attention to the wrongs which may be suffered in respect to civil rights, particular rights will be mentioned, and the limits the overstepping of which will constitute a violation of right, either by the [**326] State or by individuals, will be indicated. A wrong *is not the less a wrong because of being committed by the State through its legislation; and when thus committed some individual actor is generally in position to be held responsible. Even when that is not the case, however, a discussion of the law of wrongs could not well omit the wrongs by government.

Right to Labor and to Employ Labor. Every person *sui juris* has a right to make use of his labor in any lawful employment on his own behalf, or to hire it out in the service of others. This is one of the first and highest of civil rights.

State Regulation of Employments. Within certain limits which cannot with accuracy be conclusively defined, the State must always be at liberty to determine what are lawful employments, and to make others unlawful by forbidding them. This liberty is exercised by making games of chance unlawful, and in some States by forbidding the traffic in intoxicating drinks. The assumption supporting such prohibitions is, that the employments forbidden are hurtful and demoralizing; and they are prohibited in the exercise of a legislative discretion which is subject to no extraneous control. Passing from the cases of prohibition, we find that the authority to regulate business embraces every class and variety of occupation, and that it may be exercised either in respect to the person who may follow or be employed

2—*Ante*, pp. *8-*10. “Liberty as he may choose, subject only to the restraints necessary to secure the common welfare.” *Braceville Coal Co. v. People*, 147 Ill. 66, 71, 35 N. E. 62; *Bessette v. People*, 193 Ill. 335, 62 N. E. 215. See *McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854, 106 Am. St. Rep. 268.

in the business, or as to the methods in which the business may be conducted, or both.

The general principle of constitutional liberty is, that there must be no exclusions from lawful employments. Nevertheless, the law may make exceptions in some cases where the reasons therefor are sufficient on grounds of public policy. Without doubt persons may be excluded because their immaturity or imbecility would render the employment hurtful to themselves or dangerous to others, or for any other reason special and peculiar to their cases, and which presents a fair case for the exercise of the legislative judgment. The case of the employment of small children in mines or manufactories is an apt illustration. Forbidding this is sometimes a matter of humanity, and the right to do so is plain.³ The exclusion of females might perhaps be justified on physical grounds of equal validity in *the [*327] case of some employments.⁴ And where an occupation is peculiarly susceptible of abuse, it may be proper for the State to surround it with special restrictions, and to require those who propose to enter upon it to take out a special license and give security for good behavior, and to refuse altogether to issue licenses to persons of known bad character. Such regulations are usually made for the cases of hackmen, saloon-keepers, proprietors of billiard halls, of theaters, shows, etc.

The final test of what is a reasonable regulation must be found in the legislative judgment, unless the constitution has provisions on the subject. What the legislature ordains and the constitution does not prohibit must be lawful.⁵ But if the constitution does no more than to provide that no person shall be deprived of

3—*Commonwealth v. Hamilton Mnfg. Co.*, 120 Mass. 383.

4—Granting licenses for the sale of intoxicating drinks to males only, does not violate the constitutional provision which forbids the grant of special privileges or immunities. *Blair v. Kilpatrick*, 40 Ind. 312. A regulation which should forbid the employment of females in any place where intox-

icating liquors are sold might be supported by very strong reasons growing out of the peculiar temptations to vice and crime where the sexes are brought together in the habitual indulgence in alcoholic stimulants.

5—*Danville R. R. Co. v. Commonwealth*, 73 Pa. St. 29, 38; *Randle v. Pacific R. R. Co.*, 65 Mo. 325.

life, liberty, or property, except by due process of law, it makes an important provision on this subject, because it is an important part of civil liberty to have the right to follow all lawful employments. Regulations invidiously framed to exclude persons or classes must be held forbidden by the constitutional provision referred to.⁶ The grant by the State of monopolies in [*328] trade must *also be held forbidden by it. These were long since decided to be illegal in England,⁷ and they are equally illegal in this country.⁸ Still, the legislature, when it grants special privileges or franchises, may undoubtedly make them exclusive. The distinction seems to be this: The following of the ordinary and necessary employments of life is a matter of right, and cannot be made to depend upon the State's permission or license, except to this extent: that if the business offers temptations to exceptional abuses, it may be subjected to special and exceptional regulations, and among these may be the requirement of a license. But when the State gives permission to do something not otherwise lawful, it may in its discretion make the gift exclusive. Thus, it may grant an exclusive ferry, or an exclusive right to erect a toll-bridge, or to set up a lottery, and

6—A municipal ordinance prohibiting washing and ironing in public laundries between 10 p. m. and 6 a. m., is valid as a police regulation. *Barbier v. Connolly*, 113 U. S. 27. But an ordinance regulating such laundries which confers on the city authorities arbitrary power to interfere with or prevent the carrying on of the business and to make illegal discrimination between persons in similar circumstances, is invalid. *Yick Wo v. Hopkins*, 118 U. S. 356. See Stockton Laundry Case, 26 Fed. Rep. 611. If under the guise of police regulation to protect health, personal rights are arbitrarily invaded, the legislation is invalid. So held as to act prohibiting making of cigars in

tenement houses. *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. And act prohibiting making of any substitute for butter. *People v. Marx*, 99 N. Y. 377. In Missouri an act of the later kind has been sustained. *State v. Addington*, 77 Mo. 110. Indiscriminate sale of opium may be forbidden. *Nevada v. Ah Chew*, 16 Nev. 50. The sellers of patent rights may be required to file copy of letters patent with the county clerk. *Brechbell v. Randall*, 102 Ind. 528, 52 Am. Rep. 695.

7—*Darcy v. Allain*, 11 Rep. 84.

8—It has nevertheless been decided that the State may grant to a corporation the exclusive control of the business of slaughtering cattle for its principal city,

no one is wronged, because no one had such a liberty before, and therefore no one is deprived of any thing by the grant.

Right to form Business Relations. Preventing Employment. It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern.⁹ It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress. Thus, if one is prevented by the wrongful act of a third party from securing some employment he has sought, he suffers a legal wrong, provided he can show that the failure to employ him was the direct and natural consequence of the wrongful act.¹⁰ The difficulty here is, that this will in general be a consequence of some other legal wrong, and will constitute an *aggravation of damages [*329] rather than a distinct cause of action. Thus, the libel of a serving-man may induce one needing his services to refuse him employment;¹¹ but here the libel is the cause of action, and the loss of employment is the proof that special damage has flowed

and that this is no invasion of 782; Hundley *v.* Louisville, etc. civil rights. Slaughter-house Cases, R. R. Co., 105 Ky. 162, 48 S. W. 16 Wall. 36. The subject is discussed by the author at length in 429, 88 Am. St. Rep. 298; New the *Princeton Review* for March— York, etc., R. R. Co. *v.* Schaffer, April, 1878. Referring to the same 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628.

grant, the court has held that a 10—Quoted and approved in legislature by making a contract in Hundley *v.* Louisville, etc., R. R. in the charter cannot prevent a Co., 105 Ky. 162, 167, 48 S. W. subsequent legislature from modifying or abrogating the charter, 429, 88 Am. St. Rep. 298. so far as it affects public health or morals. Butchers' Union, &c., Co. *v.* Crescent City, &c., Co., 111 U. S. 746.

9—Quoted and approved in Brewster *v.* Miller's Sons, 19 Ky. L. R. 593, 597, 41 S. W. 301. See also Master Builders' Ass. *v.* Domanasio, 16 Colo. App. 25, 63 Pac.

11—in Ashley *v.* Harrison, 1 Esp. 48, where a manager sued

for a libel on an actor in his employ, alleging as special damage that the actor was thereby made sick and disabled from acting, Lord KENYON ruled that the damages were too remote; and in Vicars *v.* Wilcocks, 8 East, 1, it was held, that being discharged

from it. It cannot probably be safely affirmed that inducing one by any means whatsoever not in themselves unlawful to refuse a person employment will give a cause of action.¹² A wrong of that sort would be accomplished either, *first*, by the presentation of reasons, or, *second*, by means of a conspiracy: in the former case there would be no legal wrong if there were no such false assertions as would support an action; in the latter, if the conspiracy were made effectual by means of unlawful acts, the wrong would be manifest; but what shall be deemed unlawful acts in the case of a conspiracy it is not very easy to determine.

An employee, upon his discharge or leaving the service, has no common law right to a clearance card or certificate, showing the cause of his discharge or quittance, his length of service, capacity, etc., and no action lies for a refusal to give such clearance card or certificate, though it is alleged that thereby the plaintiff was prevented from getting employment elsewhere.¹³ Such a right, therefore, could only be claimed by virtue of a statute, contract or custom, and the burden would be on the plaintiff to show the contract or custom.¹⁴ Such a custom cannot be established by proof of one or two instances.¹⁵ In the Ohio case cited it is held that if the defendant company combined with other companies in an agreement not to employ any person who did not furnish a statement of his record from his former employer, it would afford no basis for an action, unless the agreement was brought about by some illegal act of the defendant, but "if the defendant, by fraud, falsehood or force, had brought about a re-

from service because of a slander not otherwise actionable would not make it so.

12—A count was held insufficient which alleged that the defendant from whose service the plaintiff had been discharged, prevented the plaintiff from getting employment with another railroad company, by calling the plaintiff, in answer to inquiries, a labor agitator. *Wabash R. R. Co. v. Young*, 162 Ind. 102, 69 N. E. 1003.

13—*Cleveland, etc., Ry. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811; *New York, etc., R. R. Co. v. Schaffer*, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628. And see *McDonald v. Illinois Central R. R. Co.*, 187 Ill. 529, 58 N. E. 463.

14—*Cleveland, etc., Ry. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811.

15—Ibid. "A usage which is to govern a question of right should be so certain, uniform and notorious as probably to be known to and understood by the parties as

fusal to employ the plaintiff, it would have committed a positive wrong against the plaintiff, which would have been actionable.”¹⁶

In *Hundley v. Louisville, etc., R. R. Co.*,¹⁷ the declaration alleged that the plaintiff was discharged by the defendant company, which falsely listed him as discharged for neglect of duty; that the defendant had entered into a combination with other railroad companies not to employ those who had been discharged for a cause, and that by reason of these acts it was impossible for the plaintiff to obtain employment with any railroad in the United States. The declaration was held bad on demurrer, because it did not show a failure to obtain employment by reason of the facts alleged; but it was further held that it would have been good if the plaintiff had averred “that he had sought and been refused employment by reason of the alleged wrongful act.”^{17a}

Procuring Discharge of Employee. One who maliciously and without justifiable cause, induces an employer to discharge an employee, by means of false statements, threats or putting in fear, or perhaps by means of malevolent advice and persuasion, is liable in an action of tort to the employee for the damages there-

entering into their contract, and cannot be proved by a single isolated instance.” *Ibid.* p. 407.

16—*New York, etc., R. R. Co. v. Schaffer*, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628. “It is the right of every person, natural or artificial, to employ or refuse to employ in his business whomsoever he may wish, and he cannot be called upon to answer for his judgment in that regard by the public or individuals, nor can the motives which prompt his action be considered.” *Ibid.*

17—105 Ky. 162, 48 S. W. 429, 88 Am. St. Rep. 298.

17a—The court says: “It is the part of every man’s civil rights to enter into any lawful business, and to assume business relations

with any person who is capable of making a contract. It is likewise a part of such rights to refuse to enter into business relations, whether such refusal be the result of reason, or of whim, caprice, prejudice or malice. If he is wrongfully deprived of these rights, he is entitled to redress. Every person *sui juris* is entitled to pursue any lawful trade, occupation or calling. It is part of his civil rights to do so. He is as much entitled to pursue his trade, occupation, or calling, and be protected in it, as is the citizen in his life, liberty or property. Whoever wrongfully prevents him from doing so inflicts an actionable injury. For every injury suffered by reason of a vio-

by sustained.¹⁸ And it makes no difference whether the employment was for a fixed term not yet expired or is terminable at the

lent or malicious act done to a man's occupation, profession, or way of getting a livelihood, an action lies. Such an act is an invasion of legal rights. A man's trade, occupation, or profession may be injured to such an extent, by reason of a violent or malicious act, as would prevent him from making a livelihood. One who has followed a certain trade or calling for years may be almost unfitted for any other business. To deprive him of his trade or calling is to condemn, not only him, but perchance a wife and children, to penury and want. Public interests, humanity and individual rights, alike, demand the redress of a wrong which is followed by such lamentable consequences. * * * If, by an arrangement among the railroad companies of the country, a record is to be kept by them of the causes of the discharge of their employees, and when they are discharged for certain causes the others will not employ them, it becomes important that the record kept should contain a true statement of the cause of an employee's discharge. A false entry on the record may utterly destroy and prevent one from making a livelihood in his chosen business. Such false entry must be regarded as intended to injure the discharged employee; therefore a malicious act. If it is the custom of the railroads of the country to keep such a record, and that employees discharged for certain causes are not to be employed by them, then it enters into and forms part of, every contract of employment that neither a false entry shall be made, nor one so made communicated, directly or indirectly, to any other railroad company." *Hundley v. Louisville, etc., R. R. Co.*, 105 Ky. 162, 164, 165, 48 S. W. 429, 88 Am. St. Rep. 298.

18—*Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367; *London Guarantee & Acc. Co. v. Horn*, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185; *Hollenbeck v. Ristine*, 105 Ia. 488, 75 N. W. 355, 67 Am. St. Rep. 306; *Hollenbeck v. Ristine*, 114 Ia. 358, 86 N. W. 377; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; *Lucke v. Clothing Cutters & Trimmers' Assembly*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408; *Walker v. Cronin*, 107 Mass. 555; *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; *May v. Wood*, 172 Mass. 11, 51 N. E. 191; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115; *Berry v. Donovan*, 188 Mass. 353; *Lally v. Cantwell*, 30 Mo. App. 524; *Lally v. Cantwell*, 40 Mo. App. 44; *Curran v. Galen*, 2 Misc. 553, 22 N. Y. S. 826; *Holder v. Cannon Mfg. Co.*, 135 N. C. 392, 47 S. E. 481; *Dannerberg v. Ashley*, 10 Ohio C. C. 558. See *McDonald v. Edwards*, 20 Misc. 523, 46 N. Y. S. 672. Defendants agreed among themselves to quit work if the plaintiff was not discharged and, on refusal of the employer to make such discharge,

will of the employer.¹⁹ In the latter case the employer is not liable, as he has the right to terminate the contract for any reason or even without any reason.²⁰ If one makes false and malicious statements against an employee, whereby he is discharged, he will be liable,²¹ but where one makes charges of uncivil conduct on the part of an employee toward himself or friends, whereby discharge results, he will not be liable if he acted in good faith and on reasonable grounds.²² In one of the cases cited the plaintiff's discharge was procured in this wise: The plaintiff was injured while in the employ of A, who was protected from liability by a policy in the defendant company. The latter threatened to procure the plaintiff's discharge unless he would settle his claim for \$75, and, upon his refusal so to do did cause his discharge by threatening to cancel its policy with A, unless the plaintiff was discharged. The defendant was held liable, the court saying: "We therefore conclude, both upon reason and authority, that where a third party induces an employer to discharge his employee, who is working under a contract terminable at will, but under which the employment would have continued indefinitely, in accordance with the desire of the employer, ex-carried out their agreement, and in consequence the mine in which all were working was shut down and the plaintiff thrown out of employment. Held that the plaintiff had no cause of action against the defendants. Clemmitt *v.* Watson, 14 Ind. App. 38, 42 N. E. 367. Where the discharge is accomplished by means of false statements it is held that the substance of the statements should be set forth in the declaration in order that the court may see whether any such effect as is alleged can reasonably be attributed to such statements and in order that the defendants may know what they are called upon to meet. May *v.* Wood, 172 Mass. 11, 51 N. E. 191; Moran *v.* Dunphy, 177 Mass. 485,

59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115.

19—*Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934, 11 Am. St. Rep. 367; *London Guarantee & Acc. Co. v. Horn*, 206, Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 83 Am. St. Rep. 289, 52 L. R. A. 115; *Lally v. Cantwell*, 30 Mo. App. 524; *Dannerberg v. Ashley*, 10 Ohio C. C. 558. But see *Holder v. Cannon Mfg. Co.*, 138 N. C. 308.

20—*Henry v. Pittsburg, &c., R. R. Co.*, 139 Pa. St. 289, 21 Atl. 157.

21—*Hollenbeck v. Ristine*, 105 Ia. 488, 75 N. W. 355, 67 Am. St. Rep. 306; *Hollenbeck v. Ristine*, 114 Ia. 358, 86 N. W. 377.

22—*Lancaster v. Hamburger*, 70

cept for such interference, and where the only motive moving the third party is a desire to injure the employee and benefit himself at the expense of the employee by compelling the latter to surrender an alleged cause of action, for the satisfaction of which, in whole or in part, such third party is liable, and where such right of action does not depend upon and is not connected with the continuance of such employment, a cause of action arises in favor of the employee against the third party.”²³ In another case the defendant, as manager of a granite quarry, made a contract with L, terminable at pleasure, to cut paving blocks in the quarry. The plaintiff was an employee of L, and, being disliked by the defendant, the latter threatened to terminate L’s contract unless he discharged the plaintiff, which L did. It was held that the defendant was not liable, though he was actuated by malice towards the plaintiff, and that “when one exercises a legal right only, the motive which actuates him is immaterial.”²⁴ In this case the defendant doubtless had a right to get rid of a person whose presence in his quarry was obnoxious to him and the case is quite different from one where the interference is without any interest or occasion, but is purely malicious.

Action for Inducing Breach of Contract. One who maliciously or without justifiable cause induces a person to break his contract with another will be liable to the latter for the damages resulting from such breach.²⁵ As to what will constitute justi-

Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856.

23—London Guarantee & Acc. Co. v. Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185.

24—Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225.

25—Dale v Hall, 64 Ark 221, 41 S. W. 761; Employing Printers’ Club v. Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353; Morehouse v. Terrill, 111 Ill. App. 460; Gore v. Condon, 87 Md. 368, 39 Atl. 1042, 67 Am. St. Rep. 352, 40 L. R. A. 382; Morgan v. Andrews, 107

Mich. 33, 64 N. W. 869; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Raymond v. Yarrington, 96 Tex. 443, 72 S. W. 580, 97 Am. St. Rep. 914; Brown Hardware Co. v. Indiana Stove Works, 96 Tex. 453, 73 S. W. 800, 62 L. R. A. 962; West Va. Trans. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; Angle v. Chicago, etc., Ry. Co., 151 U. S. 1, 14 S. C. Rep. 240, 38 L. Ed. 55; Glamorgan Coal Co. v. South Wales Miners’ Federation, (1903) 2 K.

fiable cause cannot be satisfactorily defined and must be left to the determination of the court in each case.²⁶ Some of the authorities hold that the action will not lie unless unlawful means are employed, such as fraud, deceit or intimidation.²⁷

Conspiracy to Prevent Employment. By conspiracy is here intended, a combination of two or more persons to accomplish, by some concerted action, an unlawful end to the injury of another. It was shown in a preceding chapter that the conspiracy was not in itself a legal wrong; it is a thing amiss, when it has an unlawful purpose in view, but it does not become a legal wrong until the unlawful purpose is accomplished, or until some act, distinctly illegal, is done towards its accomplishment. Nor is it perceived that the end itself can be unlawful if it can be accomplished by perfectly lawful means.²⁸

*There may be a difference in the law between breaking [*330] up a service actually entered upon or contracted for, and inducing a person by any species of inducements not unlawful in themselves to refuse to contract for service. The latter may be wrong in morals, but not illegal: the former is an actionable wrong, standing upon exactly the same footing as the wrong by which the master loses his servant's assistance through his being

B. 545; *Giblan v. National Amalgamated Laborers' Union*, (1903) 2 K. B. 600; *Quinn v. Leathem*, (1901) A. C. 495. Compare *Glen-coe Land & G. Co. v. Hudson Bros. Com. Co.*, 138 Mo. 439, 40 S. W. 93, 60 Am. St. Rep. 560, 36 L. R. A. 804.

26—Ibid.; *Glamorgan Coal Co. v. South Wales Miners' Federation*, (1903) 2 K. B. 545.

27—*Boysen v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545; *Boulier v. Macaulay*, 91 Ky. 135, 15 S. W. 60, 34 Am. St. Rep. 171, 11 L. R. A. 550; *Kline v. Eubanks*, 109 La. 241, 33

So. 211; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252.

28—to conspire maliciously and vexatiously, and without reasonable or probable cause, to commence and actually commencing a suit in the name of a third party against the plaintiff, is not actionable where no legal damage is alleged. *Cotterel v. Jones*, 11 C. B. 713. See *Wellington v. Small*, 3 Cush. 145. But a conspiracy to injure a teacher in his profession by false statements as to his character, followed by damage, is actionable. *Wildee v. McKee*, 111 Pa. St. 335. So is one to "boycott" a line of steamers and drive it out

wrongfully disabled. This general subject was recently so fully considered by the Court of Queen's Bench in an action brought for maliciously procuring an actor to break his contract of service with the plaintiff, that a reference to the case, and to the authorities upon which it was decided, seems to be all that is important in this connection. It was held in that case by the majority of the court that the action will lie whether the service had actually been entered upon or not, provided a valid contract for it was in existence.²⁹ On the other hand, it has been decided that a mere conspiracy to break a contract for the delivery of property cannot constitute a tort, even though the contract be broken in pursuance of it; the ground of it being that the party to the contract might of its own volition have broken his promise without being liable as for a wrong, and "that an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. The quality of the

act, and the nature of the injury inflicted by it must determine the question whether the action will lie."³⁰ It is difficult to understand, however, why a conspiracy to deprive one of labor contracted for can be any different in nature or damaging quality from a conspiracy to deprive him of property bargained for, or of anything else of value. There is no peculiar sacredness to the right to service over any other right,

of a certain trade. *Mogul S. S. Co. v. McGregor*, L. R., 15 Q. B. D. 476.

29—*Lumley v. Gye*, 2 El. & Bl. 216, citing the cases for enticing away or harboring servants, *Adams v. Bafeald*, 1 Leon. 240; *Blake v. Lanyon*, 6 T. R. 221; *Pilkington v. Scott*, 15 M. & W. 657; *Hartley v. Cummings*, 5 C. B. 247; *Sykes v. Dixon*, 9 Ad. & El. 693. The same rule followed in case of contract for personal service. *Bowen v. Hall*, L. R., 6 Q. B. D. 333.

30—*Kimball v. Harman*, 34 Md. 507, 6 Am. Rep. 340, citing *Hutchins v. Hutchins*, 7 Hill, 104; *Wellington v. Small*, 3 Cush. 145; *Adler v. Fenton*, 24 How. 407; *Cotterell v. Jones*, 11 C. B. 713. A conspiracy between a debtor and a third person to defraud a creditor by the debtor delivering property over to the third party and then taking the benefit of the insolvent law, was held actionable in *Perrod v. Morrison*, 2 Pen. & Watts, 126, criticised in *Wellington v. Small*, 3 Cush. 145.

and no good reason can be suggested for protecting it differently.³¹

But the acts done in pursuance of a conspiracy may be unlawful in themselves if they include deception, threats,³² intimidation, or any species of duress whatsoever, whether employed upon the laborer or upon the employer. Any one has an undoubted right to refuse to be employed by another, but he has no right whatever to resort to compulsion of any sort to keep others from the employment. A society of men may lawfully unite in agreeing that they will not perform services for those who employ laborers not associated with them, but they become wrong-doers the moment they interfere with the liberty of action of others. Upon this point the recent case of *Carew v. Rutherford* is instructive.

In that case, for some disregard of their regulations, a contractor, who had not agreed to be bound by them, was fined by a labor organization, and was threatened that, unless he paid the fine, his workmen should leave his employ, and that the power of the association should be used to prevent others engaging in his service. Says CHAPMAN, Ch. J.: "We have no doubt that a conspiracy against a mechanic who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threaten-

31—An action may perhaps be maintained for inducing a man to break a contract of marriage. *Sheperd v. Wakeman*, 1 Sid. 79.

32—See *Green v. Button*, 2 C. M. & R. 707; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30. Defendant with two hundred men went upon plaintiff's premises, and halting the men some distance from the mill went in to consult the foreman about the employees joining a strike for shorter hours. In his absence, the men against

his cautioning went into the mill and did some violent acts. Defendant held liable as a trespasser. "No man," says the court, "has a right to enter upon the premises of another for the purpose of inducing persons in the employment of that other to leave their employment to the injury of their employer for the purpose of working less hours or getting higher wages." *Webber v. Barry*, 66 Mich. 127, 33 N. W. 289.

[*332] ing to do this, so that he is induced to pay the money *demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal; and that the moneys thus obtained may be recovered back, and if the parties succeed in injuring his business, they are liable to pay all the damage thus done to him. It is a species of annoyance and extortion which the common law has never tolerated. This principle does not interfere with the freedom of business, but protects it. Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases, and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men; and it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions.³³ * * * Freedom is the policy of this country. * * * The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country, and if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both."³⁴ The same general principle has also been declared in England, where the court went so far as

33—Citing Commonwealth *v.* Hunt, 4 Met. 111, 38 Am. Dec. 346; Boston Glass Manufactory *v.* Binney, 4 Pick. 425; Bowen *v.* Matheson, 14 Allen, 499.

34—Carew *v.* Rutherford, 106 Mass. 1, 13, 8 Am. Rep. 287. See Hilton *v.* Eckersley, 6 El. & Bl. 47. A master brought action against the Executive Board of a Longshoremen's Union. Defendants were not in the plaintiff's employ

and procured plaintiff's workmen to quit work in a body to compel plaintiff to accede to defendant's demands with reference to the pay of the workmen, and further attempted to boycott the plaintiff's business in order to compel the payment of such wages, by which action plaintiff was seriously injured.

"Associations have no more right to inflict injury upon others

to enjoin a labor association which, by means of placards, advertisements, etc., was endeavoring to prevent laborers from entering the plaintiff's employment. The justification for this action was found in the fact that the organization was proceeding to destroy the value of the plaintiff's property; by their threats and intimidation, rendering it impossible for the plaintiffs to obtain workmen, without whose assistance the property would become utterly valueless for the purposes of their trade.³⁵ The same doctrine would undoubtedly be applied to the case of employers, who, by combination and unlawful means, should prevent or seek to prevent the employment of any special class of laborers. Every man has the liberty of employing and being employed, and every man must respect the like liberty in others.

Interference with Trade and Labor. Where two or more workmen combine to procure the discharge of other workmen or to prevent their employment by the exercise of unlawful means or without justifiable cause, and do thereby cause loss of employment, an action will lie for the damages sustained and either the workmen threatened or their employer may maintain a bill to restrain such unlawful interference.³⁶ The principle involved

than individuals have. All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members; or designed to prevent employers from making a just discrimination in the rate of wages paid to the skillful and to the unskillful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats

of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights, are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable." Old Dominion Steam Ship Co. v. McKenna, 30 Fed. Rep. 48. BROWN, J.

35—Springhead Spinning Co. v. Riley, Law R. 6 Eq. Cas. 551. Boycotting a factory by parading in front of it with banners inscribed with threatening words may be enjoined. Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

36—Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509,

has been thus stated by the Supreme Court of Massachusetts: "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum obseque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."³⁷

The subject has received very elaborate consideration in two recent cases in the English House of Lords, and the conclusion reached is thus stated in the syllabus to the later case: "A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers, or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable."³⁸

50 S. E. 353; *Lucke v. Clothing Cutters & Trimmers' Assembly*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339; *Berry v. Donovan*, 188 Mass. 353; *Davis v. Zimmerman*, 91 Hun, 489, 36 N. Y. S. 303; *Curran v. Galen*, 2 Misc. 553, 22 N. Y. S. 826; *Davis Machine Co. v. Robinson*, 41 Misc. 329, 84 N. Y. S. 837; *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534; *Quinn v. Leathem*, (1901) A. C. 495; *Read v. Friendly Society of Stonemasons*, (1902) 2 K. B. 732. See *Reynolds v. Everett*, 67 Hun, 294, 22 N. Y. S. 306; *Mills v.*

U. S. Printing Co.

99 App. Div. 605, 91 N. Y. S. 185; *Coons v. Chrystie*, 24 Misc. 296, 53 N. Y. S. 668; *Marretta Casting Co. v. Hiestand Thuma*, 28 Pa. Co. Ct. 248; *Manufacturers' Outlet Co. v. Longley*, 20 R. I. 86, 37 Atl. 535; *Perrault v. Gauthier* 28 Sup. Ct. Canada, 241.

37—*Walker v. Cronin*, 107 Mass. 555, 564; *Plant v. Woods*, 176 Mass. 492, 498, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339.

38—*Allen v. Flood*, (1898) A. C. 1; *Quinn v. Leathem*, (1901) A. C. 495. The former case has been much criticised in this country but the decision is explained or qualified in *Quinn v. Leathem* and the two cases must be studied together. In the later case Lord

As above stated, if the interference is accomplished by unlawful means, the defendants are liable. The means usually employed are falsehood, fraud or intimidation, or all combined. The intimidation may consist in threats of violence to workmen or of harm to the employer's property or business.³⁹ Whether the threat of a strike by the defendants is the employment of unlawful means is open to question. In New York such a threat is held not to be unlawful, and if the object of the defendants is justifiable, as to get the work for themselves or otherwise to secure a benefit, no action will lie either for damages or prevention.⁴⁰ But in Pennsylvania, where the members of one union proposed to compel the members of another union to join the defendants' union by procuring their discharge from all jobs where both were working, by means of strikes by the defendants, it was held the defendants should be enjoined. The court says: "Trades unions may cease to work for reasons satisfactory to their members, but if they combine to prevent others from obtaining work by threats of a strike or combine to prevent an employer from employing others by threats of a strike, they combine to accomplish an unlawful purpose, a purpose as unlawful now as it ever was, though not punishable by indictment. Such combination is a despotic and tyrannical violation of the inde-

Macnaughten says: "In my opinion Allen *v.* Flood, (1898) A. C. 1, laid down no new law. It simply brushed aside certain dicta which in the opinion of the majority of this house were contrary to principle and unsupported by authority. Those dicta are first to be found in the judgment delivered by Lord Esher on behalf of himself and Lord Shelborne in Bowen *v.* Hall, L. R. 6 Q. B. D. 333. They were repeated by Lord Esher and Lopes, L. J. in Temperton *v.* Russell, (1893) 1 Q. B. 715; but they were not, I think, necessary for the decision in either case. They did form the ground of decision in Allen *v.* Flood in its earlier stages.

But in the end the law was restored to the condition in which it was before Lord Esher's views in Bowen *v.* Hall and Temperton *v.* Russell were accepted by the Court of Appeal. The head note to Allen *v.* Flord might well have run in words used by Parke B., in giving the judgment of an exceptionally strong court nearly half a century ago. (Stevenson *v.* Newnham, (1853) 13 C. B. 297). 'An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.'"

39—See *ante*, p. 597, note 36.

40—National Protective Assn. *v.* Cumming, 170 N. Y. 315, 63 N.

feasible right of labor to acquire property which courts are bound to restrain. It is utterly subversive of the letter and spirit of the declaration of rights. If such combination be in accord with the law of the trade union, then that law and the organic law of the people of a free commonwealth cannot stand together; one or the other must go down.⁴¹

The same general rules apply to an interference with one's trade or business, as to interference with the employment of labor. Neither one person nor a combination of persons may interfere with one's business contracts, by inducing the obligors to break such contracts and for any such interference an action will lie.⁴² In the case cited from Illinois, it appeared that the plaintiff had built up a profitable business by obtaining customers for laundry work, which she had done by others, with whom she had contracts. The defendants, members of the Chicago Laundryman's Association, procured these parties to break their contracts and procured other laundrymen not to make contracts with her, whereby her business was destroyed, all of which was done because the plaintiff refused to increase her prices to a schedule fixed by the association. The defendants were held liable and a judgment against them for \$6,000 was sustained.⁴³

E. 369, 88 Am. St. Rep. 648, 58
L. R. A. 135. And see *Allen v. Flood*, (1898) A. C. 1.

41—*Erdman v. Mitchell*, 207 Pa. St. 79, 92, 56 Atl. 327, 99 Am. St. Rep. 783, 63 L. R. A. 534.

42—*Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 50 S. E. 353; *Doremus v. Hennessey*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203, 43 L. R. A. 797; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; *Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669; *Raymond v. Yarrington*, 96 Tex. 443, 72 S. W. 580, 97 Am. St. Rep. 914, 62 L. R. A. 962; *Brown Hardware Co. v. Indiana Stove Works*, 96 Tex. 453, 73 S.

W. 800; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *Temper-ton v. Russell*, (1893) 1 Q. B. 715; *Glamorgan Coal Co. v. South Wales Miners' Federation*, (1903) 2 K. B. 545; *Giblan v. National Amalgamated Laborers' Union*, (1903) 2 K. B. 600; *ante*, p. 592, n. 25. "No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any loss willfully caused by such interference will give the party injured a right of action for all damages sustained." *Purington v. Hinchliff*, 219 Ill. 159.

43—*Doremus v. Hennessey*, 176 Ill. 608, 52 N. E. 924, 54 N. E.

So an attempt to injure, or an injury to, a person's business by procuring others not to deal with him, or by getting away his customers, if unlawful means are employed, such as fraud or intimidation, or if done without justifiable cause, is an actionable wrong. Thus where the defendants, merchants and bankers of a town, without any purpose except to injure the plaintiff, who kept a hotel, combined to boycott the hotel by refusing to buy goods of drummers who stopped there, they being the chief source of patronage, and by persuading people not to stop at the hotel, they were held liable.⁴⁴ And generally where the defendants combine to refuse to deal with the plaintiff and to induce others to do the same, an action will lie if loss results, and in some cases the carrying out of the purpose may be enjoined.⁴⁵ "One man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him."⁴⁶

524, 68 Am. St. Rep. 203, 43 L. R. A. 797. The court says: "No persons, individually or by combination, have the right directly or indirectly to interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses willfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill and credit, will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him or causing

them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss." p. 614.

44—*Webb v. Drake*, 52 La. Ann. 290, 26 So. 791.

45—*Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547; *Hartnett v. Plumbers' Supply Ass.*, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194; *Ertz v. Produce Exchange*, 79 Minn. 140, 81 N. W. 737, 79 Am. St. Rep. 433, 48 L. R. A. 90; *Ertz v. Produce Exchange*, 82 Minn. 173, 84 N. W. 743, 83 Am. St. Rep. 419, 51 L. R. A. 825; *Temperton v. Russell*, (1893) 1 Q. B. 715.

46—*Ertz v. Produce Exchange*, 79 Minn. 140, 145, 81 N. W. 737, 79 Am. St. Rep. 433, 48 L. R. A. 90.

A boycott is illegal, and damage caused thereby is actionable, and the prosecution or continuance of a boycott may be enjoined in proper cases.⁴⁷ "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts, which tend to violence, and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs."⁴⁸

In the case just referred to, the plaintiffs were electrical contractors in Minneapolis, and the defendant council was composed of representatives from the different labor unions of that city, and controlled the action of such unions and of their members. The plaintiffs ran an "open shop," and the defendant proposed to boycott the plaintiffs as "unfair," and had threatened prospective customers with loss, strikes and trouble if they gave work to the plaintiffs. It was held that the defendant should be enjoined from interfering with the business of the plaintiffs by threats or intimidation directed to their customers or prospective customers, also from interfering with such customers or prospective customers by threats of any kind. It was further held that they should not be enjoined from notifying such customers that plaintiffs were "unfair," the word not being shown to have any particular meaning, nor from requesting union men on jobs where plaintiffs were at work to quit.

A combination to injure a person in his business or to drive

47—*Purington v. Hinchliff*, 219 Ill. 159; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407; *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 1118, 103 Am. St. Rep. 477, 63 L. R. A. 753. See *Park & Sons Co. v. National Wholesale Druggists' Ass.*, 30

App. Div. 508, 52 N. Y. S. 475; *Park & Sons Co. v. Hubbard*, 30 App. Div. 517, 52 N. Y. S. 481; *Loewe v. Cal. State Federation of Labor*, 139 Fed. 71.

48—*Gray v. Building Trades Council*, 91 Minn. 171, 179, 97 N. W. 663, 1118, 103 Am. St. Rep. 477, 63 L. R. A. 753.

him out of business is unlawful, and the injured party may recover the damages sustained or enjoin the consummation of the purpose.⁴⁹ So if a person breaks up the business of his rival by circulating false reports as to his honesty, solvency, etc., he will be liable.⁵⁰ As one person may refuse to have business relations with another, so two or more may combine or agree together not to deal with a particular person for any reason they see fit, and no action will lie either to prevent the carrying out of this agreement or for damages consequent upon its performance.⁵¹ But if the agreement includes the influencing of parties outside the combination not to deal with the plaintiff, then it is illegal.⁵² So if the members of the combination are subject to coercion, as by the infliction of penalties.⁵³ *Martell v. White*⁵⁴ is an instructive case. The defendants were members of an association composed of manufacturers, quarriers and workers of granite in and about Quincy. A by-law of the association imposed a penalty of from \$1 to \$500 upon any member dealing with a non-member.

49—*State v. Huegin*, 110 Wis. 189, 85 N. W. 1046; *Hawarden v. Youghiogheny L. & C. Co.*, 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828. In the former case the members of the combination were held liable for a criminal conspiracy. In the latter the court says: “The allegation is distinct and clear that one of the purposes and objects of this agreement was to drive the plaintiff out of business. This was an ulterior and unlawful purpose, and constitutes malice in contemplation of law. Therefore, under the allegation of the complaint, it is clear that the combination here formed was formed for the malicious purpose of doing an injury to another, and that such injury has resulted, and hence that a cause of action at law for damages is stated.” p. 551. See *Rourke v. Elk Drug Co.*, 75 App. Div. 45, 77 N. Y. S. 373.

50—*Brown v. Am. Freehold Land Mgt. Co.*, 97 Tex. 599, 80 S. W. 985.

51—*Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337; *Brewster v. Miller's Sons*, 19 Ky. L. R. 593, 41 S. W. 301; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755; *Schulten v. Bavarian Brewing Co.*, 96 Ky. 224, 28 S. W. 504.

52—*Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755.

53—*Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 24 L. R. A. 469; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085, 102 Am. St. Rep. 341, 64 L. R. A. 260; *Cleveland v. Anderson*, 66 Neb. 252, 92 N. W. 306.

54—185 Mass. 255, 69 N. E. 1085, 102 Am. St. Rep. 341, 64 L. R. A. 260.

The plaintiff was a non-member and was engaged in quarrying granite and selling it to cutters and polishers. By reason of the by-law members of the association refused to deal with the plaintiff and his business was broken up. In a suit for damages, it was held to be a case for the jury, that in the case of such combinations both the object sought must be lawful and the means used to accomplish it, and that in this case the means were not of this character. "In a case like this," says the court, "where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. If the injury be inflicted without just cause or excuse, then it is actionable. The justification must be as broad as the act and must cover not only the motive and the purpose, or in other words, the object sought, but also the means used. * * * In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. * * * This method of procedure is arbitrary, and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal."⁵⁵

On the other hand, where members of an association procured wholesalers not to sell supplies to a non-member by refusing to deal with those who did so, whereby the business of the non-member was damaged and threatened with destruction, it was held that both the object sought and the means employed were lawful, and that the injured party had no remedy. The court recognizes the rule that the defendants were not at liberty to employ coercive measures in order to induce parties not to deal with the plaintiff, and hold that the threat to withdraw trade was not coercive. On this point the court says: "It was per-

55—Ibid., pp. 258-261.

fefully competent for members of the association, in the legitimate exercise of their own business, to bestow their patronage on whomsoever they chose, and to annex any condition to the bestowal which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members of the association more than that of the non-members, they would doubtless comply; otherwise they would not.”⁵⁶

Where the defendant, in order to injure the plaintiff, refuses to employ or continue in his service men who trade at the latter's

56—Macaulay Bros. v. Tierney, then, resolves itself into this: Was 19 R. I. 255, 261, 33 Atl. 1, 61 Am. St. Rep. 770, 37 L. R. A. 455. In view of the growing importance of the subject and the increasing amount of litigation thereon as well as of the fact that the law on the subject is in a formative stage, we quote from the opinion on the objects of the defendants and the effect of the conspiracy alleged, as follows: “It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law and makes it actionable. If, therefore, there is a legal excuse for the act it is not wrongful, even though damage may result from its performance. The cause and the excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question,

the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices?

“We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done and, so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of his rival or his servants or workmen, and the procurement of the violation of contractual relations, are instances.” * * *

“To maintain a bill on the

store, whereby the plaintiff's trade is injured, he may have an action for the damage. In such a case the object sought is not a lawful one, and, therefore, the interference with the plaintiff's trade is without just cause or excuse.⁵⁷ Where the lessee of land had the right to remove the timber therefrom within a limited time and the defendant, a subsequent purchaser, by means of threats of prosecution and the like, caused the lessee's servants to leave and prevented others from entering his employ until after the time had expired, the defendant was held liable for the damages, which would be the value of the timber, less the cost of removal.^{57a}

One may advertise and sell the goods of a manufacturer at less than wholesale prices, though the purpose be to inflict loss on the

ground of conspiracy, it is necessary that it should appear that the object relied on as the basis of the conspiracy, or the means used in accomplishing it, were unlawful. What a person may lawfully do a number of persons may unite with him in doing without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. The object of the members of the association was to free themselves from the competition of those not members, which, as we have seen, is not unlawful. The means taken to accomplish that object were the agreement among themselves not to deal with wholesale dealers who sold to those not members of the association, and the sending of notices to that end to wholesalers. This, as we have also seen, was not unlawful. Hence, it follows that, as the object of the combination between the members of the association was not unlawful, nor the means adopted for its accomplishment

unlawful, there is no ground for the charge of conspiracy, and the fact of combination is wholly immaterial." pp. 258-264. *Master Builders' Ass. v. Domascio*, 16 Colo. App. 25, 63 Pac. 782, is a somewhat similar case in which the same conclusion was reached. See also *Buckley v. Mulville*, 102 Ia. 602, 70 N. W. 107, 63 Am. St. Rep. 479; *Cote v. Murphy*, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. Rep. 686, 23 L. R. A. 135; *Buchanan v. Kerr*, 159 Pa. St. 433, 28 Atl. 195.

57—*Graham v. St. Charles St. R. R. Co.*, 47 La. Ann. 214, 16 So. 806, 49 Am. St. Rep. 366, 27 L. R. A. 416; *Graham v. St. Charles St. R. R. Co.*, 47 La. Ann. 1656, 18 So. 707, 49 Am. St. Rep. 436. The contrary is held in *Payne v. Railroad Co.*, 13 Lea, 507. Threatening not to employ a man who remains a tenant of a certain landlord; gives the latter no right of action against the employer. *Heywood v. Tillson*, 75 Me. 225.

57a—*Crane v. Patton*, 57 Ark. 340, 21 S. W. 466.

manufacturer, and the latter has no remedy, for a person may sell or offer his property at any price he pleases,⁵⁸ and it is held to make no difference that the defendant did not have the goods on hand at the time he advertised them for sale.⁵⁹

In regard to the right of competition, it has been said: "One may, without liability, induce the customers of another to withdraw their custom from him, in the race of competition, in order that the former may himself get the custom, there being no contract; and it is no matter that such person is injured, and it is no matter that the other party was moved by express intent to injure him, motive being immaterial where the act is not unlawful. But where the act is not done under the right of competition, or under the cover of friendly, neighborly counsel, but wantonly or maliciously with intent to injure another, it is actionable, if loss ensue. Nor is it material in the latter case that there was no binding contract between the business man and his customers. He cannot interfere, even for his own benefit, if there is a contract."⁶⁰ Where vessel owners formed an association for the purpose of securing to themselves a monopoly of a certain carrying trade, agreed upon a division of cargoes and on freights to be charged, allowed a rebate of five per cent. to all shippers who used the vessels of the members exclusively, prohibited their agents from acting for competing lines on pain of dismissal, notified shippers that the benefit of the rebate would be withdrawn from any who shipped by rival vessels, and underbid competing lines so that they carried at a loss, it was held that the object sought and means employed were legitimate and justified by the principle of competition.⁶¹

It has often been said in cases relating to trade and the employment of labor that what one may lawfully do, two or more may

58—Passaic Print Works *v.* Ely 40 S. E. 591, 88 Am. St. Rep. 895, & Walker Dry Goods Co., 105 56 L. R. A. 804. And see Brown Fed. 163, 44 C. C. A. 426; Ajello *v.* Am. Freehold Land Mgt. Co., *v.* Worsley, (1898) 1 Ch. 274. 97 Tex. 599, 80 S. W. 985.

59—Ajello *v.* Worsley, (1898) 1 Ch. 274. 61—Mogul S. S. Co. *v.* McGregor, (1892) A. C. 25; Mogul S. S. Co.

60—West Va. Trans. Co. *v.* McGregor, 23 Q. B. D. 598. Standard Oil Co., 50 W. Va. 611,

combine to do. The Supreme Court of Massachusetts makes the following observations upon this point: "To what extent combination may be allowed in competition is a matter about which there is yet much conflict, but it is possible that in a more advanced stage of the discussion the day may come when it will be more clearly seen and will more distinctly appear in the adjudications of the courts than as yet has been the case, that the proposition that what one man lawfully can do any number of men acting together by combined agreement lawfully may do, is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and the difference between the power of individuals acting each according to his own preference, and that of an organized and extensive combination, may be so great in its effect upon public and private interests as to cease to be one simply in degree and to reach the dignity of a difference in kind."⁶²

Unlawful Combinations. A combination formed by agreement between a number of employers in the same line of business, to suspend or carry on business, as the majority shall agree, is void, because in restraint of trade.⁶³ So is an agreement between laborers, by which they undertake that they will not seek work at a shop where disputes connected with the trade have arisen, and will not encourage or assist a laborer contrary to certain rules agreed upon, or seek to procure employment for those not associated with them.⁶⁴ These are plain cases.

[*334] ***Right to Be Carried by Common Carriers.** The business of common carriers is a *quasi* public business; a term

62—Martell *v.* White, 185 Mass. or in part from such malicious motives, combine together, the injury to such other is actionable." Rep. 341, 64 L. R. A. 260. In Hawarden *v.* Youghiogheny L. & C. Co., 111 Wis. 545, 87 N. W. 472,

55 L. R. A. 828, the court says: "One person may, through malicious motives, attract to himself another's customers, and thus ruin the business of such other without redress; but when a number of persons, acting wholly

63—Hilton *v.* Eckersley, 6 El. & Bl. 47, 66. One not injured in his business by a combination of dealers cannot complain of the combination as unlawful. Fairbank *v.* Newton, 50 Wis. 628.

64—Hornby *v.* Close, L. R. 2 Q. B. 153. And see Farrer *v.*

which we employ, because it is often made use of, and because it indicates that the public have some rights in respect to the business which do not exist in the case of business of a purely private character. No man becomes a common carrier except with his own consent; but when he does so, he must conform to those principles of the common law under which the business has grown up, and which have always required of the common carrier impartiality in his business as between individuals; he must carry for all, and he must carry under impartial regulations.⁶⁵ Whether a person is acting as a common carrier is a mixed question of law and fact, which should be submitted to the jury under proper instructions.⁶⁶ The common carrier is under a common law obligation to give the same rates, facilities, and accommodations to all under substantially the same circumstances and conditions.⁶⁷ Telegraph and telephone companies are com-

Close, L. R. 4 Q. B. 602; Commonwealth v. Hunt, 4 Met. 111, 38 Am. Dec. 346; People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501. The right of a slave, freed by the thirteenth amendment to the Constitution, to be paid for his services, where he continued in the former master's service, began immediately, without any special contract. Handy v. Clark, 4 Houston, 16.

65—2 Kent. Com. 451; Redf. on Railw. Vol. 2, Introd. Ang. on Carriers.

66—Schloss v. Wood, 11 Colo. 287, 17 Pac. 910. "Whether a person is a common carrier depends wholly upon whether he holds himself out to the world as such, and he can hold himself out as a common carrier by engaging in the business generally, or by announcing or proclaiming it by cards, advertisements, or by any other means that would let the public know that he intended to be a common or general

carrier for the public." p. 291. 67—Louisville, etc., R. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; Cumberland Tel. & Tel. Co. v. Tex. & Pac. Ry. Co., 52 La. Ann. 1850, 28 So. 284; Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674; Lake Shore, etc., Ry. Co. v. Scofield, 2 Ohio C. C. 305; Hoover v. Pennsylvania R. R. Co., 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263; Avinger v. South Carolina Ry. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716; Memphis News Pub. Co. v. Southern Ry. Co., 110 Tenn. 684, 75 S. W. 941; Union Pac. Ry. Co. v. Goodridge, 149 U. S. 680, 13 S. C. Rep. 970, 37 L. Ed. 896. A railroad company was held liable for refusing to carry a blind person who was competent to look out for himself. Illinois Cent. R. R. Co. v. Smith, 85 Miss. 349, 37 So. 643, 107 Am. St. Rep. 245.

mon carriers and subject to the same rule.⁶⁸ But the common law does not determine what shall be the scope of his business; he must carry certain kinds of property only, or all kinds of property; or, if he be a carrier of persons, he may, perhaps, limit the business to the carriage of certain classes of persons only, the discrimination being based on distinctions which are not objectionable as being arbitrary, but having some principle to support them. It is not perceived, for example, that any principle of the common law should preclude a person from undertaking to carry from point to point, as a permanent business, persons of one sex only; making special arrangements for their accommodation, while another, perhaps, makes other arrangements for the other sex. But where no such discrimination was made, certain liberty of action in receiving and rejecting persons was always admissible, because it could always be justified on grounds of impartiality and reason. To take a plain case: A railroad company could never be compelled to receive and carry in one of its ordinary passenger coaches a man whose appearance was shocking to the sense of decency of others, or a man in a state of beastly intoxication, or a man afflicted with contagious disease.⁶⁹ The compulsion of impartial carriage is established on public grounds, and for the public benefit, and it is manifest that the public good does not require that persons should be received for carriage under such circumstances. But since it is impossible to anticipate all the cases which may arise to render discrimina-

tions proper, the law allows to carriers the liberty of [*335] making *rules and regulations for the control and management of their business, subject to this restriction only, that the rules and regulations must not be unreasonable,⁷⁰ and

68—*State v. Citizens' Telephone Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139; *Gwynn v. Citizens' Telephone Co.*, 69 S. C. 434, 48 S. E. 460; *Commercial Union Tel. Co. v. New Eng. Tel. & Tel. Co.*, 61 Vt. 893, 5 L. R. A. 161; *State v. Cum-* berland Tel. & Tel. Co., 114 Tenn. 194. So of companies supplying a messenger service. *White v. Postal Tel. Cable Co.*, 25 App. D. C. 364.

69—See *Jencks v. Coleman*, 2 Sum. 221; *Markham v. Brown*, 8 241, 17 Atl. 1071, 15 Am. St. Rep. N. H. 523.

70—*Day v. Owen*, 5 Mich. 520,

that they must not conflict with any which may lawfully be prescribed by competent legislative authority. Competent authority would be that of the State, in the case of commerce entirely within the State, and that of the United States, in the case of foreign and inter-State traffic.

Among the regulations often established by carriers of passengers is one setting aside certain carriages for the exclusive use of women and their escorts. Such a regulation violates the right of no one who is excluded, and for whom accommodations are elsewhere provided.⁷¹ Another, not so plainly justifiable, is a rule setting aside certain carriages within which alone will persons of color be received and carried. Such a regulation has been sustained where the accommodations furnished were equal to those supplied for other passengers,⁷² but has been held invalid where no such impartial accommodations had been provided.⁷³

Since the changes recently effected by the new amendments to the federal Constitution, and which have been brought about in the social condition of the country, it has been the policy alike of the national and of the several States to legislate against certain discriminations which before were customary, and were seldom disputed. The act of Congress of 1875 is sufficiently important in this connection to be specially noticed. Its avowed purpose was to insure to all persons the benefits of the fourteenth amendment to the Constitution of the United States, which pro-

72 Am. Dec. 62; Westchester, etc., R. R. Co. v. Miles, 55 Pa. St. 209, 93 Am. R. R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744; State v. Overton, 24 N. J. 435, 61 Am. Dec. 671.

71—Chicago &c., R. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641. A colored woman cannot be excluded from such car because of her color. Gray v. Cincinnati, &c., Co., 11 Fed. Rep. 683; Logwood v. Memphis, &c., R. R. Co., 23 Fed. Rep. 318. Nor can a prostitute unless her conduct is offensive. Brown v. Memphis, &c., Co., 5 Fed. Rep. 499.

72—Westchester, &c., R. R. Co.

v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744; Ohio Valley Ry. Co. v. Lander, 104 Ky. 431, 47 S. W. 344; *Ex parte Plessy*, 45 La. Ann. 80, 11 So. 948; Chilton v. St. Louis, etc., R. R. Co., 114 Mo. 88, 21 S. W. 457; Louisville, etc., Ry. Co. v. State, 66 Miss. 670, 6 So. 203; Railroad Co. v. Wells, 85 Tenn. 614, 4 S. W. 5; Louisville, etc., R. R. Co. v. Mississippi, 133 U. S. 587; Hart v. State, 100 Md. 595. 73—Chicago, &c., R. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641; The Sue, 22 Fed. Rep. 843.

vides, among other things, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive [*336] any person of *life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The regulations referred to are, "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land and water, theaters and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."⁷⁴ In 1883 these regulations were held unconstitutional as applied to the several States.⁷⁵

In the absence of any such regulation, it is not very clear that inn-keepers and carriers of persons, by land or by water, would be warranted, in law, in discriminating on the ground solely of a difference in race or color, or because of any previous condition. The common law required impartiality in their accommodations, and personal discriminations must be unlawful, unless the presence of the excluded person would be dangerous to others, or would be justly offensive to their sense of decency or propriety, or for other reason would interfere with the proper enjoyment by others of the accommodations which the innkeeper or common carrier affords. As is said by Mr. Justice SCOTT, "A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made

74—Laws 1875, Ch. 114.

75—Civil Rights Cases, 109 U. S. 3. The fourteenth amendment does not, says BRADLEY, J., "invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action of the kinds referred to.

It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws and the action of State officers, executive and judicial, when these are subversive of the fundamental rights specified in the amendment."

must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy.'⁷⁶

Theaters and other places of public amusement exist wholly under the authority and protection of State laws; their managers are commonly licensed by the State, and in conferring the license *it is no doubt competent for the State to [*337] impose the condition that the proprietors shall admit and accommodate all persons impartially. Therefore State regulations corresponding to those established by Congress must be clearly within the competency of the legislature, and might be established as suitable regulation of police.⁷⁷ And the power of the State to regulate the business of innkeepers and common carriers would be at least equally plain. But Congress has no corresponding police power to be exercised within the States.⁷⁸ And on the other hand, State regulations of the sort, so far as they assume to cover the transportation of passengers from State to State, are void as invasions of the constitutional power of Congress over commerce between the States.⁷⁹

76—Chicago, &c., R. R. Co. v. E. 1105, 32 L. R. A. 566; People Williams, 55 Ill. 185, 188. v. Mayor, etc., of Alton, 193 Ill.

309, 61 N. E. 1077, 56 L. R. A. 95; Baylies v. Curry, 30 Ill. App. 105; Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274; Ferguson v. Gies, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589; Bucks v. Bosso, 180 N. Y. 341, 73 N. E. 58, 105 Am. St. Rep. 762; Cremore v. Huber, 18 App. Div. 231, 45 N. Y. S. 947; Bryan v. Adler, 97 Wis. 124, 72 N. W. 368, 65 Am. St. Rep. 99, 41 L. R. A. 658.

77—The Mississippi legislation of 1873, the intent of which was, "that all persons may have equal accommodation in the vehicles of common carriers, at the inns, hotels, theatres, and other public places of amusement, upon the terms of paying the usual prices therefor," was fully sustained, against all the objections that could be suggested, in Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375. Where a skating rink may be kept without a license, a negro may be excluded at the pleasure of the owner. There is no duty to the public. Bowlin v. Lyon, 67 Ia. 536, 56 Am. Rep. 355. For decisions under civil rights legislation of the states see Baylies v. Curry, 128 Ill. 287, 21 N. E. 595; Cecil v. Green, 161 Ill. 265, 43 N.

78—Slaughter House Cases, 16 Wall. 36; U. S. v. Cruikshank, 92 U. S. 542. Civil Rights Cases, 109 U. S. 3.

79—Hall v. DeCuir, 95 U. S. 485. The statute had been previously sustained in the State courts. De Cuir v. Benson, 27 La. Ann. 1. The suit was brought for refusal

Where the defendant railroad company maintained a park to which the public were invited, and the plaintiff, having gone there as one of the public, was ordered out by the servants of the company as a disreputable woman, it was held to be an actionable wrong, for which she was entitled to damages, including the mental suffering and indignity.^{79a}

Right to Control One's Property and Actions. Every man controls his own property as he pleases, puts it to such use as he pleases, improves it or not, as he may choose, subject only to the obligation to perform, in respect to it, the duties he owes to the States and to his fellows. The State cannot substitute its judgment for his as to the use he should make of it for his own advantage.⁸⁰ Neither can the State regulate his dress or his [^{*338}table, *except so far as may be needful for the protection of morality and decency. State laws prohibiting the sale

to permit the plaintiff, a colored person not belonging to a pro-woman, to enter the ladies' cabin of defendant's steamboat, and compelling her to go into the "colored bureau," so called, and take her meals there. The case settles the point of State law, that no such discrimination is lawful within the State jurisdiction. An act abrogating the common law requirement of equal treatment by carriers is void so far as it affects inter-state commerce. *Brown v. Memphis, &c., R. R. Co.*, 5 Fed. Rep. 499. See, *The Sue*, 22 Fed. Rep. 843. And, see, *Coger v. North West Union Packet Co.*, 37 Iowa, 145, where the Congressional Civil Rights Act of 1866, forbidding similar discriminations, was sustained and enforced as against a company of common carriers navigating the Mississippi.

79a—*Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 203, 77 Pac. 209. The Court says: "Every

person not belonging to a proscribed class has a right to go to any public place, or visit a resort where the public generally are invited, and to remain there, during all proper hours, free from molestation by anyone, so long as he conducts himself in a decorous and orderly manner. This right to freedom from molestation extends not only to freedom from actual violence, but to freedom from insult, personal indignities, or acts which subject him to humiliation and disgrace, and anyone guilty of violating any of these rights is liable in all cases for the actual damages suffered therefrom by the injured person. It matters not whether the wrong be one of pure negligence, or a wanton and wilful wrong, an action will lie for the actual damages suffered." 207.

80—*Gaines v. Buford*, 1 Dana, 479, 499; *Violett v. Violett*, 2 Dana, 323.

of liquors to be drank on the dealer's premises have the public interest in view, and are justified on that ground. And laws prohibiting women to appear in public in the customary garb of men would be supported, not as regulation of fashion, but as regulations to prevent a practice likely to lead to serious abuses, and to be resorted to for the worst purposes.

The Right to an Education. It is a part of every person's civil liberty to provide for his own education as he may have the means. Among the duties of imperfect obligation imposed upon parents is that of providing suitable education for their children. This duty is usually assumed by the State to this extent: That it places or intends to place the means of education within the reach of all, providing schools which all can attend, and in some cases making instruction in these schools perfectly free to all. But the right to an education at the expense of the public is not, as against the State, a legal right at all, unless made so by the Constitution. To furnish to its citizens the means of an education is a duty which the State, at its option, will assume or decline; and when the duty is assumed, the State, in the provision it makes, will go so far as its law makers shall think proper, and no further. The provision made to-day may, perhaps, be repealed to-morrow; and though the repeal may seem in the highest degree impolitic, those who may suffer from it cannot deny to it competent force. But any provisions for education which are made by the Constitution, the people, as a matter of right, may claim the benefit of, unless legislation is necessary to give them effect. Some constitutional provisions are self-executing, and if these measure out the State's bounty for education, the legislature cannot restrict it; others cannot have effect without legislation; and where that is the case, the bounty intended may possibly be withheld.⁸¹

It may possibly be found, also, when the State has made provision for education, that it has done so with unlawful discriminations. So long as slavery existed, it was customary, in establishing and providing for the support of schools, to dis-

81—Respecting self-executing constitutional provisions, see Cooley, *Const. Lim.* 99-102,

[*339] criminate *in the advantages given, throwing open some schools to children generally, but denying admission to colored children. The right to do this was affirmed in Massachusetts, upon the broad ground that the State had undoubted right to select the objects of its bounty,⁸² and was generally conceded elsewhere. Since then the fourteenth amendment to the federal Constitution has been adopted, and it is now held that when the provision is made for education, it must be impartial. The provision gives to the whole people certain rights, and to single out a certain portion by the arbitrary standard of color, and say that these shall not have rights which are possessed by others is said to deny to them "the equal protection of the laws" and is consequently forbidden.⁸³ But no right is violated when colored pupils are merely placed in different schools, provided the schools are equal, and the same measure of privilege and justice is given in each.⁸⁴

A teacher may violate the right to instruction in the public schools by refusing to instruct those who lawfully come. Whether an action would lie against the teacher for such refusal, or whether the remedy would not be confined to an appeal to the governing board, is left in doubt on the authorities. It would seem, however, that the refusal was a plain violation of an in-

82—Roberts *v.* Boston, 5 *Cush.*, 198. See Van Camp *v.* Board of Education, 9 *Ohio St.* 406.

83—Ward *v.* Flood, 48 *Cal.* 36, 17 *Am. Rep.* 405. See People *v.* Board of Education, 18 *Mich.* 400; Clark *v.* Board of Directors, 24 *Iowa*, 266; Smith *v.* Keokuk, 40 *Iowa*, 518; Dove *v.* School District, 41 *Iowa*, 689. Children of Chinese parents who were born and have always lived in this country must be admitted. Tape *v.* Harley, 66 *Cal.* 473; Bertonneau *v.* Directors, 3 *Woods*, 177; U. S. *v.* Buntin, 10 *Fed. Rep.* 730; People *v.* Gallagher, 93 *N. Y.* 438, 45 *Am. Rep.* 232. So an act providing that whites in a city shall be taxed for white

schools, and blacks for black schools, which results in gross inequality of school privileges, is unconstitutional. Claybrook *v.* Owensboro, 16 *Fed. Rep.* 297. In Illinois a school board has no power to set apart a single school in a city and oblige all colored children to attend it alone. People *v.* Board of Education, 101 *Ill.* 308, 40 *Am. Rep.* 196. See Board of Education *v.* Tinnon, 26 *Kan.* 1.

84—Cory *v.* Carter, 48 *Ind.* 327; State *v.* McCann, 21 *Ohio St.* 198; County Court *v.* Robinson, 27 *Ark.* 116. See State *v.* Duffy, 7 *Nev.* 342, 8 *Am. Rep.* 713. Otherwise in New Jersey and Pennsylvania since 1881. Pierce *v.* Un. Dist.

dividual right, and, as such, was actionable.⁸⁵ The teacher *might also violate the right to instruction by inflicting punishment for something not within his jurisdiction,⁸⁶ or by arbitrarily subjecting the pupil to ridicule and disgrace; or by excluding him from school without justification. The teacher, as is said elsewhere⁸⁷ is vested with judicial discretion in the management of his school, but he must not abuse this, or exceed his powers. He is a judge with limited authority, not an autocrat.

School committees or trustees may also deprive individuals of their rights in schools, through regulations which demand things in themselves unreasonable.⁸⁸ Under the general authority usually conferred upon these boards to prescribe the rules and

Trustees, 46 N. J. L. 76; *Kaine v. Com.* 101 Penn. St. 490.

85—In *Spear v. Cummings*, 23 Pick. 224, 34 Am. Dec. 53, it was decided that no action would lie against a teacher by the parent whose child the former refused to receive into the school and instruct. His remedy, it was said, was to appeal to the school committee. It is intimated in the same case that no action would lie against the committee if the teacher were acting under their orders, their powers being judicial. To the same effect is *Donahoe v. Richards*, 38 Me. 376, 61 Am. Dec. 256. And see *Learock v. Putnam*, 111 Mass. 499. In *Roe v. Deming*, 21 Ohio St. 666, it is held that such an action by the father will lie; but in *Stephenson v. Hall*, 14 Barb. 222, it is said it should be brought by the child himself.

86—In *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471, the Supreme Court of Wisconsin declare that where a child attends school directed by his father to pursue certain studies only which are taught in

the school, and the teacher punishes him because he will not take up others also, this is a criminal assault; and that the duty of the child under the circumstances is to obey his father. This is good sense. See *Sewell v. Board of Education*, 29 Ohio St. 89, in which it was decided that instruction in elocution might be made compulsory in schools, and a pupil expelled for failing to be prepared with a rhetorical exercise at a time designated; and *State v. Webber*, 108 Ind. 31, 58 Am. Rep. 30, where a similar rule is laid down as to the study of music.

87—See *ante*, pp. 293, 294, 300. Also, *Anderson v. State*, 3 Head, 455; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

88—Such reasonable rules must not be unreasonably enforced. Here as to tardiness. *Fertich v. Michener*, 111 Ind. 472. Such rules cease to operate after parental control is resumed after school hours. Here a rule forbidding attending parties. *State v. Osborne*, 24 Mo. App. 309.

laws for the control of schools, their powers are no doubt very extensive, but in the nature of things there are some limits. The general principles of constitutional law undoubtedly govern their action, as they do the action of higher authorities; and whatever would violate those principles would be an excess of power on their part. It has sometimes been claimed that the principle of religious liberty was violated by regulations for the reading of the common version of the Bible in the public schools against

the objections of the parents or guardians of some
[*341] *of the pupils; but regulations for that purpose have been sustained as not beyond the proper powers of such boards.⁸⁹ On the other hand, it is held equally competent for the governing board of a school to exclude the reading of the Bible therefrom: all sects and denominations of worshipers being equal before the law, none of them can demand as a right to have its sacred book read in the schools supported by the State, against the judgment of the governing board to whose direction the State has entrusted them.⁹⁰ It is unfortunate that it ever becomes necessary to make such decisions, or that the schools where those who are to govern their country receive their training should be exposed in any degree to sectarian controversy.⁹¹

Rights in the Learned Professions. No one has any right to practice law or medicine except under the regulations the State may prescribe. To practice in the courts or to practice medicine is not a privilege of citizenship, and is therefore neither given nor protected by or under the Civil Rights act of Congress or the new amendments to the Constitution.⁹² The privilege may be

89—*Donahoe v. Richards*, 38 Me. 376, 61 Am. Dec. 256. In this case pupils were required to read portions of the Scripture against the objection and protest of their parents. To like effect is *Spiller v. Woburn*, 12 Allen, 127.

90—*Board of Education v. Minor*, 23 Ohio St. 211.

91—Whatever authority the governing board of a school possess cannot be delegated to others; for

example, they cannot empower a teacher to employ his assistant when the law vests the power in the board. *State v. Williams*, 29 Ohio St. 161.

92—See *Bradwell v. State*, 55 Ill. 535; S. C. 16 Wall. 130; *Matter of Goodell*, 39 Wis. 232, 20 Am. Rep. 42; *Ex parte Spinney*, 10 Nev. 323. As to State regulation of the practice of medicine, see *Dogge v. State*, 17 Neb. 140; *State*

given to one sex and denied to the other, and other discriminations equally arbitrary may doubtless be established. But with the right to officiate as religious teacher the State has no concern as long as the customary police regulations of the State are observed. It is a part of the religious liberty of the people that their religious teachers shall be chosen in their own mode, without State intervention, and that any one who can obtain hearers may teach in his own way. The mem*bers of [*342] none of the learned professions have any special privileges the violation of which by individuals can well constitute an actionable wrong. The attorney has a certain privilege from arrest while attending court in the discharge of professional duty, but a disregard of this privilege would be remedied, not by suit, but by an application to the court for his discharge. The unnecessary execution of process against a clergyman while he was in the discharge of his duties in the pulpit or in any religious gathering, would be highly censurable, and possibly, in a gross case, subject the officer to an action, either at the suit of the clergyman or of the religious organization whose worship was needlessly disturbed.

Religious Liberty. Having in a previous chapter defined religious liberty,⁹³ nothing more seems requisite to indicate what would constitute invasions. Individual wrongs generally consist in disturbance of religious meetings, or in some other act which would be a wrong independent of any question of the liberty of conscience or of worship. If a clergyman is assaulted in the pulpit, this is but an assault, though the time and the place may aggravate the wrong; if a religious meeting is disturbed, the right of citizens to assemble for any lawful purpose is violated, and any civil redress would be the same with that which would

v. Deal, 25 W. Va. 1. The right to practice cannot be refused without giving applicant an opportunity to be heard. *State v. State Med. Ex. Board*, 32 Minn., 324, 50 Am. Rep. 575; *Gage v. Anson*, 63 N. H. 92. A woman may not practice law. *In re Leonard*, 12 Oreg. 93, 53 Am. Rep. 323; *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239; *Contra, In re Hall*, 50 Conn. 131, 47 Am. Rep. 625; *In re Thomas*, 16 Colo. 441, 27 Pac. 707, 13 L. R. A. 538.
93—*Ante*, p. 33.

be sought had the meeting been for political, business, or social purposes. Voluntary religious organizations are formed at the will of the associates undisturbed by the State; incorporated societies can only be formed at the will of the State and under its laws.⁹⁴ But when formed they must be left to manage their own affairs in their own way, without the interference of the State to control them. The point at which the State may lawfully interfere is where these organizations disregard property rights of their members, or the rights acquired by contract; and when this occurs they become amenable, like all other organizations and individuals, to the ordinary State jurisdiction.⁹⁵ And [*343] there is a disregard of rights when *lawful members are expelled or refused participation in the privileges of the organization, for reasons which the rules or usages to which they have expressly, or by implication given assent would not recognize, or in disregard of forms which the rules or usages have made necessary, or when the purpose of the organization is perverted by radical changes without general consent.⁹⁶

94—*Silsby v. Barlow*, 16 Gray, 329; *Anderson v. Brock*, 3 Me. 243; *Meth. Ep. Church v. Sherman*, 36 Wis. 404; *Ferraria v. Vasconcelles*, 23 Ill. 456; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Robertson v. Bullions*, 11 N. Y. 243; *Atwater v. Woodbridge*, 6 Conn. 223, 16 Am. Dec. 46; *Worrell v. First Presb. Ch.* 23 N. J. Eq. 96.

95—See *Harmon v. Dreher*, 1 Speers Eq. 87; *Dieffendorf v. Ref. Cal. Ch.*, 20 Johns. 12; *Connitt v. R. P. D. Church*, 54 N. Y. 551; *Chase v. Cheney*, 58 Ill. 509; *Lawson v. Kolbenson*, 61 Ill. 405; *Smith v. Nelson*, 18 Vt. 511; *Harrison v. Hoyle*, 24 Ohio St. 254; *Sohier v. Trinity Church*, 109 Mass. 1; *Fitzgerald v. Robinson*, 112 Mass. 371; *Gartin v. Penick*, 5 Bush, 110; *Kinkead v. McKee*, 9 Bush, 535; *Gass' Appeal*, 73 Penn. St. 39, 13 Am. Rep. 726; *Hale v.*

Everett, 53 N. H. 9, 16 Am. Rep. 82; *Watson v. Jones*, 13 Wall. 679; *Sale v. First Reg. Bapt. Ch.* 62 Ia. 26, 49 Am. Rep. 136; *Att'y Gen. v. Geerlings*, 55 Mich. 562; *Livingston v. Rector, &c.*, 45 N. J. L. 230; *State v. Hebrew Cong.* 31 La. Ann. 205, 33 Am. Dec. 217; *Bird v. St. Mark's Ch.*, 62 Ia., 567. In Michigan the legal corporation is not liable to an expelled member of the church, but the ecclesiastical body, which has expelled him. *Hardin v. Bapt. Ch.* 51 Mich. 137.

96—*Watson v. Jones*, 13 Wall. 679; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Harmon v. Dreher*, 1 Speers Eq. 87; *John's Island Church*, 2 Rich. Eq. 192; *Den v. Bolton*, 12 N. J. 206; *German Reformed Church v. Seibert*, 3 Pa. St. 282; *McGinnis v. Watson*, 41 Pa. St. 9; *Gartin v. Penick*, 5 Bush, 110; *Lucas v. Case*, 9 Bush,

Equality of Right. Every person is entitled to have his rights tested by the same general laws which govern the rest of the political society. The liberty of a pauper or supposed pauper cannot be entrusted to the discretion of an overseer of the poor or other ministerial or administrative officer;⁹⁷ the apprenticing of whites and blacks must be under the same general regulation;⁹⁸ and the supposed insane must have the same right to a judicial hearing with all others.⁹⁹ And no doubt any legislation which undertakes to regulate or abolish the evil of persons roaming about the country under a false pretense of seeking *employment, must give them the same opportunity for [*344] trial as other persons accused of vagrancy are entitled to.

Exceptional Burdens. One of the most important of civil rights is the right to require that public burdens shall be impartially distributed, and the right to resist those which touch the individual unequally and unfairly. Of unequal burdens, those of unequal taxation and unequal requirement of military service may furnish suitable illustrations. But on these subjects all that can be required is, that the laws be impartial and be fairly administered; inequality in their operation being unavoidable. An impartial law for military service will be likely to provide that all able-bodied male persons between certain ages shall be liable to be summoned for actual duty, and that from a list of these the number required shall be drawn by lot. Under such a law no one is wronged who has the fortune to be drawn while his neighbor escapes. In Great Britain, until recently, when re-

297; *Grosvenor v. United Society*, 118 Mass. 78; *People v. German, &c., Church*, 53 N. Y. 103; *Fitzgerald v. Robinson*, 112 Mass. 371. A man's profession is property. It is unlawful for a bishop to prohibit a priest from following his profession without accusation and opportunity for hearing and trial. *O'Hara v. Stack*, 90 Pa. St. 477. The trustees of a Methodist church have no right to close the church against the duly appointed pastor

because a majority of the congregation do not wish him as pastor, and a mandatory injunction may issue to compel them to open it. *Whitecar v. Michenor*, 37 N. J. Eq. 6.

97—*Portland v. Bangor*, 65 Me. 120, 20 Am. Rep. 681. See, for same principle, *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301.

98—*Matter of Turner*, 1 Abb. U. S. 84.

99—*Ante*, p. *204-*207.

eruits for the navy were needed, it was allowed by immemorial custom to send out a press-gang with authority to seize upon sailors wherever found, and by force to place them upon ships of war, where they would be compelled to perform military service. Such an authority is invidious and arbitrary, and wholly inadmissible in this country.¹

The right to be exempt from unequal taxation is, as between the States, one of the privileges and immunities of citizens of the several States.² It is incompetent, therefore, to assess and tax the property of a non-resident higher than that of residents. It is equally incompetent to discriminate between residents, either by overvaluing the property of the one or by undervaluing the property of the other, or by omitting the one or his property altogether from the roll, or by any other act of omission or commission which produces inequality. The principle in these cases is plain, but the application is sometimes difficult. Where taxation is based upon an assessment of property, the assessors have judicial functions to perform, and it is always presumed that they have performed them honestly and to the best of their judgment. It is, therefore, generally held that they are not liable to a private action at the suit of an aggrieved party who

[*345] complains *that he is overtaxed in consequence of their unequal assessment.³

A remedy for the injustice in such a case must be sought in a suit to set aside the tax, or to reduce it to its proper proportions; and this may be done if it be made to appear that the assessors have been governed by improper motives, and not by their judgment, in making their valuations.⁴ The tax-payer may hold the assessors liable only when they have acted without jurisdiction, or, perhaps, where, through neglect of duty, they have deprived the tax-payer of some important privi-

1—Cooley, Const. Lim. 299.

4—Lefferts *v.* Calumet, 21 Wis.

2—Corfield *v.* Coryell, 4 Wash. C. C. 371, 380; Wiley *v.* Palmer, 14 Ala. 627; Scott *v.* Watkins, 22 Ark. 556; Oliver *v.* Washington Mills, 11 Allen, 268.

688; Milwaukee Iron Co. *v.* Hubbard, 29 Wis. 51; Merrill *v.* Humphrey, 24 Mich. 170; Republic Life Ins. Co. *v.* Pollak, 75 Ill. 292; Ottawa Glass Co. *v.* McCaleb, 81 Ill.

556; Wright *v.* Railroad Co. 64 Denio, 117. The subject will be referred to in another chapter.

64 Ga. 783.

lege; such, for instance, as the right to be heard on a review of the assessment.⁵ They act without jurisdiction if they assess persons or property not within the territorial limits for which they can act, or if they spread upon the roll a larger sum than has been lawfully voted or ordered.⁶ In these cases the tax-payer may either proceed against the officers responsible for the excess of jurisdiction, or, he may pay the tax under compulsion or protest, and then recover it back of the town, county, etc., to which it is subsequently paid over.⁷ He may also resist the collection of the tax, and hold the collector responsible as a trespasser if the want of authority appears in the list or warrant which constitutes the collector's authority, but not otherwise.

For any injustice which may be done to citizens through the selection by law of the objects of taxation, there can be no remedy whatever, except the political remedy, to be worked out through a repeal or modification of the law. Every system of taxation must be more or less arbitrary in its selection of methods and of the objects upon or in respect to which burdens shall be laid, and the judiciary can give no relief from the incidental injustice. Discriminations as between individuals, however, must rest upon some principle, or they will be illegal. In illustration, the case of a poll-tax upon adult male persons may be taken. These are sometimes levied, and they may be considered a compensation for the privilege of suffrage which males possess exclusively. But a discrimination between the sexes in the taxation of their property would be plainly inadmissible.

Unlawful Searches, Etc. An important civil right is intended to be secured by the provisions incorporated in the National and

5—See *Thames Manuf. Co. v. Atwell v. Zeluff*, 26 Mich. 118; *Lathrop*, 7 Conn. 550.

6—*Mygatt v. Washburn*, 15 N. Y. 316; *Libby v. Burnham*, 15 Mass. 144; *Grafton Bank v. Kimball*, 20 N. H. 107; *Cooley on Taxation*, 553, 554.

7—As to what is a compulsory payment of a tax, see *Boston, &c.*, *Glass Co. v. Boston*, 4 Met. 181;

Baker v. Cincinnati, 11 Ohio St. 534; *Taylor v. Board of Health*, 31 Pa. St. 73, 72 Am. Dec. 724; *Howard v. Augusta*, 74 Me. 79; *Ruggles v. Fond du Lac*, 53 Wis. 436; *Westlake v. St. Louis*, 77 Mo. 47; *Peyser v. Mayor of New York*, 70 N. Y. 497.

State Constitutions, which, in substance, declare that unreasonable searches and seizures shall be unlawful, and that all persons shall be secure in their persons, houses, papers and effects against them. In their origin these provisions had in view the mischiefs of such oppressive action by the government or its officers, as the seizing of papers to obtain the evidence of intended crimes;⁸ but their protection goes much beyond such cases: it justly assumes that a man may have secrets of business, of friendship, or of more tender sentiments, to which his books, papers, or letters may bear testimony, but with which the public have no concern; that he may even have secrets of shame which are so exclusively his own concern that others have no right to pry into or discuss them. An unlawful search and seizure is an aggravated trespass, and should be visited with corresponding damages. Many provisions of law are made to protect against it. Search warrants are allowed to be issued only after a showing of legal cause under oath to the satisfaction of a court or magistrate;⁹ it is made a criminal offense for one person wrongfully to open another's letters; the postmaster who detains or pries into letters is liable in damages for so doing; and the law might, with the utmost propriety, surround correspondence by telegraph by like securities. It has generally done so, to the extent of requiring of the persons through whose hands such correspondence may pass, the observance of secrecy; but it has [*347] been *held that they may be compelled to produce telegrams in evidence, and testify concerning them in courts and before legislative committees.¹⁰

Search Warrants. The only lawful mode of making search upon one's premises is under the command of search warrants; and these are allowed to discover stolen or smuggled goods or

8—Such as seizing the papers of Algernon Sidney in order to find among his political speculations something which could be construed into treason; or those of John Wilkes to get possession of intended libels. L. 143, Cooley, Const. L., 299-308. 10—State *v.* Litchfield, 58 Me. 267; Hensler *v.* Freedman, 2 Pars. Sel. Cas. 274; National Bank *v.* National Bank, 7 W. Va. 544; Woods *v.* Miller, 55 Ia. 168, 39 Am. Rep. 170; U. S. *v.* Hunter, 15 Fed.

9—2 Hale, P. C. 113; Bishop, Cr. Proc. Ch. XVIII.; 3 Wharton, Cr. L. §§ 2937-2946; 1. Archbold, Cr.

Rep. 712. *Ex parte* Brown, 72 Mo. 83; Gray, Com. by Telegraph, Ch. V.

implements of gaming, and in a few other cases for which provision must be found in the statutes. The authority to issue them is liable to great abuses, and the law is justly strict regarding their requirements. They must be duly issued by a court or officer of competent jurisdiction, and if it does not appear by the warrant that a proper showing was made before it was issued, the warrant can afford no protection to the officer executing it.¹¹ The warrant must also describe particularly the place to be searched, and leave nothing to the discretion of the officer in this regard;¹² and if property is to be searched for, it must describe particularly the property.¹³ The officer in executing the warrant must not go beyond its authority to search other buildings,¹⁴ or to seize other property;¹⁵ but he is no [*348]

11—*Grumon v. Raymond*, 1 Conn. 40; *Commonwealth v. Lottery Tickets*, 5 Cushing, 369; *State v. Staples*, 37 Me. 228; *State v. Carter*, 39 Me. 262; *Jones v. Fletcher*, 41 Me. 254.

12—*Humes v. Taber*, 1 R. I. 464; *Reed v. Rice*, 2 J. J. Marsh. 44, 19 Am. Dec. 122; *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *People v. Holcomb*, 3 Park Cr. R. 656; *State v. Robinson*, 33 Me. 564; *Ashley v. Peterson*, 25 Wis. 621. For instances in which the description was held insufficient, see *Meek v. Pierce*, 19 Wis. 300; *Commonwealth v. Dana*, 2 Met. 329; *Dwinnels v. Boynton*, 3 Allen, 310; *Commonwealth v. Intoxicating Liquors*, 6 Allen, 596. A warrant to search a building and outbuildings does not cover a separate building in another enclosure but connected by a covered passage way. *Com. v. Int. Liquors*, 140 Mass. 287. “The house and premises of E. D. of G.” is enough, there being but one E. D. in G., and he owning but one house there, which was searched. *Wright v. Dressel*, 140 Mass. 147. In Illi-

nois a search warrant is void, unless it commands the officer to bring the person in whose custody the property is found. *White v. Wagar*, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60. Search warrants may be issued without notice for stolen property or for property kept or used in violation of law. *Glennon v. Britton*, 155 Ill. 232, 40 N. E. 594.

13—*State v. Robinson*, 33 Me. 564; *Commonwealth v. Intoxicating Liquors*, 13 Allen, 52; *Downing v. Porter*, 8 Gray, 539. See, also, cases cited in last note. The warrant will be good if the description is sufficiently accurate to enable the officer to identify it. *Downing v. Porter*, 8 Gray, 539. If the description in the complaint is sufficient, and the warrant refers to that, it will be sufficient. *Dwinnels v. Boynton*, 3 Allen, 310.

14—*McGlinchy v. Barrows*, 41 Me. 74; *Jones v. Fletcher*, 41 Me. 254; *Downing v. Porter*, 8 Gray, 539.

15—*Crozier v. Cundey*, 6 B. & C. 232; *Stone v. Dana*, 5 Met. 98.

trespasser in seizing goods which answer the description, even though they prove not to be the goods intended.¹⁶ Neither is he a trespasser in any case if the warrant is sufficient in its apparent requisites and he simply obeys its command.¹⁷

In respect to the disposition of property seized under a search warrant, no more than in respect to where he shall search or what he shall search for, can the ministerial officer be vested with a judicial discretion. He cannot, therefore, be empowered to destroy property kept for an illegal purpose, without any judicial determination on that subject.¹⁸

Invasions of Political Rights. The citizen might be deprived of his right to meet and discuss public affairs, either by the action of private individuals, or by that of the public authorities. In the former case the means resorted to for the purpose of defeating the right would determine the nature of the remedy. Thus, persons might wrongfully and by force be removed from a place of meeting, or they might, by threats or other means of intimidation, be prevented from meeting; in the one case there would be an aggravated trespass, and in the other a wrong perhaps equal in degree, but which, being accomplished without force, must be redressed in an action on the case. When a meeting for any lawful purpose is actually called and held, one who goes there with the purpose to disturb and break it up, and commits disorder to that end, is a trespasser upon the rights of those who for the time have control of the place of meeting. If several united in the disorder, it may be a criminal riot. It is difficult to indicate the particular methods in which the right [*349] *of petition may be violated, and every case will be likely to present new facts. Parties interested in and circu-

16—*Stone v. Dana*, 5 Met. 98. and from malicious motives. *Beatty*

17—*Humes v. Taber*, 1 R. I. 464; *v. Perkins*, 6 Wend. 382; *Ludding-Bell v. Clap*, 10 Johns 263; *Dwington v. Peck*, 2 Conn. 700; *Watson v. Boynton*, 3 Allen, 310; *v. Watson*, 9 Conn. 140, 23 Am. *Sandford v. Nichols*, 13 Mass. 286, Dec. 324.

7 Am. Dec. 151; *O'Meara v. Merritt*, 128 Mich. 249, 87 N. W. 197. 18—*Fisher v. McGirr*, 1 Gray, 1, But case will lie against the complainant if he has obtained the warrant without probable cause, 61 Am. Dec. 381; *Greene v. Briggs*, 1 Curt. 311; *Hibbard v. Pedple*, 4 Mich. 125. In the recent case of *McCoy v. Zane*, 65 Mo. 11, the

lating petitions doubtless have a qualified property in them while in their possession, the disturbance of which may be redressed by suit. The disregard of petitions or remonstrances by the persons or bodies to whom they are addressed is, of course, only a political wrong.

Suffrage. The chief political right is that of suffrage. The ways in which this may be invaded are numerous, and while all of them are wrongs to the political society, and are or may be made punishable under the penal laws, only a portion of them can support a private right of action. The reason for this will be apparent when the cases are enumerated. The following may be instanced as cases in which an individual entitled to suffrage is deprived of his right:

1. Where officers have wrongfully neglected or refused to take the necessary preliminary action to enable an election to be held.
2. Where, by forcible or riotous proceedings, the holding of an election has been prevented.
3. Where illegal votes are received which control the result.
4. Where, by the illegal conduct of the officers, or of other persons, the ballots are destroyed, or in some other manner it becomes impossible to determine the result, whereby the election is defeated.

In each of these cases it may be said the individual elector is wronged, but he is wronged only in the same manner and to the same degree with all others. There is a general injury to all, but no special and particular injury to any one. Consequently the injury is only to the public, and must be redressed in a criminal prosecution. Moreover, in the third case specified, the idea of individual injury is excluded if the elector has actually exercised his own right by depositing his ballot. All other interest is then general. In a legal sense one citizen has exactly the same interest with any other in having effect given to the will of the majority of the electors, as it has been expressed in legal ball-

court avoid this point, but they implement which were not in fact hold that an officer is not pro- kept for gaming purposes; the tected in seizing and destroying, law only authorizing the destruc- under a search warrant, gaming tion of those so kept.

lots, and it would be contradictory to the theory of our institutions to assume that only those voting for the candidate receiving

the highest number of legal votes were interested in his
[*350] *receiving the office for which he is thus designated.

An election is only a means of ascertaining, in a formal manner, what the will of the electors is, and when that will has been legally expressed, it is to be presumed that every citizen is desirous and interested to give it effect. No legal principle which assumed the contrary could for a moment be admitted.

In the following cases the injury might be more direct and personal:

1. Where the elector, by force or threats, is kept away from the poll.
2. Where the officers, by wrongful decisions concerning his qualifications to vote, deprive him of the right.
3. Where officers or others wrongfully invade his right to secrecy.

In the second of these cases it will be shown, in a subsequent chapter, under what circumstances an individual remedy may be had.¹⁹ In the first, if force is employed, there is an aggravated trespass, and if it was not employed, the right of action, we take it, would be plain, if the terror excited by the threats were such that a reasonable man would have been deterred from the exercise of his right. In the third there would be more room for controversy.

An elector in this country has not only a right to vote, but he has a right to exclude others from a knowledge of how he votes. The purpose in establishing voting by ballot is to give him this right, in order that, in his action, he may be perfectly free, uninfluenced either by the fear of giving offense, or by the desire to please. His right is therefore invaded when his secrecy is uncovered.²⁰ But there are no cases in which it has judicially been determined what facts make out such an invasion, or at precisely at what point the rude indulgence of one's curiosity, which is al-

19—See Ch. xiv., p. *482, *et seq.* 23 Wis. 422; *Williams v. Stein*, 38

20—*People v. Pease*, 27 N. Y. 45; *Ind. 89*, 10 Am. Rep. 97; McCrary's *People v. Cicott*, 16 Mich. 283, 97 Law of Elections, §§ 194, 195. Am. Dec. 141; *State v. Hilmantel*,

ways an impertinence and an incivility, becomes also an illegal act. To look over one's shoulder while he is preparing his ballot might be thought a rudeness merely, as would be a like act when one is writing a private letter. Besides, at this stage, the act is incomplete; the elector may change his ballot entirely; and if one only discovers how the elector at one time has contemplated voting, his right to a secret ballot, afterward exercised, is not invaded at all. But where judges of election, when the ballot is received by them for deposit in the box, proceed first to open and inspect it, the violation of right is manifest, and the same law which gives an action for a mere nominal trespass on lands would doubtless give one here.

Exclusion from Office. One may be wronged in his right to hold office, if he possesses the necessary qualifications, and has been actually chosen to one. The qualifications must be prescribed by law; there is no such thing as a natural right to hold an office, any more than there is a natural right to vote.²¹ But when a qualified person, chosen to an office, is excluded from it, there is a wrong both to the State and to the individual; to the former, because it is thus deprived of its chosen officer, and to the latter, because he thus loses his office. If another has usurped the office, the suitable remedy to oust him is found in the proceeding by *quo warranto* or some analogous statutory process.²² Meantime, until he is ousted, if he has color of office, and actually performs the functions without hindrance, he is officer *de facto*, and his acts, which concern the public and third persons, are upheld on grounds of public policy.²³ But when the in-

21—The qualifications prescribed must of course be supported by some reason; they cannot be purely arbitrary, like the exclusion of members of a particular party. *Baltimore v. State*, 15 Md. 376, 476. See *People v. Hurlbut*, 24 Mich. 244.

22—3 Bl. Com. 362; High, Extraordinary Remedies, § 623 *et seq.*

23—*Parker v. Lett*, Ld. Raym. 658; *Commonwealth v. McCombs*,

56 Pa. St. 436; *Ray v. Murdock*, 36 Miss. 692; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Ex parte Strang*, 21 Ohio St. 610; *Bucknam v. Ruggles*, 15 Mass. 180, 8 Am. Dec. 98; *People v. Kane*, 23 Wend. 414; *Burke v. Elliott*, 4 Ired. 355, 42 Am. Dec. 142; *Taylor v. Skrine*, 3 Brev. 516; *McGregor v. Balch*, 14 Vt. 428, 39 Am. Dec. 231; *Rice v. Commonwealth*, 3 Bush, 14; *Pritchett v. People*, 6

[*352] truder is dispossessed, the money value of the *office is recognized, and the party entitled is allowed to recover his damages.²⁴

Military Subordination. An important exemption is to be free from military control, except when it is exercised in strict conformity to law. In times of peace the military remains in strict subordination to the civil power, and in times of war also, except on the theater of warlike operations.²⁵ An exception would be made, in either peace or war, by the declaration of martial law.²⁶ Where, therefore, the civil law is not suspended, either by the actual presence of warlike operations, or by declaration of martial law, whatever would be a wrong, if done by any other citizen, would be a wrong if done by a person in the military service, whether officer or private, and would be punished in the same way.

III. 525; *Jones v. Gibson*, 1 N. H. 266; *Cabot v. Given*, 45 Me. 144; *Auditors v. Benoit*, 20 Mich. 176; *McCormick v. Fitch*, 14 Minn. 252; *Leach v. Cassidy*, 23 Ind. 449; *State v. Tolan*, 33 N. J. 195; *Cary v. State*, 76 Ala. 78; *Johnson v. McGinly*, 76 Me. 432; *Gunn v. Tackett*, 67 Ga. 725; *Morton v. Lee*, 28 Kan. 286; *Golder v. Bressler*, 105 Ill. 419; *Ex parte Johnson*, 15 Neb. 512; *Carli v. Rhener*, 27 Minn. 292; *Bedford v. Rice*, 58 N. H. 446; *Yorty v. Paine*, 62 Wis. 154; *Campbell v. Com.*, 96 Pa. St. 344; *Adams v. Tator*, 42 Hun. 384; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; *Com. v. Taber*, 123 Mass. 253.

24—*Lightly v. Clouston*, 1 Taunt, 112; *Allen v. McKeen*, 1 Sum. 276; *United States v. Addison*, 6 Wall. 291; *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *People v. Miller*, 24 Mich. 458; *Nichols v. McLean*, 101 N. Y. 526; *Kessel v. Zeiser*, 102 Id. 114, 55 Am. Rep. 769. See *People v. Nolan*, 101 Id. 539.

25—*Ex parte Milligan*, 4 Wall. 2; *Milligan v. Hovey*, 3 Biss. 13; *Commonwealth v. Small*, 26 Penn. St. 31. Charges made against his superior by a militia officer not in connection with the service, but in his capacity as editor are cognizable by a civil court. *People v. Townsend*, 10 Abb. N. C. 169.

26—*Luther v. Borden*, 7 How. 1. 70 N. C. 161; *Sigur v. Crenshaw*, In time of war a default judg-

Military officers have no general authority to seize property for the purpose of government, and their subordinates have no protection in obeying their orders in doing so.²⁷ The seizures are trespasses.²⁸ The necessities of the service are to be provided for by the civil law, and unless impressment be expressly allowed by *law, what is taken must be paid for at the [*353] time, or its payment provided for.²⁹ There are exceptions to this rule, but they are of those cases only in which the necessities of the public service are urgent, and such as will not admit of delay; when the civil authority would be too late in providing the means required for the occasion.³⁰ If property was seized without such emergency no title would pass, and the owner might reclaim it in whose hands soever he might find it.³¹ Impressment in emergencies, belongs to the commander of the army, or of the district or post. The right cannot be exercised by officers of straggling squads of men.³²

Courts martial, for the trial of military offenses, are strictly courts of inferior and limited jurisdiction, and to render their proceedings valid, and a protection to those acting under them, it must appear that they have kept within their jurisdiction.³³ A

ment was had in a court of a State in military occupancy against a general for the taking of property by his orders. In time of peace an action was brought on the judgment. *Held*, the court had no jurisdiction of the cause of action. *Dow v. Johnson*, 100 U. S. 158.

27—*Riggs v. State*, 3 Cold. 85, 91 Am. Dec. 272.

28—*Mitchell v. Harmony*, 13 How. 115, 135; *Terrill v. Rankin*, 2 Bush, 453, 92 Am. Dec. 500; *Bryan v. Walker*, 64 N. C. 141; *Koonce v. Davis*, 72 N. C. 218; *Merritt v. Nashville*, 5 Cold. 95. Where an officer cannot defend dispossessing A. and putting B. in possession of property on the ground of military necessity, he may defend against A. by show-

ing B.'s title to the property to be better than A.'s. *Whalen v. Sheridan*, 17 Blatchf. 9.

29—*Sellards v. Zomes*, 5 Bush, 90; *Wilson v. Franklin*, 63 N. C. 259; *Hogue v. Penn*, 3 Bush, 663.

30—*Farmer v. Lewis*, 1 Bush, 66, 89 Am. Dec. 610; *Sellards v. Zomes*, 5 Bush, 90; *Merritt v. Nashville*, 5 Cold. 95.

31—*Reeves v. Triggs*, 7 Bush, 385.

32—*Lewis v. McGuire*, 3 Bush, 202; *Hogue v. Penn*, 3 Bush, 663.

33—*Duffield v. Smith*, 3 Serg. & R. 590; *Barrett v. Crane*, 16 Vt. 246; *Brooks v. Adams*, 11 Pick. 440; *Brooks v. Davis*, 17 Pick. 148. *Commonwealth v. Small*, 26 Pa. St. 31.

citizen not in the military service, or lawfully summoned into it, is not amenable to court martial.³⁴ But where such a court has proceeded within its jurisdiction, its action is as conclusive as the action of any court exercising its legitimate powers.³⁵

Military tribunals cannot be established for the trial of offenses against the general laws, when the civil courts are in the undisturbed exercise of their powers.³⁶

Neither military nor civil law can take from the citizen the right to bear arms for the common defense. This is an inherited and traditional right, guaranteed also by State and federal Constitutions. But it extends no further than to keep and [^{*354}] bear those *arms, which are suited and proper for the general defense of the community against invasion and oppression, and it does not include the carrying of such weapons as are specially suited for deadly individual encounters.³⁷ Therefore, the State laws which forbid the carrying of such weapons concealed are no invasion of the rights of citizenship.

34—*Smith v. Shaw*, 12 Johns. 257; *Merriman v. Bryant*, 14 Conn. 200. See, also, *Mallory v. Merritt*, 17 Conn. 178.

35—*State v. Stevens*, 2 McCord, 32; *State v. Wakely*, 2 N. & McC. 410; See *State v. Davis*, 4 N. J. 311; *Mower v. Allen*, 1 D. Chip. 381; *Commonwealth v. Small*, 26 Pa. St. 31; *Keyes v. U. S.*, 109 U. S. 336. Civil courts have no control over the trial of a soldier for deser-

tion so long as the military courts are proceeding regularly within their jurisdiction. *In re White*, 17 Fed. Rep. 723; *In re Davison*, 21 Fed. Rep. 618.

36—*Ex parte Milligan*, 4 Wall. 2. 37—*Andrews v. State*, 3 Heisk. 165; S. C. 1 Green, Cr. Rep. 466 and note; S. C. 8 Am. Rep. 8, and note; *Carroll v. State*, 28 Ark. 99, 18 Am. Rep. 538; *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556.

*CHAPTER X.

[*355]

INVASION OF RIGHTS IN REAL PROPERTY.

The ownership of lands is complete or partial; it is of present title or future title; it is several or joint. In this country most persons own their estate by absolute or fee simple title, corresponding to the old allodial titles, which were free from any feudal tenure. The characteristics are, that the owner has complete dominion, and may sell it as he would a chattel, and if he does not make a disposition of it to take effect in his life time, he may do so by testamentary conveyance, or leave it to pass to his heirs-at-law. His dominion is indeed subject to certain powers in the State, which pertain to sovereignty, and which consist in a right to appropriate it to the public use whenever it shall be found needful, and a right to regulate its enjoyment, so as to prevent needless or unreasonable interference with the rights of others. It is also, or may be, subject to certain easements and servitudes in favor of other parties, some of which are incident to ownership, while others, when they exist, arise from contract, express or implied.

In what follows, by real property is understood the thing itself; the land, and what pertains to it, and the right for the time being to possess and enjoy it. Particular estates in the land, one of which would be mere chattels real with the incidents of personal property, it does not often become important, when mere remedies are in question, to distinguish; the law looking to the right to present possession only, and defending that with its awful incidents.

The chief characteristic of ownership is this right to complete dominion. The line of a man's private domain, like the boundary line between nations, is not to be crossed without permission. In law this permission is called a license.

[*356] *Lawful license to enter one's premises may be given either, 1. Impliedly by the owner; 2. Expressly by the owner; 3. By the law.

Implied Licenses. Every retail dealer impliedly invites the public to enter his shop for the examination of his goods, that they may purchase them if they see fit; the mechanic extends the like invitation to those who may have occasion to become his customers; the physician and the lawyer invite them to their respective offices, and so on.¹ But the invitation is limited by the purpose; it would be an abuse of the implied license, and a trespass, if one, instead of visiting a dealer's shop for the purposes of the business carried on there, were to assemble his associates there for some political or other purpose, for which the shop had not been thrown open.^{1a} No doubt one may visit another's place of business from no other motive than curiosity, without incurring liability, unless he is warned away by placard or otherwise. So every man, by implication, invites others to come to his house as they may have proper occasion, either of business,² of courtesy, for information, etc. Custom must determine in these cases what the limit is of the implied invitation.³ In the case of young children and other persons not fully *sui juris* an implied license might sometimes arise when it would not in behalf of others. Thus, leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use

1—*Gowen v. Phila. Exchange Co.*, 5 Watts & S. 141, 143, 40 Am. Dec. 489. insist on an acceptance. *Breitenbach v. Trowbridge*, 64 Mich 393, 31 N. W. 402. The servants of a wife who has been divorced from her husband for his fault may peaceably enter afterward to remove her goods from the husband's premises. *Kallock v. Perry*, 61 Me. 273.

1a—If one having authority to enter for one purpose enters for another it is a trespass. *Kent County Agricultural Soc. v. Ide*, 128 Mich. 423, 87 N. W. 369.

2—It is no trespass to enter upon a man's premises to obtain settlement of a debt, even though it be not yet due. *Lehman v. Shackleford*, 50 Ala. 437. Nor to enter to make a tender of a debt; but there is no license to stay to

3—*Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 273, 3 Am. Rep. 628. A husband has an implied license to come upon station grounds to meet his wife who is coming on a railroad train. *Mc-*

of it;⁴ and, perhaps, if one were to throw away upon his premises, near the common way, things tempting to children, the same *implication should arise. So dogs may be im- [*357] pliedly invited upon lands by exposing meat which is apparently abandoned.⁵ So one who has an easement in the lands of another is licensed to enter upon such lands, whenever it becomes necessary to repair or protect it.⁶ And in a previous chapter many cases are enumerated in which one, by implication of law, is licensed to enter upon the land of another to remove property which he purchased while it was there, or which was left there under express license, or taken there wrongfully, and in some other cases.⁷ The grant of coal under land carries with it by implication the right to use such means for mining and removing it as are reasonably necessary and includes the right to construct a switch track on the land to the mine.⁸

Kone v. Mich. Centr. R. R. Co., 51 Mich. 601, 47 Am. Rep. 596.

4—*Keefe v. Milwaukee, &c.*, R. R. Co., 21 Minn. 207, 18 Am. Rep. 393. Compare *Wood v. School District*, 44 Iowa, 27; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, and see cases, p. *822 notes, *post*.

5—One who baits traps on his premises for dogs is liable to their owner for their value if they are killed in consequence. *Townsend v. Wathen*, 9 East, 277.

6—See *Prescott v. Williams*, 5 Met. 429, 39 Am. Dec. 685. So is the lessor of premises when by the lease it is his duty to repair. *Saner v. Bilton*, L. R. 7 Ch. D. 815.

7—See *ante*, p. *51. One may go upon the land of another to get personal property which it is the duty of the owner of the land to deliver to him. *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485. And see *Fischer v.*

Johnson, 106 Ia. 181, 76 N. W. 658; *Erskine v. Savage* 96 Me. 57, 51 Atl. 242. And as to license to enter burial lot to remove monument. *Fletcher v. Evans*, 140 Mass. 241. If one's beasts escape from him upon the adjoining premises, when he is driving along the highway with due care, he may lawfully enter to reclaim them. *Goodwin v. Cheveley*, 4 H. & N. 631. But he must take them out through the proper openings. If he lets down the fence for the purpose, when he might take them through a gate, he may be a trespasser. *Gardner v. Rowland*, 2 Ired. 247. If one marks what he claims as his boundary he licenses his neighbor to cut timber or grass up to the line, though it be not the true one. *Parks v. Pratt*, 52 Vt. 449; *Clark v. Dustin*, 52 Vt. 568.

8—*Ingle v. Bottoms*, 160 Ind. 73, 66 N. E. 160.

Express License. Where one gives to another authority to enter upon his lands to do a certain act or succession of acts, without at the same time granting to him any interest in the land itself, this is a license, whether given by parol or in writing. It may be given on condition, in which case it is inoperative, unless the condition is performed.⁹ It is personal as between the parties, and cannot be assigned by the licensee,¹⁰ and is revoked by a sale of the land by the licensor.¹¹ If not acted upon within a [*358] reason*able time it is presumptively recalled;¹² if it is acted upon, the licensee assumes the obligation to observe due care, and to negligently do nothing upon the land that shall be injurious.¹³ In general, the licensor assumes toward the li-

9—*Mumford v. Whitney*, 15 Wend. 380; *Freeman v. Headley*, 33 N. J. 523.

10—*Carleton v. Redington*, 21 N. H. 291; *Jackson v. Babcock*, 4 Johns. 418; *Ruggles v. Lesure*, 24 Pick. 187.

11—*Drake v. Wells*, 11 Allen, 141; *Houx v. Seat*, 26 Mo. 178, 72 Am. Dec. 202; *Carter v. Harlan*, 6 Md. 20; *Groendyke v. Cramer*, 2 Ind. 382; *Mendenhall v. Klinck*, 51 N. Y. 246; *Estes v. China*, 56 Me. 407; *Dark v. Johnson*, 55 Penn. St. 164, 93 Am. Dec. 732; *Prince v. Case*, 10 Conn. 382, 27 Am. Dec. 675; *Winne v. Ulster Co., &c.*, Inst., 37 Hun., 349; *Maxwell v. Bay City, &c., Co.*, 41 Mich. 453; *Cox v. Leviston*, 63 N. H. 283; *Jenkins v. Lykes*, 19 Fla., 146, 45 Am. Rep. 19. Perhaps it would be equally correct to say that the license had terminated by the happening of a contingency which, by implication of law, was in the understanding of the parties attached to the license at its creation. See *Cook v. Stearns*, 11 Mass. 538; *Bridges v. Purcell*, 1 Dev. & Bat. 492; *Sampson v. Burnside*, 13 N. H. 264; *Selden v. Delaware, &c., Canal Co.*,

29 N. Y. 634; *Wescott v. Delano*, 20 Wis. 514. A mere license to pipe a spring is revoked by a levy against the licensor on the land containing the spring. *Taylor v. Gerrish*, 59 N. H. 569; and by a sale of the water of the spring. *Eckerson v. Crippen*, 39 Hun., 419; and by bringing an action for damage suffered from acts done under it. *Lockhart v. Geir*, 54 Wis. 133. A license is revoked by the death of the licensor or of one of the licensees. *Estelle v. Peacock*, 48 Mich. 469; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720. License to a partnership by one partner is revoked by a dissolution of the partnership where nothing has been done under it. *Barksdale v. Hairstone*, 81 Va. 764.

12—*Hill v. Lord*, 48 Me. 83; *Parsons v. Camp.*, 11 Conn. 525. A license to enter and cut and remove timber must, so far, at least as the cutting goes, be executed within a reasonable time, or it will be lost. *Holt v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119.

13—*Eaton v. Winnie*, 20 Mich. 156.

censee no duty, but to refrain from acts willfully injurious, except, perhaps, when he had received a consideration for the license, or where his own business was such as to render the enjoyment of the license dangerous, in which case the license would impose upon him the obligation of additional care.¹⁴ A license is *not to be extended by construction, and therefore a license for the erection of a bridge will not extend to and license the rebuilding of the bridge after the original structure has passed away.¹⁵ So a license is always subject to revocation before it has been executed, but not afterward. By

14—*Steger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987, 28 Am. St. Rep. 594, 16 L. R. A. 640. A person giving a license to others to enter his premises, especially where the entry is in part for his own interest, assumes to warn all who come of any danger in coming which he knows of and they are ignorant of. *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154. The owner of a lumber yard who permits children to pass through it does not assume toward them the obligation to see that the lumber is piled so as to be reasonably secure from falling. *Vanderbeck v. Hendry*, 34 N. J. 467, citing *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Binks v. Sou. York, &c., R. Co.*, 3 B. & S. 244; *Gautret v. Egerton L. R.*, 2 C. B. 370; *Stone v. Jackson*, 16 C. B. 199. A licensee cannot recover for injury from fall of a bucket caused by a defective chain which licensor's servants were using upon the land. *Batchelor v. Fortescue*, L. R. 11 Q. B. D. 474. Tenants who have a license to use the roof of a building to dry clothes on cannot recover for falling off the roof by reason of a defective guard rail. *Ivay v. Hedges*, L. R. 9 Q. B. D. 80. A licensee of a way cannot recover unless there was in it some trap not discoverable by ordinary care. *Maenner v. Carroll*, 46 Md. 193. The licensor of a way is not liable for mere non-repair. *Nugent v. Wann*, 1 McCrary, 438. But where a railroad company allow the public a way across their premises, they assume toward them, in the management of their road, an obligation of additional care. *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; *Taylor v. Del. &c., R. R. Co.*, 113 Pa. St. 162, 57 Am. Rep. 446; *Byrne v. New York, &c., R. R. Co.*, 104 N. Y., 362, 58 Am. Rep. 512; *Davis v. Chicago, &c., Ry. Co.*, 58 Wis. 646, and cases cited; *Virginia, &c., R. R. Co. v. White*, 84 Va. 498, 5 S. E. 573; *Troy v. Cape Fear, &c., Ry. Co.*, 99 N. C. 298, 6 S. E. 77. But such permission does not amount to an invitation, and the company is liable only if the injury is wanton or willful. *Wright v. Boston, &c., R. R. Co.*, 142 Mass. 296.

15—*Hall v. Boyd*, 14 Ga. 1; *Gilmore v. Wilbur*, 12 Pick. 120, 22 Am. Dec. 410; *Ameriscoggan Bridge v. Bragg*, 11 N. H. 102; *Gardner v. Rowland*, 2 Ired. 247. The same is true in the case of dams erected under license. See *Cook v. Stearns*, 11 Mass. 533.

this is meant that the license accompanies and justifies every act done under it, but is subject at any moment to be put an end to as to any act contemplated by it but not yet performed.¹⁶ The exceptions to this general right to revoke a license embrace those cases where the licenses are coupled with an interest. By this is meant, not the interest the licensee has in doing the act permitted, but a legal interest conveyed to him in connection with the license, and to the enjoyment of which the license is essential.¹⁷ If, for example, one man sells to another cattle then depasturing on his grounds, the right transferred in the cattle supports the implied license to enter upon the grounds to [*360] to take them *away, and makes it irrevocable.¹⁸ But it is to be observed of this case that the license contemplates a temporary use of the land only; not to have any permanent enjoyment of it; if it contemplated anything further, it might be revoked, though no revocation could take from the purchaser his interest in the cattle, or preclude his right to remove

16—*Houston v. Laffee*, 46 N. H. 505; *Dodge v. McClintock*, 47 N. H. 383; *Batchelder v. Hibbard*, 58 N. H. 269; *Chynoweth v. Tenney*, 10 Wis. 397; *Kimball v. Yates*, 14 Ill. 464; *Allen v. Fiske*, 42 Vt. 462; *Woodward v. Seely*, 11 Ill. 157; *Druse v. Wheeler*, 22 Mich. 439; S. C. 26 Mich. 189; *Randal v. Elder*, 12 Kan. 257; *Giles v. Simonds*, 15 Gray, 441, 77 Am. Dec. 373; *Cook v. Stearns*, 11 Mass. 533; *Clute v. Carr*, 20 Wis. 531. It is a complete protection as to everything done under it before revocation. *Wood v. Leadbitter*, 13 M. & W. 838; *Rawson v. Morse*, 4 Pick. 127; *Giles v. Simonds*, 15 Gray, 441; *Marston v. Gale*, 24 N. H. 177; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484; *Owens v. Lewis*, 46 Ind. 489, 15 Am. Rep. 295; *Van Deusen v. Young*, 29 N. Y. 9; *Freeman v. Headley*, 32 N. J. 225. Recovery may be had for injury

suffered by licensor after a revocation. *Lockhart v. Geir*, 54 Wis. 133. An oral license to open a street may be revoked before it has been acted on. *Turner v. Stanton*, 42 Mich. 506.

17—See *Wood v. Manley*, 11 Ad. & El. 34; *Barnes v. Barnes*, 6 Vt. 388; *Parsons v. Camp*, 11 Conn. 525; *Whitmarsh v. Walker*, 1 Met. 313; *Giles v. Simonds*, 15 Gray, 441; *White v. Elwell*, 48 Me. 360, 77 Am. Dec. 271; *Lewis v. McNatt*, 65 N. C. 63.

18—One who has sold property by conditional sale, and who, when the condition is not complied with, enters peaceably the house of the vendee, with assistance, to take the property away, is not a trespasser for so doing, though the property is not found, it being furniture for use there. *Walsh v. Taylor*, 39 Md. 592.

them. So if one license another to erect and occupy a building upon his land, and he erects it accordingly, the law recognizes the license so far as to protect his right in the building; and though permission to occupy may be recalled, this will not preclude the licensee going upon the land afterwards to take the building away.¹⁹ But a license cannot be coupled with an interest in the lands, unless created by deed, or by such other instrument as is sufficient to convey such an interest under the Statute of Frauds. Therefore, rights of way, sales of growing trees, permission to flow lands permanently, or to carry water over or pipes under the land of another, are mere licenses, and revocable as such, unless created or made by deed.²⁰ And

19—*Barnes v. Barnes*, 6 Vt. 388; *Smith v. Benton*, 1 Hill, 176; *Dubois v. Kelley*, 10 Barb. 496; *Ricker v. Kelly*, 1 Me. 117; *Schoonover v. Irwin*, 58 Ind. 287; *Fischer v. Johnson*, 106 Ia. 181, 76 N. W. 658. But where one, without permission, has put up buildings on the land of another, whereby they become the property of the landowner, and he then obtains the landowner's parol consent to their removal, this consent is a mere license, and may be revoked before it has been carried out. *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749; *Gibbs v. Estey*, 15 Gray, 587; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Shell v. Haywood*, 16 Penn. St. 523.

20—See Washb. Real Prop. B. 1, C. 12, § 2. If a lessee of a parcel has by necessity a license to cross another parcel of a lessor's land in order to reach the demised parcel, his license is coupled with an interest and is irrevocable while the lease is in force. *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154. Otherwise as to the use of way if there is access from a road, though it is less convenient.

Motes v. Bates, 74 Ala. 374. As to license to drain, see *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Cronkhite v. Cronkhite*, 94 N. Y. 323; see also *Wilkins v. Irvine*, 33 Ohio St. 138; to bury, *Rayner v. Nugent*, 60 Md. 515. A sale of growing trees may or may not be a sale of an interest in lands. If it is a sale of the trees, to be taken as they stand by the vendee, it is a sale of the realty; but if it is a sale of the timber when the trees are cut, it is a sale of personality, and may be valid without deed. See cases collected, *Owens v. Lewis*, 46 Ind. 489, 15 Am. Rep. 295. A parol sale of standing timber operates as a license to protect the purchaser as to anything done under it prior to its revocation, and the title to timber actually cut before revocation passes. *Spalding v. Archibald*, 52 Mich., 365, 50 Am. Rep. 253; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776. If a third person cuts the trees before revocation, the licensee may recover from him for the conversion. *Cool v. Peters, &c., Co.*, 87 Ind., 531.

[*361] so are *the licenses which are given by the sale of tickets to theatres and other places of public amusement.²¹

In some cases where a license is revoked, it is of very little importance whether the licensee is or is not protected against liability as a trespasser for what has been done under it, because such a liability is insignificant as compared with the loss he must suffer by the license being withdrawn as to the future. The case of license to erect mill dams, and thereby flow the lands of proprietors above, is a suitable illustration; and in what we shall say further under this head we shall confine our attention to licenses of this sort. The hardship of permitting these to be revoked is so great in some cases that it is of great interest to know whether the licensee is not entitled to some protection against it.

The practical consequence of the withdrawal of such a license is this: that whereas the licensee in acting upon it has contemplated its permanent enjoyment, and has perhaps made large expenditures in reliance upon it, yet he must now not only abandon such enjoyment, but he must also destroy whatever has been erected under the license the continuance of which would require the license for its protection. When the license to flow lands is withdrawn, the dam which causes the flow must be removed. But the right of the licensor to revoke in these cases is recognized very generally and very fully.²² The statute

A railway company which, by consent of the owner, is put in possession of a way over his land, with a covenant from him for further assurance, has a license coupled with an interest, and one which is not subject to revocation. *New Jersey, &c., R. Co. v. Van Syckle*, 37 N. J. 496. A mere parol license to build a track, though acted upon, is revocable. *Nat. Stock Yds. v. Wiggins, &c., Co.*, 112 Ill. 384. *Contra*, *Texas, &c., Co. v. Jarrell*, 60 Tex. 267; *Campbell v. Ind., &c., R. R. Co.*, 110 Ind. 490.

21—*Wood v. Leadbitter*, 13 M. & W. 838; *Burton v. Scherpf*, 1 Allen, 133, 79 Am. Dec. 717. In this last case it was decided that a ticket to a concert was a mere license, and might be revoked after the party had taken his seat, and he be put out, if he refused to go. But it has been intimated that tickets for particular seats give more than a mere license. *Drew v. Peer*, 93 Pa. St. 234.

22—See *Wallis v. Harrison*, 4 M. & W. 538; *Cocker & Cowper*, 1 C. M. & R. 418; *Mumford v. Whitney*, 15 Wend. 380; *Houston v. Laffee*,

of frauds does *not permit an interest in lands, except in [*362] a few cases—of which this is not one,—to pass without deed. But a right to flow lands is, beyond any question, an important interest in the lands, and directly within the contemplation of the statute.²³ Says SAVAGE, Ch. J.: “If A. agree with B. that B. may build a dam upon the land of A., if it is to be permanent, or anything more than a mere temporary erection, such an agreement is not technically a license. The object of A. is to grant and of B. to acquire an interest which shall be permanent: a right not to occupy for a short time, but as long as there shall be employment for the water-power to be thus created. Can such an interest, such a right, be created by parol? As Mr. SUGDEN says of the case of *Wood v. Lake*, ‘It appears to be in the very teeth of the statute, which extends generally to all leases, *estates or interests*.’ To decide that a right to a permanent occupation of the plaintiff’s land may be acquired by parol, and by calling the agreement a license, would be in effect to repeal the statute.”²⁴

What relief, then, if any, can be given to the licensee without acting in the teeth of the Statute of Frauds, is the problem to which the courts have directed much attention. If they abide by the strict letter of the statute, the licensee will be remediless when the permission is recalled; for it must be impossible to give him protection without assuring him without deed an interest in lands which the statute says shall pass by deed only.

46 N. H. 505; *Selden v. Delaware*, it is not coupled with an interest. &c., Co. 29 N. Y. 634; *Foot v. New Haven*, &c., Co., 23 Conn. 214; *Morse v. Copeland*, 2 Gray, 302; *Hall v. Chaffee*, 13 Vt. 150; *Kivett, v. McKeithan*, 90 N. C. 106; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Dec. 192; *Huber v. Stark*, 124 Wis. 359, 102 N. W. 12.

23—PARKER, Ch. J., in *Cook v. Stearns*, 11 Mass. 538. It is immaterial whether a license, *as such*, is in writing or oral: the protection is the same in each case, and the right to revoke the same where

It may also be inferred from circumstances. See *Batchelder v. Sanborn*, 24 N. H. 474; *Lakin v. Ames*, 10 Cush. 198; *Harmon v. Harmon*, 61 Me. 222, 14 Am. Rep. 556. A written agreement providing for perpetual flowage of lands is not a revocable license. Interest not permissive but absolute. *Fitch v. Constantine*, &c., Co., 44 Mich. 74.

24—*Mumford v. Whitney*, 15 Wend. 380.

But the statute has been adopted from forcible considerations of public policy; and it lays down what was meant to be an inflexible rule. It is scarcely too much to say that if parties are guilty of the folly of disregarding its provisions it was the intent of the statute that they should be left without [*363] dress. Neverthe*less it is matter of every-day observation that parties do and will rely upon the word and honor of others in cases in which the statute admonishes them that nothing short of a formal instrument should be accepted; and that their confidence is frequently abused by those on whom they rely, who take advantage of the statute to shield themselves against responsibility for frauds and other wrongs. And the law, in detestation of such conduct, appears to have been quite ready in many cases to seize upon any circumstances which could seem to form an excuse for treating the case as taken out of the purview of the statute, so as to permit the courts to give relief. And so many cases have thus been treated as exceptional, and under such variety of circumstances, that the complaint sometimes made—that the statute has been repealed by judicial legislation—seems almost justified.

Some courts have been inclined to hold that, after the license has been acted upon and considerable expenditures made, it should not be revoked without making compensation to the licensee.²⁵ Other cases go still further, and hold that where the licensor has stood by and seen the licensee make large expenditures in reliance upon his license, and which will be wholly or in great part lost to him if the license should be recalled, these facts are sufficient to create an *estoppel in pais* which will preclude him from revoking. They liken the case to that of a man who suffers his property to be sold as belonging to another without interposing his claim, or who, under any other circumstances, by keeping silence as to his own rights, induces another who is

25—See *Addison v. Hack*, 2 Gill, 237, 26 Am. Dec. 739; *Ameriscog* 221, 41 Am. Dec. 421; *Rhodes v. gin Bridge v. Bragg*, 11 N. H. 102; *Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Sampson v. Burnside*, 13 N. H. 264; *Snowden v. Wilas*, 19 Ind. 10; *Hall v. Chaffee*, 13 Vt. 150. *Woodbury v. Parshley*, 7 N. H.

ignorant thereof, to take action which will be prejudicial if such rights are afterwards asserted.²⁶

*There is a class of cases which, at first view, may appear to resemble those under consideration, and to which the doctrine of estoppel may with great propriety be applied; such, for instance, as the erection of a partition-wall which parties are to enjoy in common,²⁷ or the altering the route of a water-course in which both parties are interested,²⁸ but these, we think, are to be looked upon as being not so much agreements which give interests in lands as arrangements for the suitable and convenient apportionment or improvement of separate rights which are so connected or related that neither party can properly and fully enjoy his own without some common understanding.

For all such cases the law prescribes for the conduct of the parties some regulations; but there are no reasons to preclude their consulting their own interests or convenience in adding to or modifying these; and if they shall do so, it may be supposed it will generally be done without any understanding that interests in lands are being given or acquired. Therefore, if their ar-

26—See *Swartz v. Swartz*, 4 Pa. St. 353, 45 Am. Dec. 697; *Rerick v. Kern*, 14 S. & R. 267, 16 Am. Dec. 497; *Lacy v. Arnett*, 33 Pa. St. 169; *Cumberland R. R. Co. v. McLanahan*, 59 Pa. St. 23; *Huff v. McCaulley*, 53 Pa. St. 206, 91 Am. Dec. 203; *Sheffield v. Collier*, 3 Kelly, 82; *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582; *Snowden v. Wilas*, 19 Ind. 10; *Lane v. Miller*, 27 Ind. 534; *Wilson v. Chalfant*, 15 Ohio 248, 45 Am. Dec. 574; *Ricker v. Kelly*, 1 Me. 117; *Russell v. Hubbard*, 59 Ill. 335. Unless the licensee can be placed *in statu quo*, in Indiana the license is irrevocable. *Campbell v. Ind. &c., R. R. Co.*, 110 Ind. 490; *Simons v. Morehouse*, 88 Ind. 391; *Burrow v. Terre Haute, &c., Co.*, 107 Ind. 432; *Nowlin v. Whipple*, 79 Ind. 481; but a license without consideration may be revoked before it is acted on. *Williamson v. Yingling*, 93 Ind. 42; *Parish v. Kaspape*, 109 Ind. 586. In Iowa, where money has been spent in making a mill race, the license is irrevocable. *Decorah, &c., Co. v. Greer*, 49 Ia., 490. Otherwise as to license to erect a building where only the line stakes have been driven. *Kipp v. Coenen*, 55 Ia. 63.

27—*Wickersham v. Orr*, 9 Iowa, 253, 74 Am. Dec. 348; *Rawson v. Bell*, 46 Ga. 19; *Russell v. Hubbard*, 59 Ill. 335; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190.

28—*LeFevre v. LeFevre*, 4 S. & R. 241, 8 Am. Dec. 696; *Rerick v. Kern*, 14 S. & R. 267, 16 Am. Dec. 497; *Williams v. Earl of Jersey*, 1 Cr. & Ph. 92.

rangements are merely verbal the courts should not be over-nice in technical classification for the benefit of a party seeking to repudiate them. As has been well said, the acquiescence and consent of the parties to such arrangements are in the nature of a contract, which, when fulfilled by one party at his cost and charge, must be obligatory upon both.²⁹

If, however, the doctrine of estoppel can be so applied as to make a parol license create an easement, or subject lands to a servitude on the ground of expenditures made on the faith of it, it must be through some extension of that doctrine not as yet

fully accepted. Estoppel is applied to prevent fraud; [*365] the party *who has neglected to speak when duty or good faith required him to do so, being denied the privilege of asserting his rights afterwards, when to do so would work a surprise and a damage to the party deceived and misled by his silence. But it is difficult to say that one is deceived who, with full knowledge of the facts, has seen fit to rely upon a promise which the law in advance notifies him is void. If one owning land were to say to another, "This is my land, but if you will go on and occupy it I will never assert title thereto," it would be a plain perversion of the doctrine of estoppel to hold that he was afterwards precluded from claiming the land. He has deceived no one regarding the facts, and there is nothing to distinguish the case in its legal bearings from any other in which a party refuses to hold himself bound by a void promise. If, therefore, his pledge can be enforced by estoppel, any other promise made void by the Statute of Frauds, it would seem, might be enforced in the same manner.³⁰ The doctrine of estoppel is a very salutary one, but it will not do to apply it in cases where, though the party may not be acting conscientiously, he is nevertheless only insisting upon the legal safeguards prescribed by law for the common protection of all. The rule is: "If one is silent when he *should* speak, justice will compel him to silence when he *would* speak."³¹ It precludes the facts from being

29—MERRICK, J., in *Pratt v. Lam-* Mich. 164; *Hayes v. Livingston*, 34 son, 2 Allen, 275. Mich. 384, 22 Am. Rep. 533.

30—See *Wright v. DeGroff*, 14 31—Wood, J., in *Buckingham v.*

shown because not shown in season; but there is difficulty in applying it to cases where the action has been had with full knowledge.

There is also considerable support for the doctrine, that the permission to flow after it has been acted upon may be enforced in equity on the same ground on which the courts of equity enforce parol contracts for the sale of land after there has been partial performance. Says Judge REDFIELD: "If such a license be given by parol, and expense incurred on the faith of it, so that the parties cannot now be placed *in statu quo*, there would seem to be the same reason why a court of equity should grant relief as in any other case of part performance of a parol contract for the sale of land or any interest therein, *i. e.*, to prevent fraud."³² In Pennsylvania it has been explicitly held that "expending money or labor in consequence of a license to divert a water-course, or use a water-power in a particular way, has the effect of turning such license into an agreement that will be enforced in equity;"³³ and the decision, as appears by the context, and also by subsequent cases, is not based upon any distinction between licenses which are to extinguish and those which are to create an easement or servitude, but is applicable to both.³⁴ The same doctrine is held in Indiana;³⁵ and in both these States it is held that, inasmuch as they have no court with full equity powers, they will give the licensee the necessary protection when he is proceeded against at law.³⁶

Smith, 10 Ohio 289, citing Wendell *v.* Van Rensselear, 1 Johns. Ch. 353.

32—Hall *v.* Chaffee, 13 Vt. 157, note. The execution of the license takes the case out of the statute. Lee *v.* McLeod, 12 Nev. 280. There can be no specific performance if the license is revoked before licensee's entry. Ellsworth *v.* South. Minn., &c., Co., 31 Minn. 543.

33—Rerick *v.* Kern, 14 S. & R. 267, 16 Am. Dec. 497.

34—Compare LeFevre *v.* Le *dictum* of GRIDLEY, J., in Pierre-

Fevre, 4 S. & R. 241, 8 Am. Dec. 696; Strickler *v.* Todd, 10 S. & R. 63, 13 Am. Dec. 649; McKellip *v.* McIlhenny, 4 Watts, 317; Wheatley *v.* Chrisman, 24 Pa. St. 298, 44 Am. Dec. 657; Campbell *v.* McCoy, 31 Pa. St. 263; Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732; Lacy *v.* Arnett, 33 Pa. St. 169.

35—Snowden *v.* Wilas, 19 Ind. 10; Lane *v.* Miller, 27 Ind. 534.

36—See the cases above cited. Also, Wetmore *v.* White, 2 Caines' Cas. 87, 2 Am. Dec. 323; and the

One serious difficulty encountered in putting these cases on the ground of specific performance, is that the right to the easement cannot be made complete without a grant, and the licensee has not stipulated for a grant, or understood that one was to be given. When the court undertakes to decree specific performance, it seeks to carry out the contract of the parties as nearly as may be possible; but to treat the license as a contract in these cases, it would seem to be necessary to add a new stipulation and then proceed to enforce it. With this exception the case does not differ from those in which equity is in the daily practice of administering this relief. But it may well be said that in any case of a parol contract relating to lands, it is the particular right or privilege promised that the parties have in view rather than the means or instrument by which it is to be created or given, and the court will only be adapting the proper means to the end at which the parties aimed, if it shall direct a legal assurance to

be executed.³⁷ If relief be given by awarding a perpetual injunction against disturbing the enjoyment *of the license, the same end would be reached and the licensor at the same time would only be held to the exact terms of his promise.³⁸

Assuming the case to stand on the same footing as a parol contract for the purchase of lands, the permission to flow must obviously be regarded as something more than a mere license. It

pont v. Barnard, 6 N. Y. 290, 304. Also, what is said by AMES, J., in *Foster v. Browning*, 4 R. I. 52, 67 Am. Dec. 505; *Hall v. Chaffee*, 13 Vt. 150; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675.

37—See *Stephens v. Benson*, 19 Ind. 367; *Huff v. McCauley*, 53 Pa. St. 206, 91 Am. Dec. 203; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675. In *Houston v. Laffee*, 46 N. H. 505, which overrules the early New Hampshire cases—which held a license on which large expenditures had been made was not revocable—it seems to be plainly in-

timated that the licensee would be entitled to some equitable redress.

38—The right at law to revoke a license acted upon with expenditure of moneys if fully recognized in *Owen v. Field*, 12 Allen 457; *Clute v. Carr*, 20 Wis. 559; *Hetfield v. Cent. R. R. Co.*, 29 N. J. 571; *Druse v. Wheeler*, 29 Mich. 439; *Selden v. Delaware, &c., Canal Co.*, 29 N. Y. 634; *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505; *Houston v. Laffee*, 46 N. H. 505; *Carleton v. Redington*, 21 N. H. 291; *Kamphouse v. Gaffner*, 73 Ill. 453; *Miller v. Tobie*, 41 N. H.

could not properly be treated as a personal privilege merely, but must be considered as pertaining to the mill property, so as to pass with it on a sale. And the death of the licensor or licensee, or the sale of the servient tenement, or the decay of the dam, would not revoke it. This is the view that has been taken in Pennsylvania and Indiana.³⁹ And the licensee, then, after moneys expended, would have all the rights of a purchaser in possession under a parol contract, among which would be the right to justify and defend his possession in the courts of law, until his right was terminated by such steps as would be necessary in the case of the occupation of lands under such parol contracts.

All that is above said is as applicable to a license for any other purpose as to a license for flowing lands.⁴⁰ Where adjoining proprietors have united in constructing a ditch or drain to carry off the surface water from their estate, it is held in Indiana and Iowa that neither can revoke the implied license or interfere with the ditch or drain to the detriment of the other.⁴¹ But such a license is held to be revocable in most of the States.⁴² Pipes laid under an oral license to carry water remain the property of the licensee and an interference therewith by the licensor is held to be a trespass.⁴³

84; *Marston v. Gale*, 24 N. H. 176; *Ruggles v. Lesure*, 24 Pick. 187. See *Cobb v. Fisher*, 121 Mass. 169.

39—*Lacy v. Arnett*, 33 Pa. St. 169; *Rerick v. Kerr*, 14 S. & R. 267, 16 Am. Dec. 497; *Thompson v. McElarney*, 82 Pa. St. 174; *Snowden v. Wilas*, 19 Ind. 10. And See *Mumford v. Whitney*, 15 Wend. 380.

40—See *Kamphouse v. Gaffner*, 73 Ill. 453. License to build a bridge whose abutments are on one's land is revocable. *Maxwell v. Bay City, &c., Co.*, 41 Mich. 453; *contra*, *Moses v. Sanford*, 2 Lea, 655. For numerous illustrations see 2 Lewis Em. Dom. § 298.

41—*Ferguson v. Spencer*, 127

Ind. 66, 25 N. E. 1035; *Vanvert v. Fleming*, 79 Ia. 638, 44 N. W. 906, 18 Am. St. Rep. 387, 8 L. R. A. 277. To same effect where one had erected gates in reliance upon a parol license. *Nowlin v. Whipple*, 120 Ind. 596, 22 N. E. 669, 6 L. R. A. 159.

42—*Hicks v. Swift Creek Mill Co.*, 133 Ala. 411, 31 So. 947, 91 Am. St. Rep. 38, 57 L. R. A. 520; *Durham v. Joyce*, 129 Mo. 5, 31 S. W. 337; *Yeager v. Woodruff*, 17 Utah, 361, 53 Pac. 1045; *Thoemke v. Fiedler*, 91 Wis. 386, 64 N. W. 103; 2 Lewis Em. Dom. § 298.

43—*Salley v. Robinson*, 96 Me. 474, 52 Atl. 930, 90 Am. St. Rep.

410.

3. The third class of licenses comprehends those cases in which the law gives permission to enter a man's premises. This permission has no necessary connection with the owner's interest, and is always given on public grounds. An instance is where a fire breaks out in a city. Here the public authorities, and even private individuals, may enter upon adjacent premises as they may find it necessary or convenient in their efforts to extinguish or to arrest the spread of the flames.⁴⁴ The law of overruling necessity licenses this, and will not suffer the owner of a lot to stand at its borders and exclude those who would use his premises as vantage ground in staying the conflagration. Indeed, it sometimes becomes necessary to destroy whole blocks of buildings to stop the spread of a fire, and the sufferer, instead of looking to the officials who command it or the parties who execute their commands, must seek redress at the hands of the State itself and accept what the State awards.⁴⁵ So, if a highway is out of repair or obstructed, a traveler having occasion to make use of it may lawfully pass upon the adjoining premises, carefully avoiding any unnecessary injury.⁴⁶ So the statutes which permit lands to be taken

44—*Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; *Woodruff v. Bowen*, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198.

45—*Darlington v. New York*, 31 N. Y. 164; *New York v. Lord*, 18 Wend. 126; *Stone v. New York*, 25 Wend. 157; *Surocco v. Geary*, 3 Cal., 69, 58 Am. Dec. 385; *American Print Works v. Lawrence*, 21 N. J. 257; S. C. 23 N. J. 9, 590, 57 Am. Dec. 420; *McDonald v. Red Wing*, 13 Minn. 38. As to the right to enter to make defense against public enemies, see *British Cast Plate Co. v. Meredith*, 4 T. R. 797, per BULLER, J.; *Boulton v. Crowther*, 2 B. & C. 703.

46—*Absor v. French*, 2 Show. 28; *Taylor v. Whitehead*, Doug. 749; *Bullard v. Harrison*, 4 M. & S. 387; *Campbell v. Race*, 7 Cush. 408, 44 Am. Dec. 728; *Williams v. Safford*, 7 Barb. 309; *Hedgepeth v. Robertson*, 18 Tex. 858; *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811; *Irwin v. Yeagar*, 74 Ia. 174, 37 N. W. 136. The rule is not the same in the case of a private way. *Taylor v. Whitehead*, Doug. 749; *Williams v. Safford*, 7 Barb. 309; *Boyce v. Brown*, 7 Barb. 80; *Holmes v. Seeley*, 19 Wend. 506. Though if the private way is obstructed by the owner of the adjoining land, it would be justifiable to pass over his land to avoid the obstruction. *Kent v. Judkins*, 53 Me. 160, 87 Am. Dec. 544; *Haley v. Colcord*, 59 N. H. 7, 47 Am. Rep. 176; see *Carey v. Rae*,

for public purposes may provide for preliminary surveys, in order to determine the necessity for any particular appropriation, and in thus providing, they license an entry upon the lands for the purpose.⁴⁷ So administrative officers are licensed by the law to enter upon private premises when necessary in the discharge of their duties.

A more common instance of a license given by the law is where an officer has process, in the service of which it becomes necessary to enter upon private grounds or into [*369] private buildings. In general an officer may go wherever a man is, in order to make service of process upon him. The limitation of the right is expressed in that familiar maxim of the law which recognizes every man's house as his castle. The meaning is, that every man's dwelling is sacred against any unlicensed intrusion, and he may close and defend it not against private persons merely, but against the ministers of the law also.⁴⁸ The privilege of the castle, however, is in the outer walls only; if the outer door is found open, the officer may enter for any lawful purpose, and having entered, he may, if need be, break open inner doors to make or complete a service. Even the outer doors may be forced for the purposes of an arrest for treason, felony, or breach of the peace, or to serve a search warrant which particularly specifies the building entered as the one to be searched, or to dispossess the occupant when another by the judgment of a competent court, has been awarded the possession.⁴⁹ In these cases the privilege must yield to the demands of public justice.

The privilege does not in any degree depend upon the character of the building except in this, that it must be the man's habitation. It may even be the part of a house only, as where one

58 Cal. 159; *Leonard v. Leonard*,
2 Allen, 543; *Farnum v. Platt*, 8
Pick. 339, 19 Am. Dec. 330.

47—*Walther v. Warner*, 25 Mo. 277; *Mercer v. McWilliams*, Wright (Ohio), 132; *Fox v. W. P. R. R. Co.*, 31 Cal. 538; *Bloodgood v. Mohawk, &c.*, R. R. Co., 14 Wend. 51; S. C. 18 Wend. 9.

48—If an officer breaks and enters a dwelling to serve civil process it is a trespass. *Kelly v. Schuyler*, 20 R. I. 432, 39 Atl. 893, 78 Am. St. Rep. 887, 44 L. R. A. 435.

49—*Semayne's Case*, 5 Co. 91; *Yelv. 29*; S. C. Smith Lead. Cas. 213.

building was occupied by many persons who had their separate apartments opening into a common hall, those of the plaintiff communicating with the hall by several doors. Says MERRICK, J.: "The apartments occupied by the plaintiff constituted, in and of themselves, a complete habitation for himself and for his family. He had the sole and exclusive use and possession of them as completely as if they stood separate and apart from everything else, and were in any other distinct structure. The privilege which the law allows to a man's habitation clearly ought to attach to apartments so situated. It arises from the great regard which the law has for every man's safety and quiet, and, therefore, it protects him from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect. And this reason shows that the principle of law which gives protection to dwelling houses has no reference whatever to their quality, construction, or magnitude, but is solely for the purpose of insuring the quiet, convenience and security of those who inhabit and dwell *in them."

[*370] Domestic security and peace would be equally disturbed by violence in breaking the doors and forcing an entrance into a dwelling, whether it should consist of the entire portions of the building or of separate and distinct apartments within it.

"Nor can the fact that there were several doors leading from the common passage-way into the different apartments occupied by the plaintiff lead to a different conclusion. For, although it was said by Lord Mansfield, in *Lee v. Gansel*,⁵⁰ that the having of four outer doors would lead to the grossest absurdity, since the greatest house in London has but one, that is not the manner in which, according to our prevailing habits and modes of living, our dwelling houses are here constructed. Many might, undoubtedly, be found here having four, and it would perhaps be difficult to find a house of any moderate degree of pretension which has less than two outer doors. While all the doors leading into any of the apartments occupied by the plaintiff are closed, each of them may be considered and must be treated as an outer door. They are all necessary to protect the habitation from the

ntrusion of those who have no license to enter it. Whether an officer who had lawfully passed through one of them might afterward, for the purpose of completing the service of his process, treat the others as inner doors, need not now be considered, because no such question arises upon the facts reported. The complaint against the defendant is confined to the breaking open of one of the doors before he had obtained an entrance to any of that portion of the building which was in the exclusive occupation of the plaintiff.

"The defendant contends that the door constructed and used for closing the entrance from the street or public highway into the common hall or entry of the building, is to be considered the only outer door of the plaintiff's dwelling house; that is to say, that his house consisted of the apartments occupied by him, and of the hall and entry used by him as a passage way in common with the tenants of all the other parts of the building. But this latter fact is by no means shown. On the contrary, these appear to have constituted no part of his tenement. He had an easement in them only in common with others, who all equally enjoyed the like privilege for the purpose of gaining access to their respective tenements."⁵¹

*Another case of a license granted by the law is that [*371] to enter and abate a nuisance. We have spoken of these licenses elsewhere, and need not repeat what was there said. It has been seen that the party licensed must keep strictly within

51—*Swain v. Mizner*, 8 Gray, 182, 84, 69 Am. Dec. 244, following *Islesley v. Nichols*, 12 Pick. 270, 22 Am. Dec. 425, in which, in an able opinion delivered by Chief Justice HAW, a levy on chattels, which an officer broke into a dwelling-house to make, was held to be void. The same doctrine is laid down in *People v. Hubbard*, 24 Wend. 369, 35 Am. Dec. 628, and *Bailey v. Wright*, 39 Mich. 96. See, also, *Attack v. Bramwell*, 3 Best & 520; *Oystead v. Shed*, 13 Mass. 20, 7 Am. Dec. 172; *Snydacker v. Brosse*, 51 Ill. 357. Where rooms over a store are used as a dwelling, breaking the outer door of the store to serve civil process is not a breaking of the outer door of a house. The dwelling in such case is to be considered as that portion of the building which is in fact occupied as a dwelling. *Stearns v. Vincent*, 50 Mich. 209, 45 Am. Rep. 37. A room used as a dwelling and a store is a dwelling as to breaking door to serve civil process. *Welsh v. Wilson*, 34 Minn. 92. An officer may enter

the privilege; he becomes a trespasser if unnecessary injury is done.⁵²

Abuse of License. A license, whether given by the owner himself, or by the law, may be lost by abusing it. Thus, one licensed to build an arch over a way abuses his authority if he obstructs the way in building it.⁵³ But, as respects the consequences of the abuse, a distinction which is of high importance is to be taken between the two classes of cases. The distinction is this: That if the authority was conferred by the law, an abuse not only terminates it, but revokes it; and it is presumed, from the misbehavior of the licensee, that he entered originally with the intent to do the wrong he has actually committed, and not in good faith under his license. The wrong-doer is thereupon held responsible as a trespasser *ab initio*; a trespasser in the entry itself, as in everything done afterward. Thus, if parties enter a public inn and demand entertainment there—the landlord being obliged by law to receive them—and if, after having entered, they abuse the license by riotous conduct, they not only become trespassers, but their trespass dates from their entry.⁵⁴ So the officer who distrains property for taxes is a trespasser *ab initio* if, instead of proceeding to dispose of it as required by [*372] law, he misuses or misappropriates it.⁵⁵ In these cases the law has given an authority which the owner cannot resist, and as no choice is allowed him in respect to the person who is to exercise it, it is but reasonable that the law which confers the authority should withdraw it wholly when it is abused. But when the party himself grants a license, which he might, at his option, have withheld, there is no reason why the remedy for an abuse should be broader than the abuse itself. The licensee is therefore not a trespasser in his entry, but he is liable

premises of one man to seize goods of another, the defendant in the writ. Link *v.* Harrington, 23 Mo. App. 429.

52—*Ante*, p. *51.

53—Cushing *v.* Adams, 18 Pick. 110.

54—Six Carpenters' Case, 8 Co. 290; S. C. 1 Smith L. C. 216.

55—The cases respecting trespass *ab initio* will be referred to hereafter, when protection by process is considered.

n the special case for exceeding his license, or for any misconduct after entry.⁵⁶

Boundaries. Rights and Remedies of Abutting Owners.

Where one's land is bounded on a public highway, it presumptively extends, not to the outer line, but to the middle of the road, and his supreme dominion embraces the whole, qualified only by the public easements.⁵⁷ Says PARSONS, Ch. J.: "Every use to which the land may be applied, and all the profits

- 56—*Edelman v. Yeakel*, 27 Penn. St. 26; *Cushing v. Adams*, 18 Pick. 10; *Faulkner v. Alderson*, Gilm. (Va.) 221; *Jewell v. Mahood*, 44 N. H. 474, 84 Am. Dec. 90; *Baldard v. Noaks*, 2 Ark. 45; *Dumont v. Smith*, 4 Denio, 319; *Van Brunt v. Schenck*, 13 Johns. 414; *Stone v. Knapp*, 29 Vt. 501; *Ferrin v. Syndoms*, 11 N. H. 363; *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570; *Webber v. Barry*, 66 Mich. 127, 33 N. W. 289, 11 Am. St. Rep. 466; Kent County Agricultural Soc. v. [de], 128 Mich. 423, 87 N. Y. 369; *O'Connell v. Samuel*, 81 Hun, 357, 39 N. Y. S. 889; *Madden v. Brown*, 3 App. Div. 454, 40 N. Y. S. 714.
- 57—*Lade v. Sheperd*, 2 Str. 1004; *Goodtitle v. Alker*, 1 Burr. 33; *Grose v. West*, 7 Taunt. 39; *Doe v. Pearsey*, 7 B. & C. 304; *U. S. v. Harris*, 1 Sumner, 21; *Harris v. Elliott*, 10 Pet. 25; *Barclay v. Howell's Lessee*, 6 Pet. 498; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363; *Webber v. California*, &c., R. R. Co., 51 Cal. 425; *Watkins v. Lynch*, 71 Cal. 21; *Chatham v. Brainerd*, 11 Conn. 60; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Dean v. Lowell*, 135 Mass. 55; *Chadwick v. Davis*, 143 Mass. 7; *Transue v. Sill*, 105 Pa. St. 604; *Helmer v. Castle*, 109 Ill. 164; *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 So. 1; *Huffman v. State*, 21 Ind. App. 449, 52 N. E. 713; 69 Am. St. Rep. 368; *Stevens v. Gordon*, 87 Me. 564, 33 Atl. 27; *Rich v. Minneapolis*, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861; *Friedman v. Suare*, 71 N. J. L. 605. Where land was described to center of highway excepting "the roads laid out over the land," the fee to the center of the highway passed subject to the public easement. *Wellman v. Dickey*, 78 Me. 29. Lands described in a deed as bounded by a public highway or street will be considered as bounded by the center, unless it clearly appears that it was intended to make the side line of the street a boundary instead of the center. *Moody v. Palmer*, 50 Cal. 31. See *Chicago v. Rumsey*, 87 Ill. 348. If the land is bounded on "the side" of the highway, these words are presumed to exclude the highway. *Hughes v. Providence, &c.*, R. R. Co., 2 R. I. 493; *Hoboken Land Co. v. Kerrigan*, 31 N. J. 13; *Anderson v. James*, 4 Robt. 35; *Grand Rapids, &c., R. R. Co. v. Heisel*, 38 Mich., 62; *Severy v. Cent. Pac. R. R. Co.*, 51 Cal. 194; *De Peyster v. Mali*, 27 Hun, 439; *Kings Co. Ins. Co. v. Stevens*, 87 N. Y. 287, 41 Am. Rep. 361. But see, *Low v. Tibbetts*, 72 Me. 92, 39 Am. Rep. 303. A description as "a lot on the west

[*373] which may be derived from *it consistently with the continuance of the easement, the owner can lawfully claim."⁵⁸ The herbage in the highway is therefore his, and he may maintain trespass against one whose cattle graze upon it, unless by law the cattle are permitted to roam at large.⁵⁹ The growing trees in the highway also belong to the adjoining owner, except as they may be needed for the purpose of making the way or of repairing it,⁶⁰ and if the highway officers sell trees thus standing in the road, and they are cut without necessity,

side of M. street," carries title to Reynolds, 31 N. Y. 151; Holden v. Shattuck, 34 Vt. 336; Cole v. New York, &c., Co., 37 Hun, 346. So a boundary described as extending "to the margin of the cove, thence westerly along the margin of the cove," etc., extends only to the margin, and does not include the flats. Nickerson v. Crawford, 16 Me. 245; Montgomery v. Reed, 69 Me. 510. So one "on the beach." Litchfield v. Ferguson, 141 Mass. 97. So a grant bounded by the shore. Galveston, &c., Co. v. Heidenheimer, 63 Tex. 559. See, also, Rockwell v. Baldwin, 53 Ill. 19; People v. Board of Superv., 125 Ill. 9, 17 N. E. 147. If the "channel" of a river is the boundary, the line is the center of the navigable part of the river. Warren v. Thomaston, 75 Me. 329, 46 Am. Rep. 397; Rowe v. Smith, 51 Conn. 266. The question whether the boundary is on the line of the street or along the center is always one of intent. Mott v. Mott, 68 N. Y. 246. See Salter v. Jonas, 39 N. J. 469, 23 Am. Rep. 229.

58—Perley v. Chandler, 6 Mass. 454, 456, 4 Am. Rep. 159. See Lane v. Kennedy, 13 Ohio St. 42; Phifer v. Cox, 21 Ohio St. 248, 8 Am. Rep. 58; Higgins v.

v. Shattuck, 34 Vt. 336; Cole v. Drew, 44 Vt. 49, 8 Am. Rep. 363; Graves v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536; Chamberlain v. Enfield, 43 N. H. 356; Woodrинг v. Forks Township, 28 Pa. St. 355, 361, 70 Am. Dec. 134; Baker v. Shepard, 24 N. H. 208; Adams v. Emerson, 6 Pick. 57; Barclay v. Howell, 6 Pet. 498; Jackson v. Hatheway, 15 John. 447, 8 Am. Dec. 263; Reichert v. St. Louis, etc., R. R. Co., 51 Ark. 491, 11 S. W. 696; Farnsworth v. Rockland, 83 Me. 508, 22 Atl. 394; People v. Foss, 80 Mich. 559, 45 N. W. 400; Palatine v. Kruger, 121 Ill. 72.

59—Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121; Cool v. Crommet, 13 Me. 250; Avery v. Maxwell, 4 N. H. 36; Woodruff v. Neal, 28 Conn. 165; Stevens v. Gordon, 87 Me. 564, 33 Atl. 27. So he may maintain ejectment against one who appropriates any part of his land within the highway limits. Goodtitle v. Alker, 1 Burr. 133.

60—Adams v. Emerson, 6 Pick. 56; Sanderson v. Haverstick, 8 Pa. St. 294; Overman v. May, 35 Iowa, 89; Commissioners, etc., v. Beckwith, 10 Kan. 603.

they are liable in trespass for so doing.⁶¹ So it is a trespass on the adjoining owner for a person to deposit in the highway any thing not in any manner connected with the enjoyment of the easement,^{61a} or to extend a structure on other lands over it,⁶² or *to take a stand in the highway for the purpose of blackguardism and abuse.⁶³

It is competent, however, in appropriating lands for a public way, to provide for taking, not an easement merely, but the fee simple title, and where that is done, doubtless the rights of the adjoining owner are considerably restricted. It has been decided in Iowa that under such an appropriation the complete owner-

61—*Clark v. Dasso*, 34 Mich. 86; *Baker v. Shephard*, 24 N. H. 208; *Wellman v. Dickey*, 78 Me. 29. See, further, *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Babcock v. Lamb*, 1 Cow. 238; *Williams v. N. Y. Cent. R. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 551; *Dubuque v. Maloney*, 9 Iowa, 450; *Dubuque v. Benson*, 23 Iowa, 248; *White v. Godfrey*, 97 Mass. 472; *Bliss v. Ball*, 99 Mass. 597; *Makepeace v. Worden*, 1 N. H. 16; *Sanderson v. Haverstick*, 3 Pa. St. 294; *Woodring v. Forks Town*, 28 Pa. St. 355; *Read v. Leeds*, 19 Conn. 183; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 126; *West Covington v. Freking*, 3 Bush, 121.

61a—*Lewis v. Jones*, 1 Pa. St. 136. Trees may be removed by the public authorities when reasonably necessary for the proper use or improvement of the highway. *Vanderhurst v. Thalcke*, 13 Cal. 147, 45 Pac. 266, 35 L. R. 1. 267; *Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509. So to make room for public utilities such as telephone wires. *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 9 So. 1. But if the fee of the

street is in the abutting owner, this cannot be done without compensation unless telegraph and telephone lines are legitimate street uses, to which the fee is subject. Upon the latter question the authorities are in conflict, but the better opinion and weight of authority is that they are not. In the latter case cutting trees to the damage of abutting owners to make way for electric wires is a trespass. *Hoyt v. Southern New Eng. Tel. Co.*, 60 Conn. 385, 22 Atl. 957; *Cumberland Tel. & Tel. Co. v. Cassidy*, 78 Miss. 666, 29 So. 762. If such lines are regarded as a legitimate street use to which the fee is subject, then the same rule applies as in case ordinary street uses and improvements and trees may be cut or removed when reasonably necessary. See 1 *Lewis Em. Dom.* § 131.

62—*Codman v. Evans*, 5 Allen, 308, 81 Am. Dec. 748.

63—*Adams v. Rivers*, 11 Barb. 390. So, to use without the consent of the adjoining owner the street as a hackstand in accordance with an ordinance. *McCaffrey v. Smith*, 41 Hun, 117.

ship and dominion passed to the municipal corporation by which the appropriation was made, and that if a deposit of mineral should exist beneath the surface, and be worked by the adjoining proprietor, the corporation might recover from him the value of the mineral taken out.⁶⁴ In Michigan a different view is taken; the appropriation of the fee being held to be only for the purposes of the easement, and for the other public purposes for which it is customary or proper to make use of land thus appropriated. Therefore, the earth in a city street, not needed for making or repairing it, belongs to the adjacent owner, and cannot be sold by the city.⁶⁵

Boundaries. Riparian Owners. So *prima facie* the land bounded on a stream of water is bounded by the center of [*375] the stream.⁶⁶ This rule has been applied *to such large

64—Des Moines *v.* Hall, 24 Iowa, 234. See, also, Milburn *v.* Cedar Rapids, &c., R. R. Co., 12 Iowa, 246. So also in Minnesota. Rich *v.* Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861; Viliski *v.* Minneapolis, 40 Minn. 304, 41 N. W. 1050. Compare Moses *v.* Pittsburgh, &c., R. R. Co., 21 Ill. 522; West *v.* Bancroft, 32 Vt. 367; Ohio, &c., R. R. Co. *v.* Applegate, 8 Dana, 289; Hinchman *v.* Paterson, &c., R. R. Co., 2 C. E. Green, 75; State *v.* Laverack, 34 N. J. 201; Jackson *v.* Hathaway, 15 Johns. 447, 453, 8 Am. Dec. 263. It would be otherwise, it seems, if the land were dedicated for street purposes only. Dubuque *v.* Benson, 23 Iowa, 248.

65—Cumming *v.* Prang, 24 Mich. 514; Bissell *v.* Collins, 28 Mich. 277, 15 Am. Rep. 217; Griswold *v.* Bay City, 35 Mich. 452. To the same effect. Robert *v.* Sadler, 104 N. Y. 229. In dedicating a street the owner cannot reserve the fee so as to prevent laying in it water pipes for public use.

Wood *v.* National, &c., Co., 33 Kan. 590, 52 Am. Rep. 543. Compare Delphi *v.* Evans, 36 Ind. 90, 10 Am. Rep. 12; West Covington *v.* Freking, 8 Bush, 121; Stevenson *v.* Chattanooga, 20 Fed. Rep. 586. See, further, 2 Lewis Em. Dom. §§ 589, 590; Wright *v.* Austin, 143 Cal. 236, 76 Pac. 1023, 101 Am. St. Rep. 97; Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368.

66—Bickett *v.* Morris, L. R. 1 H. L. Sc. Ap. 47; Cate's Exrs. *v.* Wadlington, 1 McCord, 581; Hayes *v.* Bowman, 1 Rand. 417; Jackson *v.* Halstead, 5 Cow. 216; Walker *v.* Board of Public Works, 16 Ohio, 540; State *v.* Gilmanton, 9 N. H. 461; Nickerson *v.* Crawford, 16 Me. 245; Browne *v.* Kennedy, 5 H. & J. 195; Ross *v.* Faust, 54 Ind. 471, 23 Am. Rep. 655; Arnold *v.* Elmore, 16 Wis. 536; Piper *v.* Connelly, 108 Ill. 646; Norcross *v.* Griffiths, 65 Wis. 599, 56 Am. Rep. 642; Carpenter *v.* Gold, 88 Va. 551, 14 S. E. 329. The owner of land on both sides

ers as the Connecticut,⁶⁷ the Delaware,⁶⁸ the Mississippi,⁶⁹ the Detroit,⁷⁰ the Sandusky,⁷¹ the Milwaukee,⁷² the St. Marie,⁷³ the Saginaw,⁷⁴ etc.⁷⁵ Where this view prevails the rights of the public are rights of navigation, and of improvement for the purposes of navigation; and where the state interposes no obstacle, the owner may use the land covered by the water, or the water itself for his own profit. It has been held that the right to gather ice therefrom was exclusive, and that the owner might maintain an action against one who, by laying a raft in front of his grounds, prevented his gathering an ice crop.⁷⁶ He may also rightfully carry out the

a stream owns the bed. Olson Merrill, 42 Wis. 204. The river the monument. The center of monument is the boundary. *Hooper v. Laconia*, 60 N. H. 203. The rule is the same in the case boundary on a canal. *Agawam Canal Co. v. Edwards*, 33 Ill. 476, 501. A description of

by lot number on a plat carries riparian rights to center of ordinary stream. *Fletcher v. Under Bay, &c., Co.*, 51 Mich. 1. See *Cole v. Wells*, 49 Mich.; *Richardson v. Prentiss*, 48 Ill. 88. See, also, *Holbert v. Ens*, 5 Lea, 204, 40 Am. Rep. 26.

7—*Adams v. Pease*, 2 Conn.

In this case, HOSMER, J., taking of the common law rule, which gives the owner of the title *ad flum medium iuris* and of the argument *ab inconvenienti*, as it applied to such streams, says: "The argument from inconvenience must be very powerful to cast a shade on so long established principle. Here I discern no inconvenience. On the other hand, the doctrine of the common law * * * promotes grand ends of civil society by suing that wise and orderly

maxim of assigning to everything capable of ownership a legal and determinate owner." Approved by SPENCER, Ch. J., in *Hooker v. Cummings*, 20 Johns. 90, 101.

68—*Rundle v. Delaware, &c., Canal Co.*, 1 Wall. Jr., 275, 294, GRIER, J.; *Hart v. Hill*, 1 Whart. 124.

69—*Morgan v. Reading*, 3 Sme. & Mar. 366; *S. B. Magnolia v. Marshall*, 39 Miss. 110; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Houck v. Yates*, 82 Ill. 179.

70—*Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435.

71—*Gavit's Admrs. v. Chambers*, 3 Ohio, 496; *June v. Purcell*, 36 Ohio St. 396.

72—*Arnold v. Elmore*, 16 Wis. 509.

73—*Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154.

74—*Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 182.

75—See *Stuart v. Clark's Lessee*, 2 Swan, 9, 58 Am. Dec. 49, where the common law rule of private ownership was held applicable to all fresh water streams.

76—*Lorman v. Benson*, 8 Mich.

[*376] shore by em^{*}bankment, or otherwise, subject to two conditions, the first of which is, that he must not do that which diminishes or threatens the corresponding rights of other riparian proprietors;⁷⁷ and the second is, that he must not abridge or obstruct the public easement, and must be [*377] subject always to State *police regulations. In Iowa, North Carolina, Missouri, Kansas, Minnesota, California, Nevada, Oregon and West Virginia, it is held that on streams

18, 77 Am. Dec. 435. So may the lessee of the riparian rights. People's Ice Co. v. The Excelsior, 44 Mich. 229. But if the upland owner does not own the bed of the stream, he has not the exclusive right to cut the ice. Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330. The right of ice harvesting in a navigable stream like the Penobscot, below Bangor, is held superior from its importance to the right of traveling over the ice—though both are common rights. Woodman v. Pitman, 79 Me. 456, 10 Atl. 321. The owner of the bed of the stream alone has the right to take the ice formed over his land. Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196; Piper v. Connelly, 108 Ill. 646. The owner of an easement to flow land does not own the ice formed over the land. Stevens v. Kelley, 78 Me. 444, 57 Am. Rep. 813; Brookville, &c., Co. v. Butler, 91 Ind. 134, 46 Am. Rep. 580. The land owner may take it unless thereby he materially injures the owner of the easement. Dodge v. Berry, 26 Hun, 246; Bigelow v. Shaw, 65 Mich. 341, 32 N. W. 800; Searle v. Gardner, 13 Atl. Rep. 835 (Penn).

77—In Bickett v. Morris, L. R. 1 H. L. Cas. Sc. Ap. 47, 61. Lord WESTBURY says: “When, how-

ever, it is said that the proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not by any means follow that that property is capable of being used in the ordinary way in which so much land uncovered by water might be used; but it must be used in such a manner as not to affect the interest of riparian proprietors in the stream. Now, the interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but it would extend also to prevent the course being interfered with or affected, so as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor.

“In the bed of a river there may, possibly, be a difference in the level of the ground, which, as we know, has the effect of directing the tide or current in a particular direction. Suppose the ordinary current flows in a manner which has created for itself, by attrition, a bay, in a particular part of the bank; if that were obstructed by a building, the effect might be to alter the course of the current, so as to direct the

hich are navigable in fact, though not subject to tide-water
ow, the line of private ownership is the bank, and not the
read of the river.⁷⁸ And this view has the approval of the
ederal Supreme Court.⁷⁹

ew with a greater degree of vio-
nce upon the opposite bank, or
ome other portion of the same
ank; and then, if at that part
the bank to which the accelerated
flow of the water in greater
rce is thus directed, there hap-
pens to be a building erected, the
ow of the water thus produced
the artificial obstruction would
ve the effect, possibly, of wear-
g away the foundation of that
ilding at some remote period,
d would thereby be product-
e of very considerable damage.
‘It is wise, therefore, to lay
wn the general rule, that even
ough immediate damage cannot
described, even though the ac-
al loss cannot be predicated, yet,
an obstruction be made to the
tual current of the stream, that
truction is one that consti-
tes an injury which the courts
ll take notice of, as an en-
-chancement which adjacent proprie-
ors have a right to have re-
oved. In this sense the maxim
s been applied by the law of
otland that *melior est conditio
hibentis*, that is to say, you
ve a right to preserve the state
things unimpaired and un-
-judiced in which you have that
sting interest.” As to the
ht of the owner of land on
viable water to build out
arves, &c., provided naviga-
n is not obstructed, see further
laplaine *v.* Chicago, &c., Ry.
. 42 Wis. 214, 24 Am. Rep. 386;
rli *v.* Stillwater, &c., Co., 28

Minn. 373, 41 Am. Rep. 290; Wil-
liamsburg Boom Co. *v.* Smith, 84
Ky. 372, 1 S. W. 765. As to pro-
tecting land from washing away,
see Diedrich *v.* Northw., &c., Ry.
Co., 42 Wis. 248, 24 Am. Rep. 399;
Barnes *v.* Marshall, 68 Cal. 569.

78—McManus *v.* Carmichael, 3
Iowa, 57; Haight *v.* Keokuk, 4
Iowa, 199; Tomlin *v.* Railroad Co.,
32 Iowa, 106, 7 Am. Rep. 176; Wil-
son *v.* Forbes, 2 Dev. 30; Col-
lins *v.* Benbury, 3 Ired. 277, 38
Am. Dec. 722; S. C. 5 Ired. 118;
State *v.* Glen, 7 Jones, (N. C.)
321; Benson *v.* Morrow, 61 Mo.
345; Meyers *v.* St. Louis, 8 Mo.
App. 266; Wood *v.* Fowler, 26
Kan. 682, 40 Am. Rep. 330; Mor-
rill *v.* St. Anthony, &c., Co., 26
Minn. 222, 37 Am. Rep. 399; Un-
Depot Co. *v.* Brunswick, 31 Minn.
297, 47 Am. Rep. 789; Packer *v.*
Bird, 71 Cal. 134; Shoemaker *v.*
Hatch, 13 Nev. 261; Minto *v.* De-
laney, 7 Ore. 337; Ravenswood *v.*
Flemings, 22 W. Va. 52, 46 Am.
Rep. 485; Brown Oil Co. *v.* Cald-
well, 35 W. Va. 95, 13 S. E. 42, 29
Am. St. Rep. 793. See Bainbridge
v. Sherlock, 29 Ind. 364, 95 Am.
Dec. 644. If by act of congress
such stream is declared non-navi-
gable the owner’s title is not car-
ried to the center. Wood *v.* Chi-
cago, &c., Ry. Co., 60 Ia. 456.

79—Barney *v.* Keokuk, 94 U. S.
324. In Ryan *v.* Brown, 18 Mich.
196, it was decided that the State
could not build structures in a
fresh water navigable stream
without the consent of the pro-

On the small streams which are highways only for rafting purposes, the title of the bank-owner is conceded on all hands to extend to the thread of the stream, but the public may use them for rafting, taking care not needlessly, by checking the water or otherwise to injure adjacent lands.⁸⁰

Where land is bounded on a fresh-water lake, large or [*378] small, *the boundary line is perhaps low-water mark.⁸¹

On waters where the tide ebbs and flows the line of high

prietor of the bank, or without first making compensation. The decision in *Barney v. Keokuk* is *contra*. Each State may determine the extent of the riparian owner's title; *Webber v. Pere Marq., &c., Co.*, 62 Mich. 626, 30 N. W. 469; *Barney v. Keokuk*, *supra*.

80—*Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Middleton v. Flat River Booming Co.*, 27 Mich. 533. See *Brown v. Chadboume*, 31 Me. 9, 1 Am. Rep. 641; *Treat v. Lord*, 42 Me. 552, 46 Am. Dec. 298; *Morgan v. King*, 35 N. Y. 454; *Weise v. Smith*, 3 Ore. 445, 8 Am. Rep. 621; *Hubbard v. Bell*, 54 Ill. 110, 5 Am. Rep. 98; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Weaver v. Miss., &c., Co.*, 28 Minn. 534; *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584; *Haines v. Welch*, 14 Ore. 319; *Anderson v. Thunder Bay, &c., Co.*, 61 Mich. 489, 28 N. W. 518; *Field v. Apple River, &c., Co.*, 67 Wis. 569. A stream not capable of use for rafting purposes in its natural condition cannot lawfully be made so by dams to the prejudice of land owners. *Thunder Bay Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184. If there is a sufficient sluice in a lawful dam to allow unrafted logs to pass, there is no duty to so build that a raft can pass. *Foster v. Searsport, &c., Co.*, 79 Me. 508, 11 Atl. 273.

81—*Waterman v. Johnson*, 13 Pick. 261; *Bradley v. Rice*, 13 Me. 198, 29 Am. Dec. 501; *Stevens v. King*, 76 Me. 197, 49 Am. Rep. 609; *Champlain, &c., R. R. Co. v. Valentine*, 19 Barb. 484; *Canal Commissioners v. People*, 5 Wend. 423; *Wheeler v. Spinola*, 54 N. Y. 377; *Fletcher v. Phelps*, 28 Vt. 257; *Jakeway v. Barrett*, 38 Vt. 316; *Austin v. Rutland, &c., R. R. Co.*, 45 Vt. 215; *State v. Gilmanton*, 9 N. H. 461; *West Roxbury v. Stoddard*, 7 Allen, 158; *Trustee v. Schroll*, 120 Ill. 509, discussing what is a lake and what a stream. The line in Ohio as to Lake Erie and in Wisconsin as to large and small lakes is that where the water in its usual condition stands. *Sloan v. Biemiller*, 34 Ohio St. 492; *Delaplaine v. Chicago, &c., Co.*, 42 Wis. 214, 24 Am. Rep. 386; *Boorman v. Sunnuchs*, id. 233. Where private ownership extends only to low water mark, the owner of uplands cannot grant a submerged lot separate from the upland. The riparian rights cannot be thus conveyed. *Lake Sup. Land Co. v. Emerson*, 38 Minn. 406, 38 N. W. 200. In *Rice v. Ruddiman*, 10 Mich. 125, the owner of the bank on Lake Muskegon, a small body

ter is the limit of exclusive private ownership,⁸² though this rule in the Atlantic States is much modified either by legislation or by customary law.⁸³ And in respect to boundary on highways or fresh-water streams, the rules above given are rules of presumption merely,⁸⁴ and in any grant of lands the words of conveyance may be such as to bound the lands on the exterior side of a highway, or on the bank of a stream, or on any other line sufficiently designated.⁸⁵

***Possession of Lands.** Land, the ownership of which [*379] is passed from the sovereignty, in contemplation of law is always in the possession of some one. The possession may be

water through which the river 525. Hoboken *v.* Penn. Ry. Co., Iskegon passes near its mouth, 16 Fed. Rep. 816; Coburn *v.* Ames, 52 Cal. 385, 28 Am. Rep. 634. So in case of the Harlem river. Mayor, &c., of N. Y. *v.* Hart, 95 N. Y. 443.

83—See opinion of Chief Justice GREEN, in Gough *v.* Bell, 22 N. J. 441; Bell *v.* Gough, 23 N. J. 624. Commonwealth *v.* Vincent, 108 Mass. 441; Opinion by GRAY, J.; Parker *v.* Cutler Mill Dam Co., 20 Me. 353, 37 Am. Dec. 56; Nudd *v.* Hobbs, 17 N. H. 524.

84—Waterman *v.* Johnson, 13 Pick. 261; Mott *v.* Mott, 68 N. Y. 246.

85—Alden *v.* Murdoch, 13 Mass. 256; Pettingill *v.* Porter, 3 Allen, 349; Tyler *v.* Hammond, 11 Pick. 193; Smith *v.* Slocomb, 9 Gray, 36; Howard *v.* Ingersoll, 13 How. 381; Hughes *v.* Providence, &c., R. R. Co., 2 R. I. 508; Hoboken Land Co. *v.* Kerrigan, 31 N. J. 13; Morrow *v.* Willard, 30 Vt. 118; Starr *v.* Child, 5 Denio, 599; Halsey *v.* McCormick, 13 N. Y. 296; Nickerson *v.* Crawford, 16 Me. 245; Rockwell *v.* Baldwin, 53 Ill. 19; Grand Rapids, &c., R. R. Co. *v.* Heisel, 38 Mich. 62.

; State *v.* Jersey City, 25 N. J.

rightful or wrongful, and if rightful, it may be by one who has only a temporary interest therein, as tenant for years or at will, or it may be by one having a freehold estate. Where one has actual possession, he does not lose it by temporary absences for pleasure or business, but the possession will be kept for him by servants, if any remain, or by his domestic animals or his goods. If one occupies part of a known description of land, but has color of title to the whole and claims the whole, he has constructively possession of the whole provided no one else is occupying any portion thereof.⁸⁶ Where the owner of the legal title is in possession of part of a tract and the owner of color of title to the same tract is in possession of part, it is held that the owner of the legal title is deemed to be in possession of the whole tract, except the part actually occupied under the color of title.⁸⁷ If there is no *pedis possessio* of any part of the land, the real owner has constructive possession, and may sue an intruder for the disturbance of his possession, and will recover if he makes out his title.⁸⁸ If possession has been taken from the owner, his

- 86—Achey *v.* Hull, 7 Mich. 423; Dobbs *v.* Gullidge, 4 Dev. & Bat. 68; Barber *v.* Trustees of Schools, 51 Ill. 396. See Collins *v.* Benbury, 5 Ired. 118; Ruggles *v.* Sands, 40 Mich. 559; Moore *v.* Douglas, 14 W. Va. 708; Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703. The claim must be made before the trespass is committed. Hosford *v.* Whitecomb, 56 Vt. 651. In Wisconsin, where an injury is to the possession and not a permanent one to the freehold, plaintiff may maintain an action if he shows good title to a part and possession of the whole. Boyington *v.* Squires, 71 Wis. 276, 37 N. W. 227. Otherwise, if the injury is to the freehold and he fails to show good title. Winchester *v.* Stevens' Point, 58 Wis. 350; Reed *v.* Chicago, &c., Co., 71 Wis. 399, 37 N. W. 225.
- 87—Schlossnagle *v.* Kolb, 97 Md. 285, 54 Atl. 1006. And see Ault *v.* Meager, 112 Ga. 148, 37 S. E. 185.
- 88—Miller *v.* Miller, 41 Md. 623; Griffin *v.* Creppin, 60 Me. 270; Tolles *v.* Duncombe, 34 Mich. 101; Appleby *v.* Obert, 1 Harr. 336; Gunsolus *v.* Lormer, 54 Wis. 630; Storrs *v.* Feick, 24 W. Va. 606; Taylor *v.* State, 65 Ark. 595, 47 S. W. 1055; Bonham *v.* Loeb, 107 Ala. 604; Louisville, etc., R. R. Co. *v.* Hall, 131 Ala. 161, 32 So. 603; Waterbury Clock Co. *v.* Trion, 71 Conn. 254, 41 Atl. 827; Yellow River R. R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568; Chicago, etc., R. R. Co. *v.* Beach, 29 Ill. App. 157; Faith *v.* Yocom, 51 Ill. App. 620; Schlossnagle *v.* Kolb, 97 Md. 285, 54 Atl. 1006; Avitt *v.* Farrell, 68 Mo. App. 665. See Whiddon *v.* Williams Lumber Co.,

thod of recovering it will depend upon the circumstances. At common law he might have retaken it by force, but as this often led to serious breaches of the public peace the Statute, 5 ch. II., C. 7, was enacted, which declared that "none henceforth make entry into any lands and tenements but in cases where entry is given by the law, and in that case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner." This *statute has been re-enact- [*380] in the several American States, or recognized as a part of the American common law. If, notwithstanding its provision, one shall forcibly seize possession of lands, or if, after being in any manner unlawfully obtained possession, he shall forcibly detain the same against the owner, summary statutory remedies are given by means of which the party forcibly excluded or wrongfully excluded by force, may regain possession. Said title is no defense to a complaint for a forcible entry.⁸⁹ There are several reasons why the law cannot suffer a forcible entry upon a peaceable possession, even though it be in the assertion of a valid title against a mere intruder. *First.* Whoever assumes to make such an entry makes himself judge in his own cause, and enforces his own judgment. *Second.* He does this by the employment of force against a peaceable party. *Third.* the other party must have an equal right to judge in his own cause, and to employ force in giving effect to his judgment, a breach of the public peace would be invited, and any wrong, if unredressed at all, would be redressed at the cost of a public dis-

Ga. 700, 25 S. E. 770; *Casey v.* 48 N. W. 925; *Nicol v.* Illinois son, 8 Okl. 665, 59 Pac. 252. 9—*Newton v.* Harland, 1 M. & 644; *Hillary v.* Gay, 6 C. & P. . See *Mugford v.* Richardson, Jllen, 76, 83 Am. Dec. 617; *Gault Jenkins*, 12 Wend. 488; *Mussey Scott*, 32 Vt. 82; *Judy v.* Citi- , 101 Ind. 18; *Rawson v.* Put- n, 128 Mass. 552; *Sinclair v.* nley, 69 Tex. 718, 7 S. W. 511; *Wnradt v.* Campbell, 25 Kan. ; *Spiers v.* Duane, 54 Cal. 176; *aball v.* Shoemaker, 82 Ia. 459, U. S. 608.

Cent. R. R. Co., 44 La. Ann. 816, 11 So. 34. There may be a forcible entry or detainer without use of personal violence. *Steinlein v.* Halstead, 42 Wis. 422; *Ely v.* Yore, 71 Cal. 130. But, see *Fort Dearborn Lodge v.* Klein, 115 Ill. 177, 56 Am. Rep. 133; *Johnson v.* West, 41 Ark. 535. A forcible entry and detainer statute covers the forcible seizure of a railroad. *Iron Mt., &c., Co. v.* Johnson, 119

turbance, and perhaps of serious bodily injury to the parties.⁹⁰ The good of the State could not tolerate such proceedings, and therefore when forcible possession is taken, the law compels a restoration, and refuses to inquire into the title until it is made. But if one lawfully entitled to possession can make peaceable entry, even while another is in occupation, the entry, in contemplation of law, restores to him complete possession,⁹¹ and it is

not unlawful for him to resort to such means, short of
[*381] the employment of force, as will render further occupation by the other impracticable.⁹²

It is never unlawful, however, to expel by force an intruder upon lands, provided the party intruded upon is
[*382] *prompt in his action. If he, his family, or his servants, are upon the land at the time, the necessary force may then be employed; but if the intruder steals in unawares, the

90—A mere right to possession refusal, burst open an inner door which the female servant can never justify the use of force had fastened and refused to open, in order to regain it. Parsons *v.* Brown, 15 Barb. 590; Newkirk *v.* Sabler, 9 Barb. 652; State *v.* Yeaton, 53 Me. 125; Newcombe *v.* Irwin, 55 Mich. 620; Wahl *v.* Laubensheimer, 174 Ill. 338, 51 N. E. 860; Concanan *v.* Boynton, 76 Ia. 543, 41 N. W. 213; Bristor *v.* Burr, 120 N. Y. 427, 24 N. E. 937.

91—Esty *v.* Baker, 50 Me. 325, 79 Am. Dec. 616; Ryan *v.* Sun Sing Chow Poy, 164 Ill. 259, 45 N. E. 497; Vial *v.* Hofen, 106 Mich. 160, 64 N. W. 11.

92—The case of Stearns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442, is so full upon this point, both in its discussion and citation of authorities, that we cannot do better than to copy freely from it. The case was one in which a tenancy had been properly terminated. The tenants not leaving, the landlord entered peaceably, requested them to quit and remove their furniture, and upon their

took off the doors and windows on a cold day in winter, brought a blood-hound into the house, and refused to permit any food to be brought in for the woman for several days. APPLETON, Ch. J., (p. 572), says: “Upon these facts the presiding judge instructed the jury as follows: ‘There is no controversy that if he, the defendant, had obtained peaceable possession, he had a right to remain there, the property being his at the time. But what was the nature of his possession? Did he go there for the purpose of deception, merely to call as a friend on a visit, or did he go there with the intention, after making such an entry, to forcibly expel the inmates? If that was his design, then the entry would not be recognized, in law, to give him a peaceable possession.’ As the defendant had a right to enter

htful possessor, instead of treating this as a dispossession, y at once proceed to remove him. "A mere trespasser can-, by the very act of trespass, immediately and without ac-
easence, give himself what the law understands by possession

ceably into his own house, being there to remain, and to leave the tenant wrongfully re-
maining, it does not affect the rights of the parties whether he closed or concealed his intention to remove his tenant. Nor
is material whether he entered h such intention, or formed intention after his entry, if entry was peaceable and without force. 'It is not necessary,' remarks Lord TENDERDEN, in *cher v. Butcher*, 7 B. & C. 399, 't the party who makes the entry should declare that he entered to take possession; it is sufficient if he does any act to show intention.' In the same case, LEY, J., says: 'I think that a party, having a right to the land, acquires by entry the lawful possession of it, and may maintain a trespass against any person who, being in possession at the time of entry, wrongfully continues in the land.' The defendant might instantly bring trespass against the plaintiff, wrongfully remaining in his house, or he might remove her. As the law gives him a right to enter peacefully and remove his tenants and their goods, if it could be done without a breach of the peace, the intention to do what the law authorizes cannot make an entry in such intent wrongful.

If there is any evidence to support the latter part of the instructions can apply, then the exceptions should be sustained;

for a peaceable entry cannot be metamorphosed into a forcible one, by reason of an existing and concealed intention on the part of the party entering to do, after entry what by law he was legally authorized to do.

"The court instructed the jury that the plaintiffs could not recover on the count for breaking and entering. But if he was not a trespasser for entering into his own house, whatever his purpose or intention, then, being there, he might remove doors or windows. If the plaintiffs could not maintain trespass *quare clausum* for his entry, neither could they for his acts after such entry. Meader *v. Stone*, 7 Met. 147. The right of the plaintiffs to the possession of the house had terminated by their failure to pay rent, and the notice given to them by the defendant to quit the same. In this state of facts, observes DEWEY, J., in *Mugford v. Richardson*, 6 Allen, 76, 83 Am. Dec. 617, 'the defendant had the right to enter upon the premises and take out the windows of the same. * * * Being thus in peaceable possession of a portion of the tenement, the court properly instructed the jury that if the female plaintiff undertook to prevent him from taking out the windows, he had a right to use as much force as was necessary, in order to overcome her resistance.' In *Harris v. Gillingham*, 6 N. H. 11, 23 Am. Dec. 701, the owner of the land, after

against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession.'⁹³ But instead of resorting to force, it is

requesting his tenant to leave, upon his refusal entered, tore down the chimneys, and put the building in an uninhabitable condition, for doing which the tenant brought an action of trespass *quare clausum*. 'We are of opinion,' say the court, in delivering their opinion, 'that the disturbance done to her possession, by putting the house in a situation which compelled her to leave it, did not make them trespassers *ab initio*, because she had no right to be there against the will of D. Gillingham, the owner of the land. Erwin *v.* Olmstead, 7 Cow. 229; Wilde *v.* Cantillon, 1 Johns. Cas. 123; Hyatt *v.* Wood, 4 Johns. 150, 4 Am. Dec. 258; Ives *v.* Ives, 13 Johns. 235.'

The court further cite Taunton *v.* Costar, 7 T. R. 431; Newton *v.* Harland, 1 M. & G. 644; Harvey *v.* Brydges, 14 M. & W. 437; Polllen *v.* Brewer, 7 C. B. 371; Burring *v.* Read, 11 Q. B. (N. S.), 907; Ives *v.* Ives, 13 Johns. 235; Meader *v.* Stone, 7 Met. 147; Curtis *v.* Galvin, 1 Allen, 215; Whitney *v.* Swett, 22 N. H. 10, 53 Am. Dec. 228; Moore *v.* Boyd, 24 Me. 242; Rollins *v.* Mooers, 25 Me. 192; Allen *v.* Bicknell, 36 Me. 436. The conclusion was that the acts of defendant constituted neither a trespass in respect to the realty, nor an assault upon the female plaintiff. See, further, Illinois, &c., Co. *v.* Cobb, 94 Ill. 55; Clover *v.* Maynard, 112 Ga. 340, 37 S. E. 370; Liebstadter *v.* Fedugreen, 80 Hun, 245, 29 N. Y. S. 1039.

93—Lord DENMAN, Ch. J., in Browne *v.* Dawson, 12 Ad. & El. 624, 628. See Hillary *v.* Gay, 6 C. & P. 284; Asher *v.* Whitlock. L. R. 1 Q. B. 1; Christy *v.* Scott, 14 How. 282; Ward *v.* McIntosh, 12 Ohio St. 231; Harrington *v.* Scott, 1 Mich. 17; Nichols *v.* Todd, 2 Gray, 568; Taylor *v.* Adams, 58 Mich. 187; Newton *v.* Doyle, 38 Mich. 645; Marsh *v.* Bristol, 65 Mich. 378, 32 N. W. 645; Wray *v.* Taylor, 56 Ala. 188; Ostatag *v.* Taylor, 44 Ill. App. 469; Millikin *v.* Trover, 42 Ill. App. 592; Mitchell *v.* Mitchell, 54 Minn. 301, 55 N. W. 1134; Brebach *v.* Johnson, 62 Ill. App. 121; Lyon *v.* Fairbank, 79 Wis. 455, 48 N. W. 492, 24 Am. St. Rep. 732. Plaintiff cut grass within the limits of a highway, the center line of which he claimed as his boundary. Defendants claimed to own the land covered by the highway subject to the public use. They went peaceably upon the side of the way where the grass was lying, and when plaintiff strove to prevent their removing it, forcibly resisted him and claimed that they did him no unnecessary injury. The action was for assault. The court says: "But it does not appear that plaintiff had such possession at the time of the affray as to deprive defendants of the right to resist plaintiff's attempt to prevent their carrying away the hay, if defendants owned the fee of the road. The defendants entered upon the land during the plaintiff's absence,

equally competent *for the person ejected to maintain [*383] trespass, provided he moves promptly and does not, by keeping on his rights, acquiesce in his dispossession.⁹⁴

From what has been said it appears that possession is either rightful or wrongful. Presumptively, a peaceful possession is always rightful, and the proof of it is sufficient evidence of title to enable one to recover in ejectment against one who is subsequently found in possession, and who shows no right in himself.⁹⁵ A tenant's possession, while it continues, is as complete or all purposes of redress against wrong-doers as is the possession of an owner in fee simple. An injury to real [*384] state, while the tenancy exists, may support two actions, one by the tenant, who in any event, must suffer some legal in-

peaceably and without force, and from that time they were in actual possession, and the possession of the plaintiff was determined. An entry by a stranger without right, during the temporary absence of the plaintiff, would not have divested his possession, and he would have been justified in removing the intruder by force. But his prior possession gave him no such right as against the defendants. The true owner of land wrongfully held out of possession may watch his opportunity, and if he can regain possession peaceably may maintain it, and lawfully resist an attempt by the former occupant to take possession, nor will he be able for forcible entry and dainer." The court, therefore, should have allowed defendants to give evidence as to the title of the highway. *Bliss v. Johnson*, 73 N. Y. 529.

94—*Browne v. Dawson*, 12 Ad. & Ill. 624, 628. Where a disseizee acquiesces for the time in his dispossessing, he cannot afterward bring trespass for injuries to the

freehold while he was dispossessed. *Allen v. Thayer*, 17 Mass. 299; *Rowland v. Rowland*, 8 Ohio, 40; *Wood v. Lafayette*, 68 N. Y. 181. Nor can he maintain assumpsit for the value of timber or other things severed from the freehold and sold while the disseizin continued. *Bigelow v. Jones*, 10 Pick. 161. Occasional acts, such as an owner might perform on the premises, do not constitute possession. *Swift v. Gage*, 26 Vt. 224.

95—*Kilbourn v. Rewer*, 8 Gray, 415; *Look v. Norton*, 55 Me. 103; *Black v. Grant*, 50 Me. 364; *Illinois, &c., Coal Co. v. Cobb*, 82 Ill. 183; *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703; *Van Auken v. Monroe*, 38 Mich. 725; *Bradshaw v. Emory*, 65 Ala. 208; *Hoffman v. Harrington*, 44 Mich. 183; *Duncan v. Yordy*, 27 Kan. 348; *Keith v. Tilford*, 12 Neb. 271; *New Windsor v. Stockdale*, 95 Md. 196, 52 Atl. 596, 60 L. R. A. 580. Not enough for defendant to show title in third person unless he connects himself with it. *Stratton v. Lyons*, 53 Vt. 641. But

jury, and one by the reversioner, when the injury is of a nature to affect the reversion. A trespass is an injury to the tenant, but his recovery is limited to the injury suffered by himself.⁹⁶ Thus, the destruction of buildings is an injury to both; so may be the flooding of lands, the cutting of timber, and the obstruction of a right of way under circumstances of injury to the reversion.⁹⁷ An act to the injury of the reversion is an act of waste, and whether committed by the tenant himself or by any third person, will support an action on the case by the reversioner.⁹⁸

The entry of the landlord on the rightful possession of the tenant is as much a trespass as the entry of any third person,⁹⁹ but if the tenant hold over after the expiration of his term, the landlord may rightfully make a peaceable entry,¹ and though

mere possession is not enough against one who has claim or color of title. *Dunn v. Miller*, 75 Mo. 260.

96—*Gilbert v. Kennedy*, 22 Mich. 5; *Foster v. Elliott*, 33 Iowa, 216; *Parks v. Boston*, 15 Pick. 198; *Hosking v. Phillips*, 3 Exch. 168; *Strohlburg v. Jones*, 78 Cal. 381, 20 Pac. 705. Life tenant and remainder man may join in action if interests of both are affected. *McIntire v. Westmoreland, &c., Co.*, 118 Pa. St. 108, 11 Atl. 808. Any person is to be deemed a tenant who, for the time, has lawful possession of lands subordinate to the right of another, as, for example, one occupying under a contract of purchase. *Smith v. Price*, 42 Ill. 399; *Ives v. Cress*, 5 Pa. St. 118. The owner, in leasing lands, may reserve to himself the use of a building thereon, and then have trespass *quare clausum* for an entry and the carrying away of his property from that building. *Jordan v. Staples*, 57 Me. 352. If

one is in possession of lands merely at the will of the owner, the latter is constructively in possession, and may sue trespassers.

Starr v. Jackson, 11 Mass. 519.

97—See *Dobson v. Blackmore*, 9 Q. B. 991; *Higgins v. Farnsworth*, 48 Vt. 512; *George v. Norcross*, 32 N. H. 32. The landlord cannot sue unless the reversion is injured. *Bascom v. Dempsey*, 143 Mass. 409. Putting up on poles on the demised land a boarding to obstruct a window is not such an injury. *Cooper v. Crabtree*, L. R. 19 Ch. D. 193, 20 *id.* 589.

98—*Randall v. Cleveland*, 8 Conn. 328; *Lane v. Thompson*, 43 N. H. 320. This subject, however, will be considered in another place.

99—*Luther v. Arnold*, 8 Rich. 24, 62 Am. Dec. 422; *Bryant v. Sparrow*, 62 Me. 546; *Crowell v. New Orleans, &c., Co.*, 61 Miss. 631.

1—*Taylor v. Cole*, 3 T. R. 292; *Taunton v. Costar*, 7 T. R. 431.

t has been held in some cases, with much good reason, that he is not warranted in employing force to expel the tenant,² he may, nevertheless, treat as trespassers all *other persons who may then be there without authority, or who

2—*Newton v. Harland*, 1 M. & Jr. 644; *Hillary v. Gay*, 6 C. & P. 184. *Moore v. Boyd*, 24 Me. 242; *Dustin v. Cowdry*, 23 Vt. 631; *Reeder v. Purdy*, 41 Ill. 279; *Mealer v. Stone*, 7 Met. 147. There is a dispute on this point, some courts holding that in a civil suit against the landlord who has, by force, put out a tenant at sufferance, his title is a complete protection, and that it is only when prosecuted criminally for the force that he is precluded from showing title. See *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 42; *Sterling v. Warden*, 51 N. H. 117, 239, 12 Am. Rep. 80; *Clark v. Keliher*, 107 Mass. 406; *Wood v. Phillips*, 43 N. Y. 152. In a late Illinois case it is held that "the paramount owner of a tract of land having a present right of immediate possession, may enter the same in a peaceable manner, though occupied by another," without becoming a trespasser. If sued in trespass for such entry he plea of *liberum tenementum* is good. The force meant in the forcible entry and detainer statute is "actual force." Distinguishing *Page v. De Puy*, 40 Ill. 06; *Reeder v. Purdy*, 41 Ill. 282; *Dustin v. Cowdry*, 23 Vt. 635, because in each of them there was such "actual force." *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 6 Am. Rep. 133. In a late English case the conclusion is reached by FRY, J., from the cases that the tenant wrongfully in possession cannot recover damages in a civil action for the entry, but may for independent wrongful acts done in or after the entry. Therefore he cannot recover for the eviction but may for damage to his furniture in the course of it. *Beddall v. Maitland*, L. R. 17 Ch. D. 174. See *Edwick v. Hawkes*, L. R. 18 Ch. D. 199; *Burgess v. Graffam*, 18 Fed. Rep. 251. In R. I. if he uses no more force than necessary, he is not civilly liable at all. *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364. But if the tenant has gone away and locked up the house, leaving some of his furniture in it, this will not prevent the landlord taking possession, and if need be, he may break open doors for the purpose. *Turney v. Meymott*, 1 Bing. 158; S. C. 7 Moore, 574. If a landlord may not retain possession forcibly he may not peaceably enter in absence of tenant to repossess premises held over. *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552. Mere temporary absence, where one of the family remains, is not enough. *State v. Shepard*, 82 N. C. 614. If the entry is attended with display of force and destruction of property on the land, it may be forcible. *Ely v. Yore*, 71 Cal. 130. It is not forcible detainer to hold possession of a house before vacant and only constructively in plaintiff's possession. *Johnson v. West*, 41 Ark. 535.

may afterward make entry.³ His own peaceable entry gives him seizin, and the previous relation of landlord and tenant, and the possession of the tenant under it is sufficient evidence of his title as against one who shows no right in himself.⁴

Tenants in Common. The possession of one tenant in common is in law the possession of both, and, therefore, if one makes entry, he is presumed to do so in the right of both and to hold in their right afterward.⁵ But one tenant may disseize [*386] the other, *either by a forcible expulsion or exclusion, or by an exclusive receipt of the rents and profits, accompanied by a denial of all right in his co-tenant.⁶ The ouster, however, must be by some decisive, unequivocal act or conduct, for, as the tenant in possession is rightfully there, the presumption must always be that he holds only as he rightfully may—in the interest of both—and not wrongfully to the other's exclusion.⁷ Where there is an actual ouster, the disseizee is put to his

3—*Hey v. Moorhouse*, 6 Bing. 13 B. Mon. 436. Disseizin is not to be presumed from the long continued possession of one, even though it be continued for twenty years. *Northrup v. Wright*, 24 Wend. 221; *Van Bibber v. Frazier*, 17 Md. 436. Compare *Purcell v. Wilson*, 4 Gratt. 16, and *Dubois v. Campau*, 28 Mich. 304, and numerous cases cited. The possession to constitute disseizin must be public and totally irreconcilable with that of a co-tenant. *Long v. McDow*, 87 Mo. 197. Presumption that the entry is not hostile ceases when the possession has been exclusive for nearly forty years. *Campau v. Dubois*, 39 Mich. 274.

4—*Jayne v. Price*, 5 Taunt. 326; *Dainty v. Brocklehurst*, 3 Exch. 207. As to damages in trespass see *Brinkmeyer v. Bethea*, 139 Ala. 376, 35 So. 996; *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848; *Western Book & S. Co. v. Jevne*, 78 Ill. App. 668; *Bahr v. Boley*, 85 Hun, 448, 32 N. Y. S. 881; *Litchfield v. Norwood Mfg. Co.*, 22 App. Div. 569, 48 N. Y. S. 496; *Searle v. Parks*, 68 N. H. 311, 34 Atl. 744.

5—*Roberts v. Morgan*, 30 Vt. 319; *Dubois v. Campau*, 28 Mich. 304; *Van Bibber v. Frazier*, 17 Md. 436; *McClung v. Ross*, 5 Wheat. 116; *Bishop v. Blair*, 36 Ala. 80. See *Terrell v. Martin*, 64 Tex. 121.

6—*Bracket v. Norcross*, 1 Me. 89; *Abercrombie v. Baldwin*, 15 Ala. 363; *Larman v. Huey's Heirs*,

32 Penn. St. 69; *Bennett v. Bullick* 35 Penn. St. 364; *Anders v. Anders*, 9 Ired. 214; *Newell v. Woodruff*, 30 Conn. 492; *Colburn v. Mason*, 25 Me. 434, 43 Am. Dec. 292; *Hannon v. Hannah*, 9 Grat. 146. Giving a deed of

ejectment, and his right may be barred by a continuous adverse possession of his co-tenant for the period prescribed by the statute of limitations.⁸ When the ousted tenant recovers, he may then maintain trespass for the mesne profits.⁹ For a distinct injury by one co-tenant to the joint estate, during [*387] the joint possession, the other may have the appropriate remedy against him, as where by negligence he burns down a house, or by means of a dam on his several estate floods the common property.¹⁰ But in the use of the premises he has large

the whole does not alone make out an ouster. *Roberts v. Morgan*, 30 Vt. 319; *Wilson v. Collishaw*, 13 Pa. St. 276. It does, if followed by possession of the grantee. *Kinney v. Slattery*, 51 Ia. 353. Giving by a co-tenant a quitclaim of his interest and a warranty deed of a part of the tract, does not. *Hume v. Long*, 53 Ia. 299.

8—*Russell's Heirs v. Mark's Heirs*, 3 Met. (Ky.) 37; *Gill v. Fauntleroy's Heirs*, 8 B. Mon. 177, 186; *Dubois v. Campau*, 28 Mich. 304; *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. 236. See, further, as to ejectment. *Elliott v. Frakes*, 71 Ind. 412; *Frakes v. Elliott*, 102 Ind. 47; *Norris v. Sullivan*, 47 Conn. 474. For ouster in case of a partition wall, see *Stedman v. Smith*, 8 El. & Bl. 1. Tenants in common by agreement may apportion the land between them, and in that case each has the land he occupies and may sue the other in trespass for a disturbance of his possession. *Keay v. Goodwin*, 16 Mass. 1.

9—*Goodtitle v. Tombs*, 3 Wils. 118; *Allen v. Carter*, 8 Pick. 175; *Critchfield v. Humbert*, 39 Pa. St. 427, 80 Am. Dec. 533; *Tongue v. Nutwell*, 31 Md. 302. It was held in *McGill v. Ash*, 7 Pa. St. 397, and *Erwin v. Olmsted*, 7 Cow. 229,

that the ousted tenant in common might at once maintain trespass against his co-tenant, but the first case is overruled by *Bennett v. Bullock*, 35 Pa. St. 364. And, see, *Jones v. Chiles*, 8 Dana, 163. If that which is the subject of the tenancy is actually destroyed by one co-tenant, no doubt the other may sue in trespass. *Wilkinson v. Haygarth*, 12 Q. B. 845; *Maddox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604; *Dubois v. Beaver*, 25 N. Y. 128, 82 Am. Dec. 326.

10—*Chesley v. Thompson*, 3 N. H. 9, 14 Am. Dec. 324; *Blanchard v. Boher*, 8 Me. 253, 23 Am. Dec. 504; *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Jones v. Weatherbee*, 4 Strob. 50, 51 Am. Dec. 653. See *Hutchinson v. Chase*, 39 Me. 508, 63 Am. Dec. 645; *Guyther v. Pettijohn*, 6 Ired. 388, 45 Am. Dec. 499; *McClellan v. Jenness*, 43 Vt. 183. If one co-tenant erects a structure, which excludes another from the possession of a part of the common property, without the latter's assent, the latter may take it down, doing no needless damage, without being liable in trespass. *Byam v. Bickford*, 140 Mass. 31. Where the owners of one-half a saw mill carried off and kept certain parts of the mill, so that it could not be

liberty of judgment and is only responsible for a clear abuse.¹¹

Injuries to the possession of tenants in common are injuries to all, and, therefore, all should join in suits for trespasses, nuisances, etc.¹²

Trespasses in Hunting. The very general acquiescence of owners of lands in the pursuit by others of wild beasts and game upon them establishes no law, and is to be looked upon rather as a waiver of a right to complain of a trespass than as a license to make use of their lands for this purpose. And whenever one goes upon the premises of another with dogs, and the dogs worry the domestic animals of the land owner, or do him other damage, the trespasser is responsible without evidence of his knowledge of vicious propensities in his dogs, for it is his own trespass, and the mischief done by the dogs is only matter of aggravation.¹³ A state license to hunt and fish confers no right to commit a trespass.¹⁴

operated, they were held liable in damages to the owner of the other half interest. *Ball v. Levin*, 48 La. Ann. 359, 19 So. 118.

11—Where one of the two joint owners of timber land cut and sold timber in the usual way, it was held he was not liable to the other owner in tort, but only in contract for the value of his share at the stump. *Patureau v. Wilbert*, 44 La. Ann. 355, 10 So. 782.

12—*Phillips v. Sherman*, 61 Me. 548; *Parke v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310; *Merrill v. Berkshire*, 11 Pick. 269; *Austin v. Hall*, 13 Johns. 286. In Vermont, it seems one may recover in trespass for all. *Hibbard v. Foster*, 24 Vt. 542; *Bigelow v. Rising*, 42 Vt. 678. See *Allen v. Gibson*, 4 Rand. 468; *Wooley v. Campbell*, 37 N. J. 163. In *Lowery v. Rowland*, 104 Ala. 420, 16 So. 88, it is held that part may sue and recover their proportionate part of the damage.

13—*Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 89 N. E. 880, 91 Am. St. Rep. 898; *Beckwith v. Shordike*, 4 Burr. 2092; *Van Leuven v. Lyke*, 1 N. Y. 515, 49 Am. Dec. 346. One has no legal right, when he starts game, to follow it upon another man's land. *Deane v. Clayton*, 7 Taunt. 489. Fox hunting with dogs and horses is a trespass. *Paul v. Summerhayes*, L. R. 4 Q. B. D. 9. When parties go together hunting, and commit a trespass in so doing, each is responsible for the whole damage. *Hume v. Oldacre*, 1 Stark. 351. Under a statute unauthorized shooting on land where a certain notice was posted was a misdemeanor. A man's boundary was the center of a navigable river. He had the notice posted on his land. Defendant shot from a boat on the river flying birds while they were over that part of the river whose bed belonged to the man. Defendant, while not a

***Trespasses in Fishing.** The right to take fish in the [*388] fresh-water streams of the country belongs to the owners of the soil under them, to the exclusion of the public.¹⁵ As, however, the exercise of the right by one riparian proprietor might unduly encroach upon the rights of others, the case is one that properly calls for regulating legislation; and the authority to regulate has been very freely exercised, not only by forbidding the employment of seines and other means of taking fish otherwise than singly in certain waters, but also by prohibiting their being taken at all at certain seasons, and requiring a free passage to be kept open for the passage of fish in all streams in

trespasser, because the river was a highway, was held guilty under the act. *State v. Shannon*, 36 Ohio St. 423, 38 Am. Rep. 599. One who owns the fee of soil covered by navigable fresh water, over which the public has the right to pass, has the exclusive right to shoot wild fowl over the water. Shooting is not a public right appurtenant to the right to navigate. *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845. Am. St. Rep. 692; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178; *Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898. But, see *Burroughs v. Whitwam*, 59 Mich. 279. The right is, of course, not inseparable from ownership, but may be acquired distinct therefrom by a grant of the owner, or by prescription. *Cobb v. Davenport*, 32 N. J. 369; 34 N. J. 223. But

14—*Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898.

15—*Browne v. Kennedy*, 5 H. & J. 195; *Waters v. Lilly*, 4 Pick. 145, 16 Am. Dec. 333; *Cottrill v. Myrick*, 12 Me. 222; *Adams v. Pease*, 2 Conn. 481; *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382; *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249; *Trustee, &c., v. Strong*, 60 N. Y. 56; *Ingram v. Threadgill*, 3 Dev. 59; *Williams v. Buchanan*, 1 Ired. 535, 35 Am. Dec. 760; *Beckman v. Kreamer*, 43 Ill. 447; *Cobb v. Davenport*, 32 N. J. 369; same *v. Same*, 33 N. J. 223, 97 Am. Dec. 718; *Beach v. Morgan*, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692. A custom to fish on the lands of others is not recognized by the law and cannot be shown, and the fact that the stream has

which rights of fishery are important.¹⁶ In some States the power of regulation is conferred, either generally or in [*389] particular instances, *upon the county or township authorities,¹⁷ and in Massachusetts and Maine the towns have been allowed to exercise this power for the common benefit of the people of the towns in their aggregate capacity, and to sell or lease rights of fishery in waters where, at the common law, the rights of the owners of the banks would have been exclusive.¹⁸ Such regulations must, of course, take notice of and respect all other rights of the riparian owner, including his right to the exclusive possession of his land not covered with water; and if he has a milldam he cannot, under pretence of regulation, be compelled to remove it without compensation made therefor;¹⁹ though unquestionably, as regards any future constructions, it would be competent to require that they be made, leaving free passage for fish, according to established regulations.

been stocked by the fish commissioner confers no right to fish on the land of others. *Ibid.*

16—*Randolph v. Braintree*, 4 Mass. 315; *Burnham v. Webster*, 5 Mass. 266; *Nickerson v. Brackett*, 10 Mass. 212; *Commonwealth v. Chapin*, 5 Pick. 199; *Vinton v. Welsh*, 9 Pick. 87; *Commonwealth v. Tiffany*, 119 Mass. 300; *Lunt v. Holland*, 14 Mass. 149; *Peables v. Hannaford*, 18 Me. 106; *State v. Skolfield*, 63 Me. 266; *Budd v. Sip*, 13 N. J. 348; *Haney v. Compton*, 36 N. J. 507; *Hart v. Hill*, 1 Whart. 124; *People v. Reed*, 47 Barb. 285; *State v. Hockett*, 29 Ind. 302; *State v. Boone*, 30 Ind. 225; *Stuttsman v. State*, 57 Ind. 119; *Drew v. Hilliker*, 56 Vt. 641; *Doughty v. Conover*, 42 N. J. L. 193; *Weller v. Snover*, 42 N. J. L. 341; *Maney v. State*, 6 Lea, 218. State may forbid non-residents catching fish in navigable waters

for making oil and the making of oil from fish so caught. *Chambers v. Church*, 14 R. I. 398, 51 Am. Rep. 410.

17—See *Vinton v. Welsh*, 9 Pick. 87; *Cottrill v. Myrick*, 12 Me. 222.

18—*Nickerson v. Brackett*, 10 Mass. 212; *Randolph v. Braintree*, 4 Mass. 815; *Cottrill v. Myrick*, 12 Me. 222; *Peables v. Hannaford*, 18 Me. 106. Since the first settlement of Massachusetts the riparian owners upon non-navigable streams have held their rights of fishing subject to legislative control and the paramount claims of the public are implied in all grants abutting on such streams. *Cole v. Eastham*, 133 Mass. 65. See *Cottrill v. Myrick*, 12 Me. 222.

19—*State v. Glen*, 7 Jones, (N. C.) 321, nor to put in chute after use of more than twenty years. *Woolever v. Stewart*, 36 Ohio St. 146, 38 Am. Rep. 569. In the New

The rule regarding fresh-water streams applies to the small lakes or ponds of the country.²⁰ That it applies to the larger lakes is more than doubtful. In one well-considered case it has been declared that the right of fishery in Lake Winnipiseogee is public and general right, and that incident to this was the right to protect the passage of the fish up and down the rivers which form its outlets to the sea. "If it be admitted," says the court, that the right of fishing in the Winnipiseogee River belongs exclusively to the riparian proprietors, and that the wrong done to one of these riparian proprietors by the act of another in obstructing the passage of fish, is not of the nature which the law will redress by a criminal prosecution, it does not follow that the obstructions now complained of are not criminal.

The riparian proprietors are not the only persons interested. The right of fishing in the lake is not limited to the proprietors of the shores, but is common to all citizens of the state, just as much as the fishery in the tide-waters of the Piscataqua.²¹ It was, therefore, held that the maintenance of a dam without fishways was a common-law nuisance, punishable by injunction. This doctrine seems to be reasonable, but there may be some practical difficulties in determining what bodies of water do and what do not come within it.²²

In tide-waters the right to take fish belongs to the public, and presumptively is common to all.²³ In Massachusetts the towns

England States the right of eminent domain is employed for the improvement of fisheries. See *Cristol v. Water Co.*, 42 Conn., 403; *ole v. Eastham*, 133 Mass. 65. 20—*Cobb v. Davenport*, 32 N. J. 9; S. C. 33 N. J. 223, 97 Am. Dec. 8. This case examines the general subject very fully and carefully. See *State v. Roberts*, 59 N. 484; *Reynolds v. Com.*, 93 Penn. 458.

21—SMITH, J., in *State v. Frank-1 Falls Co.*, 49 N. H. 240, 6 Am. 513. State may regulate fishing in a small pond on land wholly

owned by one man if it connects with other waters and is a breeding place for fish. *State v. Roberts*, 59 N. H. 484; see, *State v. Blount*, 85 Mo. 543. The right to fish in a bay of Lake Erie is in the public. *Sloan v. Biemiller*, 34 Ohio St. 492; see, *Lincoln v. Davis*, 53 Mich. 375.

22—See *West Roxbury v. Stoddard*, 7 Allen, 158.

23—*Crosby v. Wadsworth*, 6 East. 603; *Bagott v. Orr*, 2 B. & P. 472; *Martin v. Waddell*, 16 Pet. 367; *Lay v. King*, 5 Day, 72; *Parker v. Cutler Mill Dam Co.*, 20 Me.

have been allowed to appropriate the right to take fish within their limits;²⁴ and private grants may be made by the State itself to individuals, and individuals may also obtain exclusive rights by prescription.²⁵ The right of individuals to plant oyster-beds, and to be protected in the enjoyment of them, has been very generally recognized.²⁶

[*391] But the right of fishery in tide-

waters is always subordinate to the public right of regulation and improvement for the benefit of navigation, and therefore a structure in front of one's premises bordering on tide-water, erected by State authority for the benefit of navigation, violates no right of the owner of the shore so long as his access to the water for the purposes of a highway is not ob-

353, 37 Am. Dec. 56; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Preble v. Brown*, 47 Me. 284; *Cooledge v. Williams*, 4 Mass. 140; *Weston v. Sampson*, 8 Cush. 347, 45 Am. Dec. 764; *Trustees, &c., v. Strong*, 60 N. Y. 56; *Proctor v. Wells*, 103 Mass. 216. *Brown v. DeGroff*, 14 Atl. Rep. 219 (N. J.). So in tidal-river. *Pearce v. Scotcher*, L. R. 9 Q. B. D. 162. Or creek wholly within a man's farm. *Parsons v. Clark*, 76 Me. 476. But the tide must ebb or flow at the spot ordinarily, not occasionally, in times of high tides below. *Reece v. Miller*, L. R. 8 Q. B. D. 626. Where upland owner has qualified ownership of the flats, the public may dig shell fish there or fish with the line. *Weston v. Sampson*, 8 Cush. 347; *Packard v. Ryder*, 144 Mass. 440, 51 Am. Rep. 101; *Matthews v. Treat*, 75 Me. 594.

24—*Cooledge v. Williams*, 4 Mass. 140.

25—*Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Gould v. James*, 6 Cow. 369; *State v. Sutton*, 2 R. I. 434; *State v. Medbury*,

3 R. I. 138; *Paul v. Hazleton*, 37 N. J. 106; *Bennett v. Boggs*, Baldw. 60. See *Eastham v. Anderson*, 119 Mass. 526; *Trustees, &c., v. Strong*, 60 N. Y. 56; *Neill v. Duke of Devonshire*, L. R. 8 App. Cas. 158; *Malcolmson v. O'Dea*, 10 H. L. C. 593.

26—*Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592; *Lowndes v. Dickerson*, 34 Barb. 586; *Hand v. Newton*, 92 N. Y. 88; *McCarty v. Holman*, 22 Hun, 53; *Post v. Kreischer*, 32 Hun, 49; *Power v. Tazewellis*, 25 Gratt. 786; *State v. Taylor*, 27 N. J. 117; *Haney v. Compton*, 36 N. J. 507; *Metzger v. Post*, 44 N. J. L. 74, 43 Am. Rep. 341; *Birdsall v. Rose*, 46 N. J. L. 361; Compare *Brinkerhoff v. Starkins*, 11 Barb. 248. There are statutes in some States for the protection of fishing rights acquired by improvement. See above cases. Also, *Commonwealth v. Weatherhead*, 110 Mass. 175. One may not take oysters planted by another and staked out in public water, although such planting is a public nuisance. *Grace v. Willets*, 50 N. J. L. 414, 14 Atl. 559?

structed.²⁷ Indeed, in all waters navigable in fact, the right of navigation is the paramount right,²⁸ but those engaged in navigation must respect rights of fishery, and they will be liable for any negligent injuries which their vessels may cause to seines, oyster-beds, etc.²⁹ In North Carolina, if fresh-water streams are navigable in fact, the right to take fish therein is held to be in the public and not in the owners of the banks.³⁰ Whether the taking of fish in private waters, where the public have been accustomed to take them, should be regarded as a trespass is not clear. As the mere entry upon the water can cause no damage, there is not the same reason for treating it as a trespass which exists in the case of an entry upon lands, and if the owner himself does not make use of the fishery for purposes of profit, and is cognizant of the acts of others within it, it would seem that a license to enter might well be implied until in some manner the objection of the owner is manifested.³¹

Trespass by Means of Inanimate Objects. It is a trespass to cast inanimate objects upon the land of another, or to throw water upon it, or to cut trees so that they fall upon it, and this whether the result was intended or not. It has accordingly been *held that, if where one is blasting rock, [*392] the fragments are thrown upon the land of another, this is an actionable trespass, and it is no defense that the party was guilty of no negligence.³² So, if one, in cutting down trees,

27—*Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21, 100 Am. Dec. 597; *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116.

28—*Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

29—*Marshall v. Steam Nav. Co.*, 3 B. & S. 732; *Cobb v. Bennett*, 75 Penn. St. 326, 15 Am. Rep. 752.

30—*Wilson v. Forbes*, 2 Dev. 30; *Collins v. Benbury*, 3 Ired. 277, 38 Am. Dec. 722; *S. C. 5 Ired.* 118; *State v. Glen*, 7 Jones, (N. C.) 321. So in Wisconsin. *Willow River Club v. Ward*, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305.

31—See *Marsh v. Colby*, 39 Mich. 626, 33 Am. Rep. 439.

32—*Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284; *St. Peter v. Denison*, 58 N. Y. 416; *Georgetown, &c., R. R. Co. v. Eagles*, 9 Colo. 544, 13 Pac. 696. See *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163, 45 Am. Rep. 30. So, if in improving his own premises, one casts material upon another's he is liable, notwithstanding he has a license from municipal authorities. *Mairs v. Manh. Real Est. Assn.*, 89 N. Y. 498. The inundation of premises by a defective sewer is a trespass. *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664. So is throwing

causes one to fall, though without meaning to do so, on the land of his neighbor.³³ But if a deposit of stones or other material on one man's land is carried by a violent storm upon the land of another, this is no trespass, and is to be regarded as an accident merely.³⁴

Waste. Waste is an injury done or suffered by the owner of the present estate which tends to destroy or lessen the value of the inheritance. This is an injury to any person having an interest in the reversion, and it may be an injury to any person having a lien on the land. Waste differs from trespass in its being committed or suffered by the person actually or constructively in possession of the land, while trespass is an injury to the possession itself.³⁵

Waste is either voluntary or permissive. The first consists of some positively wrongful act which injures the inheritance; the other consists in the neglect of some duty from which a like injury follows. There is no absolute rule as to what shall constitute waste under all circumstances, because many things are injurious at some times and in some places which might be positively beneficial in others. A striking illustration is afforded in the case of the cutting of timber. The tenant of lands, whether for life or for any lesser estate, is entitled to take wood for ordinary uses thereon; for fuel, and for the repairs of buildings, fences and agricultural implements;³⁶ and in Eng-
[*393] land, *and some parts of this country, he would be limited strictly to what was reasonable for these purposes,

snow upon another's premises. Barry *v.* Peterson, 48 Mich. 263. Defendants in blasting for the new York subway broke a water pipe and flooded the plaintiff's premises. Held a trespass. Wheeler *v.* Norton, 92 App. Div. 368, 86 N. Y. S. 1095. So is discharging roof water by spouts on to plaintiff. Conner *v.* Woodfill, 126 Ind. 85, 25 N. E. 876, 22 Am. St. Rep. 568.
33—Newsom *v.* Anderson, 2 Ired. 42.

34—Snook *v.* Brantford, 14 Up. Can. Q. B. 255. See Ingalls *v.* Hart Hardware Co., 93 Ky. 442, 20 S. W. 387.

35—One who, not being a tenant in possession, has a right to take ore from land is not guilty of waste, if he takes more than he ought. Grubb's App. 90 Penn. St. 228.

36—Bl. Com. 35; 1 Washb. Real Prop. 4th ed. 128.

and would be liable for waste if he exceeded what was reasonable.³⁷ So he could only cut for use on the premises, and would not be at liberty even to exchange that which was growing upon the estate, but was unfit for his purposes, for suitable wood procured elsewhere.³⁸ But any such strictness would be manifestly unsuited to the condition of things in other parts of this country, because it could be of no service to the inheritance. In the newer States, where timber is abundant, it might, indeed, be beneficial to the inheritance, rather than wasteful, to permit the timber to be removed; and therefore what is waste elsewhere might, in these sections of the country, be permissible. It has been held in Ohio that a widow endowed of wild lands might not only take the common law estovers, but she might also cut wood upon the premises and sell the same to pay the taxes upon the estate and the expenses of overseeing the property and protecting it against trespasses and other injury.³⁹ But she may, no doubt, go further than this, where her assignment of dower is wholly or mainly of wild lands, and clear off a reasonable proportion of them for the purposes of cultivation.⁴⁰ That would be a reasonable use of the land, and not waste. So it might be a reason-

37—*Webster v. Webster*, 33 N. H. 18; *Lester v. Young*, 14 R. I. 579. See *Sarles v. Sarles*, 3 Sandf. Ch. 601. So to cut timber merely for sale. *Dorsey v. Moore*, 100 N. C. 41, 6 S. E. 270. So as to cutting valuable forest trees, where there is little woodland on a farm. *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572. See, *Silva v. Garcia*, 65 Cal. 591.

38—*White v. Cutler*, 17 Pick. 248; *Livingston v. Reynolds*, 2 Hill, 157; *Elliott v. Smith*, 2 N. H. 430; *Richardson v. York*, 14 Me. 221; *Phillips v. Allen*, 7 Allen, 115.

39—*Crockett v. Crockett*, 2 Ohio St. 180.

40—*Parkins v. Coxe*, 2 Hayw. 339; *Owen v. Hyde*, 6 Yerg. 334, 27 Am. Dec. 467; *Hastings v. Crunck-*

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eton, 3 Yeates, 261; *Allen v. Mc-Coy*, 8 Ohio, 418; *Shine v. Wilcox*, 1 Dev. & Bat. Eq. 631. For the Massachusetts rule see *Conner v. Shepherd*, 15 Mass. 164; *White v. Cutler*, 17 Pick. 248. It is not waste if the cutting does not damage or diminish the value of the inheritance and is conformable to the rules of good husbandry, even though the timber so cut is sold or used off the premises. *Wilkinson v. Wilkinson*, 59 Wis. 557. Moving cabins and cutting timber is not waste. But allowing fixtures—gin machinery—to be detached and sold, and the gin-house to be dismantled, and woodland to be sold for taxes payable by the tenant are severally, acts of waste. *Cannon v. Barry*, 59 Miss. 289.

able use of the premises to cut and sell hoop poles from [*394] them, if *that had been the customary use before the tenant's estate began.⁴¹

For the tenant to do upon leasehold premises that for which the premises are leased can never be waste, provided it is done in a proper manner. But, except where they are leased for a special purpose, and always when the estate comes into existence by operation of law, as in case of dower, the question of waste must be governed largely by the previous use. This is particularly true as regards buildings. It would be waste to turn a dwelling into a shop or a stable; or, on the other hand, to make over a shop or a stable into a dwelling; the right of the tenant is to use the buildings as they are, and not to force upon the reversioner something new or different in the place of them.⁴² Slight changes may lawfully be made, provided they do not injure the inheritance, but preserve the estate substantially the same.⁴³ So with respect to the land itself; it would be waste to cut up farming lands with excavations in search for minerals or to sell gravel or clay; though if such had been the previous use of the premises it would be different.⁴⁴ In England, any es-

41—*Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621. Oreg. 3, 57 Am. Rep. 1. To build a chimney without the landlord's consent is waste. *Brock v. Dole*, 66 Wis. 142.

42—*Huntley v. Russell*, 13 Q. B. 572.

43—See *Winship v. Pitts*, 3 Paige, 259. The general principle governing waste is, that the tenant shall not be permitted to do any act of permanent injury to the inheritance, except to take his reasonable estovers. *Webster v. Webster*, 33 N. H. 18, citing *Chase v. Haseltine*, 7 N. H. 171; *Pynchon v. Stearns*, 11 Met. 304. But decayed and worthless buildings may be taken down. *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621; *Beers v. St. John*, 16 Conn. 322. The right to alter a building does not include the right to tear down though a better one is erected. *Davenport v. Magoon*, 13

44—Tenant for life of salt works may open new wells. *Findlay v. Smith*, 6 Munf. 134, 8 Am. Dec. 733, relying upon *Clavering v. Clavering*, 2 P. Wms. 388. If coal has been mined for domestic use, the life tenant may not mine for sale. *Franklin Coal Co. v. McLellan*, 49 Md. 549, 33 Am. Rep. 280. So, if mining has been abandoned for forty years by the owner a life tenant may not mine. *Gaines v. Green Pond, &c., Co.*, 32 N. J. Eq. 86. A tenant without impeachment of waste may not commit malicious waste to the injury of the remainder man. *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205.

sential change in the methods of cultivating farm lands might, perhaps, be waste; as by changing arable land into meadow, and the like; but this can now scarcely be a general rule in that country, and is not recognized in this.⁴⁵

*To sell manure made on the premises to be removed [*395] from it is waste in the case of agricultural lands, because it is implied in leasing such lands that the manure made is to be used thereon.⁴⁶

Permissive waste consists in suffering that to take place to the injury of the inheritance, which ordinary care would prevent. In respect to buildings, a tenant, unless he has covenanted to make repairs, is under no obligation to do more than to exercise reasonable diligence for their preservation; but a duty to that extent is incident to the relation. A like duty arises to protect the remainder of the estate against negligent waste and decay, and this extends to protection against the acts of trespassers.⁴⁷ A tenant is liable for waste if a building is injured or destroyed by his negligence; but not for accidental fires occurring without his fault, unless upon covenants.⁴⁸ Where a tenant overloaded a barn, by reason of which it collapsed, he was held liable for voluntary waste.⁴⁹

While for waste actually committed, an action on the case for the recovery of damages is the common remedy, a more effectual protection for the interest of the reversioner is the preventive remedy by injunction, when the waste is merely begun or threatened. Where one has only a lien on the premises, he is entitled to the like preventive remedy, but it is not so clear what remedy he would have by action. In New York it has been decided that

45—See Washb. Real Prop. 4th ed. 145.

46—*Perry v. Carr*, 44 N. H. 118; *Hill v. De Rochemont*, 48 N. H. 87; *Lassell v. Reed*, 6 Me. 222; *Lewis v. Jones*, 17 Penn. St. 262; *Daniels v. Pond*, 21 Pick. 367, 32 Am. Dec. 269.

47—*Attersoll v. Stevens*, 1 Taunt. 183; *Cook v. Champlain, &c., Co.*, 1 Denio, 91.

48—4 Kent, 81, and note.

49—*Chalmers v. Smith*, 152 Mass.

561, 26 N. E. 95, 11 L. R. A. 769. A tenant is not liable for waste unless he is guilty of some fault or negligence, and therefore is not liable for what is done under the exercise of the police or eminent domain powers. *Beekman v. Van Dolsen*, 63 Hun, 487, 18 N. Y. S. 376.

if the mortgagor, or one in privity with him, commits voluntary waste upon the mortgaged premises, and the premises, in consequence, prove insufficient for the satisfaction of the mortgage debt, he may recover the damage done him by the waste, of the party committing it, provided the mortgagor is insolvent, or not personally liable for the debt.⁵⁰ In Massachusetts the court goes further, and holds that the damage is not to be measured by proof of insufficiency of the remaining security. "The mortgagee," it is said, "is not obliged to accept what remains as satisfaction *pro tanto* of his debt, at any valuation whatever."

He is entitled to the full benefit of the mortgaged [*396] *estate, for the full payment of his entire debt.⁵¹ But

in Massachusetts, as well as in other New England States, the mortgage vests the legal estate in the mortgagee, who, after condition broken, may maintain trespass against the mortgagor for acts of waste, though the latter still retains possession;⁵² a state of the law quite different from the law of New York, where the mortgagee has a mere lien on the land, and is not even entitled to possession until foreclosure completed. In Rhode Island a mortgagee is held entitled to wood and timber cut upon the mortgaged premises in waste of the same, and in substantial diminution of his security, though he could not sue in trespass for the cutting;⁵³ and in New Jersey, the fact that the waste renders the security insufficient seems to be regarded as the ground for giving the mortgagee a remedy by injunction.⁵⁴ And in

50—*Shepard v. Little*, 14 Johns. 210; *Van Pelt v. McGraw*, 4 N. Y. 110; *Yates v. Joyce*, 11 Johns. 136.

51—*Byrom v. Chapin*, 113 Mass. 308, citing *Woodruff v. Halsey*, 8 Pick. 333; *Page v. Robinson*, 10 Cush. 99. And see *Gooding v. Shea*, 103 Mass. 360.

52—*Page v. Robinson*, 10 Cush. 99, citing *Stowell v. Pike*, 2 Me. 387; *Smith v. Goodwin*, 2 Me. 173; *Pettengill v. Evans*, 5 N. H. 54; *Sanders v. Reed*, 12 N. H. 558, and other cases. And see *Gore v. Jeness*, 19 Me. 53; *Frothingham v.*

McKusick, 24 Me. 403; *Leavitt v. Eastman*, 77 Me. 117; *Harris v. Haynes*, 34 Vt. 220; *Bellows v. Boston, &c.*, R. R., 59 N. H. 491.

53—*Waterman v. Matteson*, 4 R. I. 539.

54—*Coggshall v. Millburn Land Co.*, 25 N. J. Eq. 87. In Minnesota the owner of a mortgage, before foreclosure, is not entitled to timber cut from the mortgaged premises. *Adams v. Corriston*, 7 Minn. 456. See *Cooper v. Davis*, 15 Conn. 556; *Wilson v. Malthby*, 59 N. Y. 126.

Pennsylvania the mortgagee, if he recovers for waste committed before foreclosure, must account upon his debt for the amount received.⁵⁵ But probably in any of the States, if there has been an actual sale in foreclosure of the mortgage, with right of redemption afterward, the purchaser, when his estate is perfected, may recover for any waste committed intermediate the sale and the period when the right to redeem expired; for his right, when perfected, relates back to the time of the sale,⁵⁶ and a purchaser at execution sale would have a like right.⁵⁷

55—*Guthrie v. Kahle*, 46 Penn. (Mich.) 184. Under Michigan statutes not necessarily waste for debtor to take away ore after sale St. 331.

56—*Phoenix v. Clark*, 6 N. J. Eq. 447. Waste by mortgagor in possession after foreclosure decree. *Malone v. Marriott*, 64 Ala. 486. Ward v. Carp River Iron Co., 47 Mich. 65.

57—*Stout v. Keyes*, 2 Doug.

INJURIES BY ANIMALS.

The common law made it the duty of every man to keep his cattle within the limits of his own possessions. If he failed so to keep them, he failed in duty, and when they strayed upon the land of another, the owner was chargeable with a trespass. Nor did his liability for the mischief done by them depend in any degree upon his personal fault, since, if the cattle escaped from his custody, notwithstanding due care on his part, his responsibility for the injury actually committed by them was the same that it would have been had he voluntarily permitted them to roam at large. Nor did the common law impose upon the owner of lands the obligation to enclose them as a protection against the beasts of others; but he might, at his option, leave them entirely unenclosed, and it was then as unlawful for the beasts of a neighbor to cross the invisible boundary line as it would be to overleap or throw down the most substantial wall.¹ This rule became a part of the common law in most of the American States, and it still remains a part of it, except as legislation has modified or abolished it.² And it is upon this ground that railway companies have in some cases been held not bound to fence

[*398] their road for the protection of beasts that might otherwise stray upon their tracks, and be killed or injured;

1—*Wells v. Howell*, 19 Johns. Me. 356; *Lord v. Wormwood*, 29 385; *Stafford v. Ingersoll*, 3 Hill, Me. 282. *New Hampshire*: Avery 38; *Ellis v. Loftus Iron Co.*, L. R. v. Maxwell, 4 N. H. 36. *Massachusetts*: *Rust v. Low*, 6 Mass. 10 C. P. 10; S. C. 11 Moak, 214; French v. Creswell, 13 Ore. 418. It has been held that the owner 90; *Thayer v. Arnold*, 4 Met. 589; of beasts is liable for their trespasses, even though a stranger Lyons v. Merrick, 105 Mass. 71; turned them into the road, from Boston, &c., R. R. Co. v. Briggs, whence they strayed. *Noyes v. Colby*, 30 N. H. 143. 132 Mass. 24. *New York*: *Wells v. Howell*, 19 Johns. 385; *Holland v. Marsh*, 3 Wend. 142, 20 Am. Dec. 678; *Phillips v. Covell*, 2—*Maine*: *Little v. Lathrop*, 5 79 Hun, 210, 29 N. Y. S. 613. *New*

they being proprietors of their tracks, and having the same right to protection against trespasses as any other land owners. There have, nevertheless, been intimations in some of the newer States that the common law on this subject was never suited to their condition and circumstances, and was consequently never adopted;³ but it can scarcely be said that the point was ever distinctly ruled.⁴ It has been repeatedly said, however, in particular States, that the common law on this subject was inconsistent with their legislation, and therefore not in force.⁵ And in those States the owner of land is left to protect his lands against in-

- Jersey:* Angus *v.* Radin, 5 N. J. 815; Coxe *v.* Robbins, 9 N. J. 384. *Pennsylvania:* N. Y. & Erie R. R. Co. *v.* Skinner, 19 Pa. St. 298; Dolph *v.* Ferris, 7 Watts & S. 367, 42 Am. Dec. 246; Gregg *v.* Gregg, 55 Penn. St. 227. *Maryland:* Richardson *v.* Milburn, 11 Md. 340. *Indiana:* Brady *v.* Ball, 14 Ind. 317; Kelenberg *v.* Russell, 125 Ind. 531, 25 N. E. 596. See Stone *v.* Kopka, 100 Ind. 458. *Michigan:* Williams *v.* Mich. Cent. R. R. Co., 2 Mich., 259, 55 Am. Dec. 59. *Wisconsin:* Stone *v.* Donaldson, 1 Pinney, 393; Harrison *v.* Brown, 5 Wis. 27. *Minnesota:* Locke *v.* First Div. &c., R. 15 Minn. 350. *Kansas:* Union P. R. R. Co. *v.* Rollins, 5 Kan. 167. But see Martin *v.* Priddy, 39 Kan. 462, 18 Pac. 514. *Delaware:* Vandegrift *v.* Delaware, &c., R. R. Co., 2 Houst. 87. *Vermont:* Hurd *v.* Rutland, &c., R. R. Co., 25 Vt. 116. *Illinois:* Bulfit *v.* Matthews, 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55; Bulfit *v.* Matthews, 42 Ill. App. 561; McNeer *v.* Boone, 52 Ill. App. 181; Selover *v.* Osgood, 52 Ill. App. 260; McPherson *v.* James, 69 Ill. App. 337. *Iowa:* De Mers *v.* Rohan, 126 Ia. 488, 102 N. W. 413. *Montana:* See Bernhorn *v.* Griswold, 27 Mont. 79, 69 Pac. 557, 59 L. R. A. 771, 94 Am. St. Rep. 818. *Nebraska:* Lorance *v.* Hillyer, 57 Neb. 266, 77 N. W. 755. *North Dakota:* Bostwick *v.* Minneapolis, etc., Ry. Co., 2 N. D. 440, 51 N. W. 781; Ely *v.* Rosholt, 11 N. D. 559, 93 N. W. 864. *Ohio:* Morgan *v.* Hudnell, 52 Ohio St. 552, 40 N. E. 716, 27 L. R. A. 862; Northcott *v.* Smith, 4 Ohio, C. C. 565. *Oregon:* Eilen *v.* Paisley, 18 Ore. 47, 21 Pac. 934, 4 L. R. A. 840; Pacific Live Stock Co. *v.* Murray, 45 Ore. 103, 76 Pac. 1079.
- 3—See Seeley *v.* Peters, 10 Ill. 130; Michigan, &c., R. R. Co. *v.* Fisher, 27 Ind. 96; Vicksburg, &c., R. R. Co. *v.* Patton, 31 Miss. 156; Walker *v.* Herron, 22 Tex. 55.
- 4—But it appears to have been ruled in the following cases: Merritt *v.* Hill, 104 Cal. 184, 37 Pac. 893; Johnson *v.* Oregon Short Line Ry. Co., 7 Idaho, 355, 63 Pac. 112, 53 L. R. A. 744; Pace *v.* Potter, 85 Tex. 473, 22 S. W. 300; Cosgriff *v.* Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977; Martin *v.* Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571.
- 5—Seeley *v.* Peters, 10 Ill. 130; Stoner *v.* Shugart, 45 Ill. 76; Waters *v.* Moss, 12 Cal. 535, 73 Am.

juries by domestic animals as he may think is for his interest. But though the owner of cattle may lawfully permit them to run at large, either because the common law rule is held not to prevail or by virtue of a statute, he may not willfully drive them upon the unenclosed lands of another and depasture or herd them thereon, and such an act is a trespass.⁶ Whether the owner of unenclosed lands owes any duty of care with respect to trespassing animals, where by law they are permitted to run at large, is a question not settled by the authorities. The negative is held in Montana and, where the plaintiff's cattle trespassed on the defendant's land, drank poison left thereon in a vat and died from its effects, it was held there was no liability.⁷ But in Alabama it is held that such owner is liable for injuries to stock by any artificial erection or excavation naturally calculated to produce injury to stock, such as a single barbed wire loosely strung around a lot.⁸

Dec. 561; *Comerford v. Dupuy*, 17 Cal. 308; *Studwell v. Ritch*, 14 Conn. 291; *Hine v. Woodin*, 37 Conn. 123; *Campbell v. Bridwell*, 5 Oreg. 211; *Baylor v. Balt. & Ohio R. R. Co.*, 9 W. Va. 270; *Blaine v. Chesap. & Ohio R. R. Co.*, 9 W. Va. 252; *Wagner v. Bissell*, 3 Iowa, 396; *Smith v. Chicago, &c., R. R. Co.*, 34 Iowa, 96; *Kerwhacker v. Cleveland, &c., R. R. Co.*, 3 Ohio St. 172; *Cent. R. R. Co. v. Davis*, 19 Ga. 437; *Macon, &c., R. R. Co. v. Baber*, 42 Ga. 300; *Murray v. Sou. Car. R. R. Co.*, 10 Rich. 227; *Laws v. Nor. Car. R. R. Co.*, 7 Jones, (N. C.) 468; *Jones v. Witherspoon*, 7 Jones, (N. C.) 555, 78 Am. Dec. 263; *Walker v. Herron*, 22 Tex. 55; *Ala., &c., R. R. Co. v. Harris*, 25 Ala. 232; *Mobile, &c., R. R. Co. v. Williams*, 53 Ala. 595; *South, &c., R. R. Co. v. Hagood*, 53 Ala. 647; *Joiner v. Winston*, 68 Ala. 129; *Hurd v. Lacy*, 93 Ala. 427, 9 So. 378, 30 Am. St. Rep. 61; *Harrison v. Adamson*, 76 Ia.

337. See *Berry v. St. Louis, &c., R. R. Co.*, 65 Mo. 172; *Chase v. Chase*, 15 Nev. 259. So in Nebraska and Colorado. *Delaney v. Errickson*, 10 Neb. 492; *Morris v. Fraker*, 5 Col. 425. But close herded sheep may not negligently be allowed to trespass. *Willard v. Mathesus*, 7 Col. 76. Nor may cattle be driven on prairie land against owner's will. *Delaney v. Errickson*, 11 Neb. 533; if there are visible indications of possession. *Otis v. Morgan*, 61 Ia. 712.

6—*Harrison v. Adamson*, 76 Ia. 337, 41 N. W. 34; *Cosgriff v. Miller*, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977. And see cases cited at end of note 4.

7—*Beinhorn v. Griswold*, 27 Mont. 79, 69 Pac. 557, 94 Am. St. Rep. 818, 59 L. R. A. 771. To same effect *Fennell v. Sequin St. Ry. Co.* 70 Tex. 670, 8 S. W. 486.

8—*Hurd v. Lacy*, 93 Ala. 427, 9 So. 378, 30 Am. St. Rep. 61.

The statutes which, under some circumstances, or for some purposes, require lands to be fenced by their owners, are so various in the several States that it is not easy even to classify them. Some of them provide merely that unless the owner shall cause *his lands to be fenced with such a fence as is [*399] particularly described, he shall maintain no action for the trespasses of beasts upon them. These statutes are generally limited in their force to exterior fences, and are intended as a part of a system under which cattle are or may be allowed to depasture the highway.⁹ In some States, from the earliest days, beasts have been allowed to roam at large in the highways and unenclosed lands, either by general law or on a vote of the township or county to that effect; a futile permission, if owners of lands are not required to fence against them.¹⁰ A more common provision is one requiring the owners of adjoining premises to keep up, respectively, one-half the partition fence between them, this being apportioned for the purpose of agreement, by prescription, or by the order of fence viewers. A neglect of duty under these statutes would not only preclude the party in fault from maintaining suit for injuries suffered by himself in consequence thereof,¹¹ but it would seem that if the domestic animals

9—*Johnson v. Wing*, 3 Mich. 163; *Brady v. Ball*, 14 Ind. 317; *Cook v. Morea*, 33 Ind. 497; *Herold v. Meyers*, 20 Iowa, 378; *Reddick v. Nedburn*, 76 Mo. 423.

10—See *Kerwhacker v. Cleveland, &c.*, R. R. Co., 3 Ohio St. 172. In New York, the authority to permit beasts to pasture in the streets is denied, unless, when the land was taken for the public easement, the existing laws allowed it, so that the appropriation can be said to be for the pasturage as well as the easement. *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239; S. C. 4 N. Y. 349. See, also, *Avery v. Maxwell*, 4 N. H. 36. At the common law, pasturage in the streets belongs to

the adjoining owner, and it is no wrong for him to leave his cattle in the streets to take it; and if an injury to another arises in consequence, he is liable, if at all, only on some showing of negligence, such, for instance, as that the beast was vicious. *Holden v. Shattuck*, 34 Vt. 336, 80 Am. Dec. 684.

11—*Phelps v. Cousins*, 29 Ohio St. 135, and cases cited pp. *62 and *63, *ante*. Where the plaintiff sues for the trespass of his neighbor's cattle he must show that they came through the defendant's part of the fence, or, if they came through the plaintiff's part, that it complied with the statute. *Selover v. Osgood*, 52 Ill. App. 260;

of his neighbor should wander upon his lands, invited by his own neglect, and should there fall into pits, or otherwise receive injury, he would be responsible for this injury, as one occurring proximately from his own default.¹² Where the plaintiff's cattle escaped through the defendant's insufficient division fence, strayed upon a railroad running through the defendant's land, and were killed, the defendant was held liable, and it was held not to be contributory negligence on the part of the defendant to keep his cattle in the adjoining lot, though he knew the defendant's fence was insufficient.¹³ But where one, knowing that the part of the fence which his neighbor should keep up is insecure, and that on his neighbor's land there is an open quarry, turns his horse into his own field, he cannot recover if the horse falls into the quarry.¹⁴ The statutes which require the construction

of partition fences do so for the benefit exclusively of the adjoining proprietors. These proprietors may, at their option, by agreement, dispense with them, and even if they do not agree to do so, but fail to maintain them as the law contemplates, still, if the cattle of third persons come wrongfully upon one man's lands, and from there enter the adjoining enclosure, it is no answer to an action of trespass brought by the owner of the latter that the partition fence provided for by the law was not maintained.¹⁵

McKowan v. Harman, 56 Ill. App. 368.

12—See *Lee v. Riley*, 18 C. B. (n. s.) 722; *Powell v. Salisbury*, 2 Y. & Jer. 391; *Sexton v. Bacon*, 31 Vt. 540; *Cate v. Cate*, 50 N. H. 144, 9 Am. Rep. 179; *Gilman v. Noyes*, 57 N. H. 629.

13—*Eddy v. Kinney*, 60 Vt. 554, 15 Atl. 198; *Wilder v. Stanley*, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479.

14—*Krum v. Anthony*, 115 Pa. St. 431, 8 Atl. 598. To the same effect is *Roy v. Stuckey*, 113 Wis. 77, 88 N. W. 900, 90 Am. St. Rep. 844, where the plaintiff turned his horse into his pasture, knowing

that the defendant's barbed wire fence was out of repair, and the horse became entangled in the wire and was injured. The plaintiff's contributory negligence was held a bar to his recovery.

15—*Avery v. Maxwell*, 4 N. H. 36; *Lawrence v. Combs*, 37 N. H. 331, 72 Am. Dec. 332; *Little v. Lathrop*, 5 Me. 356; *Lord v. Wormwood*, 29 Me. 282; *Eames v. Salem, &c., R. R. Co.*, 98 Mass. 560, 96 Am. Dec. 676; *Lyons v. Merrick*, 105 Mass. 71; *Hurd v. Rutland, &c., R. R.*, 25 Vt. 116; *Wilder v. Wilder*, 38 Vt. 678; *Chambers v. Mathews*, 18 N. J. 368; *Cook v. Morea*, 33 Ind. 497; *Aylesworth v. Her-*

Where beasts unlawfully enter upon the premises of another, and there commit mischief, because of some vicious propensity, the owner is liable for this injury, whether he had notice of the propensity or not.¹⁶ The particular injury might not of itself support an action, but it is a part of the damage suffered from the trespass, and goes to swell a recovery which the unlawful entry justifies.¹⁷

It has been held that if one's horse reaches over the division *fence, and bites and injures another horse, this [*401] is a trespass, which renders the owner liable, irrespective of any question of fault on his part.¹⁸ Where animals, while trespassing, injure third persons, the owner is not liable, unless the animals are vicious and he had knowledge of the fact.¹⁹

rington, 17 Mich. 417. Where the owner is liable for all damage done by his cattle, one is not liable for trespass of another's stock upon his neighbor's land although they have reached that land through a defective fence which it is his duty to maintain. Little *v.* McGuire, 43 Ia. 447. As to fencing laws, see, further, Wright *v.* Wright, 21 Conn. 329; New Orleans, &c., R. R. Co. *v.* Field, 46 Miss. 573; McManus *v.* Finan, 4 Iowa, 283; Cleveland, &c., R. R. Co. *v.* Elliott, 4 Ohio St. 474. The obligation to fence rests upon the occupier of lands. Tewksbury *v.* Bucklin, 7 N. H. 518.

Laws for fencing have no application to the case of animals not usually domesticated. Therefore, if one undertakes to keep a buffalo bull, he must, at his peril, keep him within his enclosure; if he escapes, and does damage on the lands of another, he may be killed, whether the lands are fenced or not. Canefox *v.* Crenshaw, 24 Mo. 199.

As between adjoining proprietors, until the statutory assign-

ment of what each shall build and keep in repair has been made to them respectively, each remains liable at the common law for injuries done by his beasts. Coxe *v.* Robbins, 9 N. J. 384; Rust *v.* Low, 6 Mass. 90; Heath *v.* Rickert, 2 Me. 72; Little *v.* Lathrop, 5 Me. 357; Knox *v.* Tucker, 48 Me. 373, 77 Am. Dec. 233; Bradbury *v.* Gilford, 53 Me. 99; Harlow *v.* Stinson, 60 Me. 347. See Aylesworth *v.* Herrington, 17 Mich. 417.

16—Morgan *v.* Hudnell, 52 Ohio St. 552, 40 N. E. 716, 27 L. R. A. 862; Snow *v.* McCracken, 107 Mich. 49, 64 N. W. 866; Burleigh *v.* Hines, 124 Ia. 199, 99 N. W. 723.

17—Lyke *v.* Van Leuven, 4 Denio, 127; S. C. 1 N. Y. 515; Mason *v.* Morgan, 28 Up. Can. Q. B. 323. If an animal is not wrongfully on land, the owner is not liable unless he had notice of the vicious propensity. Scott *v.* Grover, 56 Vt. 499, 48 Am. Rep. 814.

18—Ellis *v.* Loftus Iron Co., L. R. 10 C. P. 10; S. C. 11 Moak, 214.

19—Klenberg *v.* Russell, 125

The liability for the trespasses of animals is imposed, not because of ownership, but because of possession, and the duty to care for them. Therefore, if they are in the hands of an agister, or of any one who, by agreement with the owner, has the care and custody of them for the time being, and are suffered to escape and do mischief, he, and not the owner, is the party responsible.²⁰ But in Massachusetts it is held that either the general owner or the agister may be proceeded against, at the election of the party trespassed upon.²¹

Cattle Escaping When Being Driven. There is an exception in the common law to the rule that every man at his peril must keep his beasts from the lands of others. If one is driving his domestic animals along the public highway, he is bound to observe due care, and if, notwithstanding he is guilty of no negligence, they escape from him and go upon private grounds, he is not responsible, provided he removes them within a reasonable time. And what is a reasonable time must depend upon all the circumstances.²⁴

[*402] ***Injuries by Vicious Animals.** The reason why the common law makes the owner of domestic animals responsible for such injuries as have already been specified, is because,

Ind. 531, 25 N. E. 596; *Troth v. Wills*, 8 Pa. Supr. Ct. 1.

20—*Rossell v. Cottom*, 31 Pa. St. 525; *Ward v. Brown*, 64 Ill. 307, 16 Am. Rep. 561; *Reddick v. Newburn*, 76 Mo. 423; *Atwater v. Lowe*, 39 Hun. 150; *Eck v. Hocker*, 75 Ill. App. 641. See, *Tewksbury v. Bucklin*, 7 N. H. 518; *Moulton v. Moore*, 56 Vt. 700; *Weymouth v. Gile*, 72 Me. 446.

21—*Sheridan v. Bean*, 8 Met. 284, 41 Am. Dec. 507. This case, though decided several years before *Rossell v. Cottom*, *supra*, is not there noticed. Possibly there may be a distinction between the cases, as in the Pennsylvania case it is said the beasts were "prone to do mischief," by which we under-

stand that, to use the common phrase, they were unruly. Compare *Stafford v. Ingersoll*, 3 Hill, 38, and see *Weymouth v. Gile*, 72 Me. 446. An occupant of land who holds the cattle as their owner's general agent is liable. *Kennett v. Durgin*, 59 N. H. 560; but if he is a mere bailee of them upon their owner's land the latter is. *Blaisdell v. Stone*, 60 N. H. 507, though it would seem from this case that either might be.

24—*Goodwin v. Chevely*, 4 H. & N. 631. This was the rule while land owners were not required to fence their lands. Possibly when the statute provides for an exterior fence, and the land owner has constructed one along the road

taking notice of their propensities, it is his duty to anticipate that they will commit them as opportunity offers, and to guard against it. The difference in the nature of animals requires precautions in one case which it does not require in another. Thus, a dog which has manifested no vicious propensity is not likely to commit noticeable injury by merely crossing the premises of a neighbor. Therefore the common law has never given an action of trespass for the unlicensed entry of dogs upon the premises of other persons than their owners.²⁵ But in the case of beasts whose subsistence is, wholly or in part, upon grass, grain, and vegetables, there was abundant reason for a different rule. If they break into enclosures where crops are being cultivated, some mischief is certain to be committed, and it may be of a very serious character. Indeed, a few cattle or swine allowed to run at large without any restraint might render profitable cultivation impossible in a whole township. Because of this destructive propensity, the common law requires every owner of cattle, horses, *sheep, swine, and other domestic animals [*403] which would naturally commit destruction in private enclosures, to keep them at his peril off the lands of other persons; he must take notice of the natural propensity of cattle to stray and trample down crops, as one who keeps a beast of prey must

which meets the statutory requirement, but which fails to restrain cattle passing in the highway, a question may arise whether a fair construction of the statute would not give damages. Where an ox, carefully driven, ran into a shop, *held*, no liability. *Tillett v. Ward*, L. R. 10 Q. B. D. 17. To make the owner of a bull responsible for an injury occurring by the animal's breaking away from a servant who was leading him in a public street, the owner must have knowledge of such propensities as cause it to be dangerous so to lead him, and the servant must be negligent in view of the propensities of such an animal. *Linne-*

ham v. Sampson, 126 Mass. 506, 30 Am. Rep. 692. See *Smith v. Matteson*, 41 Hun, 216. If one's horse escape from an enclosure and injure a child upon the highway the owner is not liable unless he was negligent in allowing it to escape or in not pursuing and recapturing it, though under the statute the fact that the horse was loose on the street was *prima facie* evidence of negligence. *Fallon v. O'Brien*, 12 R. I. 518, 34 Am. Rep. 713.

25—*Brown v. Giles*, 1 C. & P. 118. Not even if he kills the owner's dog there, when his master had no reason to anticipate such result. *Buck v. Moore*, 35 Hun,

take notice that he will kill and destroy animals and human beings if he is suffered to escape.²⁶

But there are other mischiefs which may be committed by domestic animals that one is under no obligation to anticipate and guard against, because they are not the result of a general propensity, but are committed, if at all, by exceptionally vicious individuals of the particular species of animals. Thus, though every horse will roam into neighboring fields if not restrained from doing so, it is only in rare and exceptional cases that a horse will attack and injure those who come near him. Therefore, while the owner should anticipate and protect against trespasses on lands by his horses, he is under no moral obligation to anticipate that a horse in which no such disposition has been discovered will suddenly make an assault upon and kick and bite some passer-by who chances to come within his reach. For this reason the keeper of a domestic animal is not in general responsible for any mischief that may be done by such animal which was of a kind not to be expected from him, and which it would not be negligence in the keeper to fail to guard against.²⁷

338. It would be different, however, if the owner himself were to take him there: it is then his trespass, and what mischief the dog may do is an aggravation of it. *Beckwith v. Shoredike*, Burr. 2092; even though he did not know the dog was likely to do the mischief. *Green v. Doyle*, 21 Ill. App. 205. So if he were to send his dogs upon another man's land to worry the latter's cattle. *Mitten v. Faudrye*, Pop. 161. And where a dog had a propensity for chasing and destroying game, of which his owner was aware, the owner was held responsible for a trespass and for the killing of pheasants by the dog. *Read v. Edwards*, 17 C. B. (n. s.) 245. In Wisconsin the owner is held liable without notice of the propensity if a dog enters and bites a cow.
- Chunot *v. Larson*, 43 Wis. 536, 28 Am. Rep. 567.
- 26—*Van Leuven v. Lyke*, 1 N. Y. 515. Where one's cattle break into the enclosure of another, and there commit mischief of a kind not to be expected from them—such as one cow goring another—their owner is responsible for this as an aggravation of the trespass. *Angus v. Radin*, 5 N. J. 815, 8 Am. Dec. 626; *Dolph v. Ferris*, 7 W. & S. 367, 42 Am. Dec. 246. See, also, cases of injury by diseased sheep trespassing. *Anderson v. Buckton*, Stra. 192; *Barnum v. Vandusen*, 16 Conn. 200.
- 27—*Vrooman v. Lawyer*, 13 Johns. 339; *Van Leuven v. Lyke*, 1 N. Y. 515; *Smith v. Causey*, 22 Ala. 568; *Wormley v. Gregg*, 65 Ill. 251; *Dearth v. Baker*, 22 Wis. 73; *Jackson v. Smithson*, 15 M. & W.

But there are exceptional cases which rest upon substantially the same reasons with those which sustain an action against the owner of straying beasts. If it be made to appear that any domestic animal is vicious and accustomed to do hurt, and that the owner has been notified, or has knowledge of the fact, a duty is then imposed upon him to keep the animal secure, and he is *responsible for the mischief done by the animal [*404] in consequence of the failure to observe this duty.²⁸ To recover the plaintiff must prove both that the animal was vicious and that the defendant had notice of the fact.²⁹ If the defendant had no notice of the vicious propensities of the animal he is

563; *Hudson v. Roberts*, 6 Exch. Rep. 454; *Benoit v. Troy*, etc., 697; *Cox v. Burbridge*, 13 C. B. R. R. Co., 77 Hun, 576, 28 N. Y. S. (n. s.) 430; *Moss v. Pardridge*, 9 Ill. App. 490; *Finney v. Curtis*, 78 Cal. 498, 21 Pac. 120; *Ward v. Danzeezen*, 111 Ill. App. 163; *Martinez v. Bernhard*, 106 La. 368, 30 So. 901, 55 L. R. A. 671.

28—*Smith v. Pelah*, Stra. 1264. “The Chief Justice ruled that if a dog has once bit a man, and the owner having notice thereof keeps the dog, and lets him go about, or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person’s treading on the dog’s toes; for it was owing to his not hanging the dog on the first notice. And the safety of the King’s subjects ought not afterwards to be endangered. The scienter is the *git* of the action.” *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591; *Conway v. Grant*, 88 Ga. 40, 13 S. E. 803, 30 Am. St. Rep. 145, 14 L. R. A. 196; *Hill v. Applegate*, 40 Kan. 31, 19 Pac. 315; *Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837; *Fake v. Addicks*, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716; *Brice v. Bauer*, 108 N. Y. 428, 15 N. E. 695, 2 Am. St.

Rep. 454; *Benoit v. Troy*, etc., 697; *Cox v. Burbridge*, 13 C. B. R. R. Co., 77 Hun, 576, 28 N. Y. S. (n. s.) 430; *Sylvester v. Maag*, 155 Pa. St. 225, 26 Atl. 392, 35 Am. St. Rep. 878; *Lynch v. Kineth*, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958.

29—*Clowdis v. Fresno Flume*, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; *Harvey v. Buchanan*, 121 Ga. 384, 49 S. E. 281; *Kolb v. Klages*, 227 Ill. App. 531; *West Chicago St. R. R. Co. v. Walsh*, 78 Ill. App. 595; *Fritsch v. Clemow*, 109 Ill. App. 355; *Eastman v. Scott*, 182 Mass. 192, 64 N. E. 968; *Cuney v. Campbell*, 76 Minn. 59, 78 N. W. 878; *Brice v. Bauer*, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454; *Lawlor v. French*, 2 App. Div. 140, 37 N. Y. S. 807; *Bauer v. Lyons*, 23 App. Div. 204, 48 N. Y. S. 729; *Leonard v. Donoghue*, 87 App. Div. 104, 84 N. Y. S. 60; *Hallyburton v. Burke County Fair Ass.*, 119 N. C. 526, 26 S. E. 114, 38 L. R. A. 156; *Meegan Bros. v. McKay*, 1 Okl. 59, 30 Pac. 232; *Eddy v. Union R. R. Co.*, 25 R. I. 451, 56 Atl. 677; *Quigley v. Adams Exp. Co.*, 27 Pa. Supr. Ct. 116.

not liable.³⁰ The special notice which the owner has that his beast is inclined to commit the particular injury stands in the place of the general notice that the natural propensity of cattle to roam gave in the case of trespasses by them upon lands, and imposes upon him a corresponding obligation to prevent the particular mischief which he now has reason to expect will be committed should the opportunity occur. Therefore, where the owner is notified that his dog has been accustomed to worry sheep or other animals, or to attack persons, if he still keeps him he becomes, from the time of such notice, responsible for all injuries of the sort he may thereafter commit;³¹ and the fact that he endeavors to so keep the dog as to prevent the mischief will not protect him, but by keeping him he will take upon himself all risks.³² So if one drive a bull along the public highway

30—*Finney v. Curtis*, 78 Cal. 498, 21 Pac. 120; *Cox v. Murphy*, 82 Ga. 623, 9 S. E. 604; *Reed v. Southern Express Co.*, 95 Ga. 108, 22 S. E. 213, 51 Am. St. Rep. 62; *Ward v. Danzeezen*, 111 Ill. App. 163; *Maitenez v. Bernhard*, 106 La. 368, 30 So. 901, 55 L. R. A. 671; *State v. Donohue*, 49 N. J. L. 548, 10 Atl. 150.

31—*Jones v. Perry*, 2 Esp. 482; *Sarch v. Blackburn*, 4 C. & P. 297; *Thomas v. Morgan*, 2 C. M. & R. 496; *Read v. Edwards*, 17 C. B. (N. S.) 245; *May v. Burdett*, 9 Q. B. (N. S.) 101; *Durden v. Barnett*, 7 Ala. 169; *Pickering v. Orange*, 2 Ill. 338, 32 Am. Dec. 35; *Keightlinger v. Egan*, 65 Ill. 235, and 75 Ill. 141; *Wormley v. Gregg*, 65 Ill. 251; *Partlow v. Haggarty*, 35 Ind. 178; *Karr v. Parks*, 44 Cal. 46; *Marsh v. Jones*, 21 Vt. 378, 52 Am. Dec. 67; *Dearth v. Baker*, 22 Wis. 73; *McCaskill v. Elliott*, 5 Strob. 196, 53 Am. Dec. 706; *Murray v. Young*, 12 Bush, 337; *Buckley v. Leonard*, 4 Denio, 500; *Paff v. Slack*, 7 Pa. St. 254; *Campbell v.*

Brown, 19 Pa. St. 359; *Montgomery v. Koester*, 35 La. Ann. 1091, 48 Am. Rep. 253; *Melsheimer v. Sullivan*, 1 Colo. App. 23, 27 Pac. 17; *Warner v. Chamberlain*, 7 Houst. Del. 19, 30 Atl. 638; *Conway v. Grant*, 88 Ga. 40, 13 S. E. 803, 30 Am. St. Rep. 145, 14 L. R. A. 196; *Chicago, etc., R. R. Co. v. Kuckkuck*, 197 Ill. 304, 64 N. E. 358; *Garrison v. Barnes*, 42 Ill. App. 21; *Johnson v. Eckberg*, 94 Ill. App. 634; *Clanin v. Fagan*, 124 Ind. 304, 24 N. E. 1044; *Cameron v. Bryan*, 89 Ia. 214, 56 N. W. 234; *Delisle v. Bourriague*, 105 La. 77, 29 So. 731, 54 L. R. A. 420; *Cuney v. Campbell*, 76 Minn. 59, 78 N. W. 878; *Rowe v. Ehrmauntraut*, 92 Minn. 17, 99 N. W. 211; *Roehers v. Remhoff*, 55 N. J. L. 475, 26 Atl. 860; *Brice v. Bauer*, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454; *Sylvester v. Maag*, 155 Pa. St. 225, 26 Atl. 392, 35 Am. St. Rep. 878; *Robinson v. Marino*, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50.

32—*Kelly v. Tilton*, 3 Keyes,

knowing of his propensity to attack and gore any person wearing a red garment, and taking no precautions, he will be held responsible if such an at*tack is made.³³ The same [*405] rule is applicable to all classes of domestic animals, and particulars need not be gone into here.³⁴ When an animal is permitted to be at large, in violation of law, the owner is liable for all damage or injury done by the animal, whether he knew

263; *Stumps v. Kelly*, 22 Ill. 140; by *hogs*: *Jenkins v. Turner*, Ld. *Ahlstrand v. Bishop*, 88 Ill. App. 424; *Dockerty v. Hutson*, 125 Ind. 102, 25 N. E. 144; *McGuire v. Ringrose*, 41 La. Ann. 1029, 6 So. 895; *Fye v. Chapin*, 121 Mich. 675, 80 N. W. 797; *Woodbridge v. Marks*, 14 Misc. 368, 36 N. Y. S. 81.

33—*Hudson v. Roberts*, 6 Exch. 697. See *Cockersham v. Nixon*, 11 Ired. 269; *Earhart v. Youngblood*, 27 Pa. St. 331; *Dolph v. Ferris*, 7 W. & S. 367, 42 Am. Dec. 246; *Barnes v. Chapin*, 4 Allen, 444, 81 Am. Dec. 710; *Clowdis v. Fresno Flume*, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; *Barnum v. Terpening*, 75 Mich. 557, 42 N. W. 967; *O'Neill v. Blase*, 94 Mo. App. 648, 68 S. W. 768. So if one insecurely tethers a bull, known to be vicious, near a path, he is liable even to one using the path without right. *Glidden v. Moore*, 14 Neb. 84, 45 Am. Rep. 98. Where a cow, being led along the street by the defendant's servant, is set upon by dogs, runs away and knocks the plaintiff down, there is no liability, if no negligence. *Moynahan v. Wheeler*, 117 N. Y. 285, 22 N. E. 702.

34—Injuries by *rams*: *Jackson v. Smithson*, 15 M. & W. 563; *Oakes v. Spaulding*, 40 Vt. 347, 94 Am. Dec. 404; *Spaulding v. Oakes*, 42 Vt. 343; *Graham v. Payne*, 122 Ind. 403, 24 N. E. 216. Injuries

Injuries by *horses*: *Cox v. Burbridge*, 13 C. B. (n. s.) 430; *Popplewill v. Pierce*, 10 Cush. 509; *Dickson v. McCoy*, 37 N. Y. 400; *Goodman v. Gay*, 15 Pa. St. 188, 53 Am. Dec. 589; *Wales v. Ford*, 8 N. J. 267; *Eastman v. Scott*, 182 Mass. 192, 64 N. E. 968; *Lynch v. Kineth*, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958. Injuries by *cows*: *Hewes v. McNamara*, 106 Mass. 281; *Stumps v. Kelley*, 22 Ill. 140; *Cogswell v. Baldwin*, 15 Vt. 404; *Mahoney v. Dwyer*, 84 Hun, 348, 32 N. Y. S. 346. Injuries by *mules*: *Hill v. Applegate*, 40 Kan. 31, 19 Pac. 315; *Meegan Bros. v. McKay*, 1 Okl. 59, 30 Pac. 232. In *Dean v. St. Paul Union Depot Co.*, 41 Minn. 360, 43 N. W. 54, 16 Am. St. Rep. 703, 5 L. R. A. 442, the rule appears to be applied in case of the human animal and it was held that, where the tenant of the parcel room in the defendant's depot kept in his employ a savage and vicious man, who had frequently assaulted people lawfully there, and all this was known to the defendant, the latter was liable for an assault by this man upon a passenger. See, further, *Van Leuven v. Lyke*, 1 N. Y. 515; *Woolf v. Chalker*, 31 Conn. 121, 81 Am.

of its vicious propensities or not.³⁵ And where the plaintiff was kicked by the defendant's horse, which was being lead on the sidewalk by his servant, the defendant was held liable without proof of *scienter*, and it is said that when the animal inflicting the injury is where it has no right to be, the rule as to proof of vicious character and *scienter* does not apply.³⁶ In such cases the liability is grounded on negligence.

According to the great preponderance of authority, in a suit for injuries by a vicious animal, the gist of the action is not negligence in keeping the animal, but the keeping him with knowledge of his vicious propensity. According to these authorities one having such knowledge keeps such an animal at his peril and must respond for any damage done by the animal, irrespective of negligence on his part.³⁷ Some courts, however, hold that the gist of the action is negligence. In an action to recover for being bitten by a vicious dog, the Supreme Court of Ohio says: "The real foundation of an action like the one at bar is not the keeping or harboring of the animal, as was said in one of the courts below, for he may be kept as a watch dog for the protection of the keeper's person or property. Nor is it merely the keeping and harboring of the dog after knowledge of his vicious and dangerous propensities and habits; for if he

Dec. 175. Measure of damage, for letting unpedigreed bull run at large, whereby a blooded cow is got with calf, see *Crawford v. Williams*, 48 Ia. 247.

v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123; *Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837; *Spring Co. v. Edgar*, 99 U. S. 645; *Bell v. Leslie*, 24 Mo. App. 661; *Melshimer v. Sullivan*, 1 Colo. App. 23, 27 Pac. 17; *Ahlstrand v. Bishop*, 88 Ill. App. 424; *Dockerty v. Hutson*, 125 Ind. 102, 25 N. E. 144; *McGuire v. Ringrose*, 41 La. Ann. 1029, 6 So. 895; *Fye v. Chapin*, 121 Mich. 675, 80 N. W. 797; *Woodbridge v. Marks*, 14 Misc. 368, 36 N. Y. S. 81; *Robinson v. Marino*, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50; *Lynch v. Kenneth*, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958.

35—*Kitchens v. Elliott*, 114 Ala. 290, 21 So. 965; *Briscoe v. Alfrey*, 61 Ark. 196, 32 S. W. 505, 54 Am. St. Rep. 203, 30 L. R. A. 607; *Meier v. Shrunk*, 79 Ia. 17, 44 N. W. 209; *Decker v. McSorly*, 111 Wis. 91, 86 N. W. 554; *Burleigh v. Hines*, 124 Ia. 199, 99 N. W. 723.

36—*Healey v. Ballentine*, 66 N. J. L. 339, 49 Atl. 511.

37—*Murray v. Young*, 12 Bush, 337; *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226; *Mann v. Weiand*, *81 Pa. St. 243; *Muller*

were cowardly, indolent and peaceable he would not be of much service as a guardian of person or property. A person who has need for a watch dog, of necessity chooses one of more or less brute ferocity, and the law has never yet said that he may not lawfully keep such a protector by him; but the very qualities of the animal for such a purpose require that he shall be securely kept, so that injury may not result to innocent persons, who may be where they have a right to be and are in the pursuit of lawful purposes. Hence the gist of such an action as this is not the keeping of the dog with knowledge of his dangerous nature, but rather the negligent failure to properly restrain the animal, and to keep him so safely that he may not injure anyone who is lawfully at the place.³⁸ The courts of Minnesota, New Jersey and Vermont hold the same doctrine.³⁹

The notice which charges the owner with the duty must be a notice that the animal was inclined to do the particular mischief that has been done. Notice that a dog is disposed to worry sheep is no notice that he will attack persons. Notice that a horse is unruly is no notice that he is likely to kick and bite.⁴⁰ But notice that a bull attacks and gores other domestic animals is sufficient warning that he would attack persons in like manner.⁴¹ The question in each case is whether the notice was sufficient to put the owner on his guard, and to require him to anticipate the injury which has actually occurred.

The sufficiency of the notice is a question of what is sufficient to put a reasonable and prudent man on his guard. It is not necessary that it be notice of mischief actually committed; it is the propensity to commit the mischief that constitutes the danger.⁴² And if the mischief is of a sort that animals of

38—*Hayes v. Smith*, 62 Ohio St. 161, 182, 56 N. E. 879.

39—*Fake v. Addicks*, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 118 Cal. 315; *Clowdis v. Fresno Flume, etc., Co.*, 50 Pac. 373, 62 Am. St. Rep. 238; *Barnum v. Terpening*, 75 Mich. 557, 42 N. W. 967.

40—See *Spray v. Ammerman*, 66 Ill. 309; *Keightlinger v. Egan*, 65 Ill. 235; *Cockersham v. Nixon*, 11 Ired. 269; *Hartley v. Halliwell*, 2 Stark. 212; *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226.

41—*Earhart v. Youngblood*, 27 Pa. St. 331; *Cockersham v. Nixon*, 11 Ired. 269.

42—*McCaskill v. Elliott*, 5 Strob. 196, 53 Am. Dec. 706; *Worth v.*

[*406] the kind *are likely to commit at a certain season of the year—as in the case of stallions—the owner should anticipate and guard against it without any special notice or warning.⁴³ The rules above laid down are applicable to the case of cattle which are accustomed to overleap or throw down the fences

Gilling, L. R. 2 C. P. 1; Rowe *v.* Ehrmauntraut, 92 Minn. 17, 99 N. W. 211. Not necessary that notice be of acts precisely similar. Enough if it shows a disposition to commit a substantially similar injury. Reynolds *v.* Hussey, 64 N. H. 64, 5 Atl. 458; Mann *v.* Weiand, *81 Pa. St. 243. Not necessary that a dog known to be ferocious should have previously bitten a man. Godeau *v.* Blood, 52 Vt. 251, 36 Am. Rep. 751; Kolb *v.* Klages, 27 Ill. App. 531. See Flansburg *v.* Basin, 3 Ill. App. 531. If owner has notice of a dog's propensity to bite, it makes no difference whether the biting is in sport or anger. State *v.* McDermott, 49 N. J. L. 163, 6 Atl. 653. Notice to defendant of mischief on a single previous occasion seems to be sufficient. Arnold *v.* Norton, 25 Conn. 92; Kittredge *v.* Elliott, 16 N. H. 77, 41 Am. Dec. 717, and cases cited; Mann *v.* Weiand, *81 Pa. St. 243; Marsel *v.* Bowman, 62 Ia. 57; Bauer *v.* Lyons, 23 App. Div. 204, 48 N. Y. S. 729. Compare Bulkley *v.* Leonard, 4 Denio, 500; Appleby *v.* Percy, L. R. 9 C. P. 647; Perkins *v.* Mossman, 44 N. J. L. 579; Be-noit *v.* Troy, etc., R. R. Co., 154 N. Y. 223, 48 N. E. 524. Direct proof is not essential. Knowledge may be made out by circumstances without it. Judge *v.* Cox, 1 Stark. 285; McCaskill *v.* Elliott, 5 Strob. 196, 53 Am. Dec. 706. May be presumed from his keeping dog

tied during the day. Goode *v.* Martin, 57 Md. 606, 40 Am. Rep. 448; Brice *v.* Bauer, 108 N. Y. 428, 15 N. E. 695. Or from the fact that he keeps the dog to guard his property, and usually keeps him chained or muzzled. Hahnke *v.* Friederich, 140 N. Y. 224, 35 N. E. 487. Notice to a servant who has charge of the beast is sufficient. Baldwin *v.* Casella, L. R. 7 Exch. 325; S. C. 3 Moak, 434; Clowdis *v.* Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238. Or to a general agent in charge of a farm on which a dog is kept. Curtiss *v.* Smith, 53 Vt. 532. Notice to one of two or more who jointly own or harbor the animal is notice to all. Hays *v.* Smith, 15 Ohio C. C. 300. Where a bull had made a previous attack on the defendant it was held enough to show *scienter*. Talmage *v.* Mills, 80 App. Div. 382, 80 N. Y. S. 637. Where the declaration alleged that the defendant knew that the dog in question was accustomed to bite mankind, it was held that the allegation must be proved as stated and that it was not sufficient to prove that the dog was savage or vicious. Fritsche *v.* Clemow, 109 Ill. App. 355.

43—Meredith *v.* Reed, 26 Ind. 334. See McIlvaine *v.* Lantz, 100 Pa. St. 586, 45 Am. Rep. 400; Hammond *v.* Melton, 42 Ill. App. 186.

which are sufficient for cattle in general. The person having such cattle will be liable for injuries resulting from the indulgence of this propensity, even in the case of those whose duty it was to maintain the fence overleaped or thrown down. That duty is a duty to keep up only such fences as are as sufficient to protect against cattle in general, and not such as vicious or unruly beasts make necessary.⁴⁴

The duty to protect against vicious animals is imposed upon the keeper, irrespective of ownership.⁴⁵ If the animal is kept on the defendant's premises with his knowledge and consent, he is liable, though he may be owned and cared for by others.⁴⁶ A railroad corporation was held liable for injuries by a vicious dog kept at its station by its agent.⁴⁷ In such case, doubtless, the agent would be liable also,⁴⁸ as all who take part in harboring a vicious dog are jointly and severally liable.⁴⁹ In New York it is held that "a vicious domestic animal, if permitted to run at large, is a nuisance, and a person who, knowingly, keeps or harbors it, and thus affords it a place of protection and refuge, is liable for the maintenance of a nuisance, and for all the damages directly resulting from it."⁵⁰ In the case referred to the wife was held liable for injuries by a vicious dog owned by her husband and kept upon her premises, where they both resided,

44—*Hine v. Wooding*, 37 Conn. Ohio St. 161, 56 N. E. 879. See 123; *Barnum v. Vandusen*, 16 Weide *v. Thiel*, 9 Ill. App. 223. Conn. 200.

46—*Snyder v. Patterson*, 161 Pa. St. 98, 28 Atl. 1006.

45—*Frammell v. Little*, 16 Ind. 251; *Marsh v. Jones*, 21 Vt. 378, 52 Am. Dec. 67; *Wilkinson v. Parrott*, 32 Cal. 102; *Marsel v. Bowman*, 62 Ia. 57; *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226;

47—*Chicago, etc., R. R. Co. v. Kuckkuck*, 197 Ill. 304, 64 N. E. 358.

Marsh v. Handy, 40 Hun, 339; *Hornbein v. Blanchard*, 4 Colo. App. 92, 35 Pac. 187; *Shultz v. Griffith*, 103 Ia. 150, 72 N. W. 445, 40 L. R. A. 117; *Lettis v. Horning*, 67 Hun, 627, 22 N. Y. S.

48—*Lawlor v. French*, 14 Misc. 497, 35 N. Y. S. 1077.

565; *Bundschuh v. Mayer*, 81 Hun, 111, 30 N. Y. S. 622; *Duval v. Barnaby*, 75 App. Div. 154, 77 N. Y. S. 337; *Hayes v. Smith*, 62 C. 300. The defendant was held not to harbor a dog kept by his hired man with his knowledge, who occupied a separate house on the defendant's farm. *Simpson v. Griggs*, 58 Hun, 393, 12 N. Y. S. 162.

49—*Hayes v. Smith*, 15 Ohio C.

201, 204, 32 N. E. 47, 17 L. R. A. 521.

50—*Quilty v. Battie*, 135 N. Y. 201, 204, 32 N. E. 47, 17 L. R. A. 521.

she paying the family expenses and caring for the dog. But in such case, if the wife does not consent she is not liable.⁵¹ In Alabama it is held that, though the wife owns the dog and the same is kept upon her premises, where she and her husband reside, he alone is liable, as he is the head of the family and controls the premises.⁵²

If the injury committed was to a person, it is no defense to an action therefor that the party injured was at the time committing same trifling trespass upon the defendant's land, for the law will not suffer a man to defend his premises against mere trespasses by such dangerous means as ferocious ani-
[*407] mals,⁵³ whose assault might be dangerous *to life and limb, any more than it will by scattering poison about to kill animals that come upon them,⁵⁴ or by setting spring guns.⁵⁵ But doubtless a man might defend his house against burglars by the use of a ferocious dog, and might even defend against casual trespasses with a dog not likely to do serious injury.⁵⁶

51—McLaughlin *v.* Kemp, 152 Mass. 7, 25 N. E. 18.

52—Strouse *v.* Leiff, 101 Ala. 433, 14 So. 667, 46 Am. St. Rep. 122, 23 L. R. A. 622.

53—Blackman *v.* Simmons, 3 C. & P. 138; Loomis *v.* Terry, 17 Wend. 496, 31 Am. Dec. 306; Sherfey *v.* Bartley, 4 Sneed, 58, 67 Am. Dec. 597. Compare Brock *v.* Cope-land, 1 Esp. 203; Conway *v.* Grant, 88 Ga. 40, 13 S. E. 803, 30 Am. St. Rep. 145, 14 L. R. A. 196; Carroll *v.* Marcoux, 98 Me. 259, 56 Atl. 848; Leonorvoitz *v.* Ott, 40 Misc. 551, 82 N. Y. S. 880. See Hill *v.* Applegate, 40 Kan. 31, 19 Pac. 315.

54—Johnson *v.* Patterson, 14 Conn. 1.

55—See Ante, p. *194.

56—In Sarch *v.* Blackburn, 4 C. & P. 296, TINDALL, C. J., affirmed the right of a man to defend his

premises by a dog, provided he had given notice, but held that a printed notice conspicuously displayed was not sufficient for the case of one who could not read. Compare Curtis *v.* Mills, 5 C. & P. 489; Montgomery *v.* Koester, 35 La. Ann. 1091, 48 Am. Rep. 253. According to Laverone *v.* Mangianti, 41 Cal. 138, 10 Am. Rep. 269, one who keeps a vicious dog as a watch-dog is responsible to one who is bitten by him, though not all in fault; an accident putting the party injured in his way.

One may use a dog in driving away domestic animals trespassing on his grounds, but he will be liable if the dog be fierce and worry the animals beyond what is needful to accomplish the purpose. See Amick *v.* O'Hara, 6 Blackf. 258; Wood *v.* LaRue, 9 Mich. 158; Tifft *v.* Tifft, 4 Denio,

The doctrine of contributory negligence applies to the case of injury by animals.⁵⁷ If a man heedlessly places himself on the premises of another, in the way of a bull which he knows is fierce and dangerous, he has no lawful ground of complaint if he is gored.⁵⁸ But where a child is injured by vicious animals, the party responsible for their keeping cannot escape liability because the child did not exhibit a thoughtfulness and prudence beyond his years.⁵⁹

Sometimes a vicious animal may lawfully be killed, though the circumstances would not support an action against the owner. Thus, if a savage dog is actually found doing mischief,⁶⁰

175; *Davis v. Campbell*, 23 Vt. recovery. *Marble v. Ross*, 124 Mass. 44.

57—*Williams v. Moray*, 74 Ind. 478; *Eberhart v. Reister*, 96 Ind. 25, 39 Am. Rep. 76; *Quimby v. Woodbury*, 63 N. H. 370; *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226; *Carpenter v. Latta*, 29 Kan. 591; *Weide v. Thiel*, 9 Ill. App. 223. See *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Lynch v. McNally*, 73 N. Y. 347; *Buckley v. Geeg*, 55 Ill. App. 388; *Stuber v. Gannon*, 98 Ia. 228, 67 N. W. 105; *Bush v. Wathen*, 104 Ky. 548, 47 S. W. 599; *Wooldridge v. White*, 105 Ky. 247, 48 S. W. 1081; *Hathaway v. Tinkham*, 148 Mass. 85, 19 N. E. 18; *Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837; *Farley v. Picard*, 78 Hun, 560, 29 N. Y. S. 802; *Woodbridge v. Marks*, 17 App. Div. 139, 45 N. Y. S. 156; *Hallyburton v. Burke County Fair Ass.*, 119 N. C. 526, 26 S. E. 114, 38 L. R. A. 156. Accidentally stepping on a dog is not contributory negligence. *Fake v. Ad-dicks*, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716.

58—But the mere fact that one is a trespasser does not preclude

59—*Munn v. Reed*, 4 Allen, 431; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645.

60—*Wadhurst v. Damme*, Cro. Jac. 45; *Vere v. Cawdor*, 11 East, 568; *Barrington v. Turner*, 2 Lev. 28; *Protheroe v. Mathews*, 5 C. & P. 581; *Putnam v. Payne*, 13 Johns. 312. But a man has no right to kill a dog found on his premises doing no mischief, simply because he suspects him to have done mischief before. *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35. But if he has killed hens, and to prevent such killing at that time it is reasonably necessary to shoot him, he may be killed. *Anderson v. Smith*, 7 Ill. App. 354; *Marshall v. Blackshire*, 44 Ia. 475. See *Livermore v. Batchelder*, 141 Mass. 179. One has no right to enter the owner's dwelling to kill a dog not registered and collared. *Bishop v. Fahay*, 15 Gray, 61; *Uhlein v. Cromack*, 109 Mass. 273. Any one may kill an uncollared dog if in so doing he commit no trespass. *Morewood v. Wakefield*, 133 Mass. 240. See *Dinwiddie v. State*, 103 Ind. 101; *Lowell v.*

[*408] or if it *becomes necessary in order to protect against him,⁶¹ the dog may be killed, whether the owner has notice of his disposition or not. A trespassing dog may be killed when reasonably necessary, for the protection of the person of the plaintiff, or of any of his family, or of his property.⁶² And a dog that is ferocious and accustomed to bite, or that has been bitten by a mad dog, may be killed as a common nuisance.⁶³ But animals that are property at the common law could not thus be destroyed.⁶⁴ Before one could be justified in killing them, it

Gathright, 97 Ind. 313. In Missouri a sheep-killing dog may be killed by any one at any time. Carpenter v. Lippitt, 77 Mo. 242.

61—Janson v. Brown, 1 Camp. 41; Wells v. Head, 4 C. & P. 568. Or person when attacked on the highway, Reynolds v. Phillips, 13 Ill. App. 557.

62—Gillum v. Sisson, 53 Mo. App. 516; Fenton v. Bisel, 80 Mo. App. 135; Fisher v. Badger, 95 Mo. App. 289; Life v. Blackwelder, 25 Ill. App. 119. In the latter case the defendant shot and killed the plaintiff's dog which was trespassing upon his wheat field and a verdict for the defendant was affirmed. The court says: "Every man has a right to defend and protect his property of every kind and character from injury or destruction, provided he uses only such means as are reasonably necessary under the circumstances. And the reasonableness or unreasonableness of the means is always a question of fact for the jury."

63—Barrington v. Turner, 2 Lev. 28; Dodson v. Mock, 4 Dev. & Bat. 146, 32 Am. Dec. 677; Perry v. Phelps, 10 Ired. 261; Brown v. Carpenter, 26 Vt. 638; Putnam v. Payne, 13 Johns. 312; Hinckley v. Emerson, 4 Cow. 351, 15 Am. Dec.

383; Loomis v. Terry, 17 Wend. 496, 31 Am. Dec. 306; Maxwell v. Palmerston, 21 Wend. 406; Brill v. Flagler, 23 Wend. 354; Dunlap v. Snyder, 17 Barb. 561; Parker v. Mise, 27 Ala. 480, 62 Am. Dec. 776. As to when he may be killed as a trespasser, see King v. Kline, 6 Pa. St. 318.

64—Reis v. Stratton, 23 Ill. App. 314. See Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219; Heiligmann v. Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272. Whoever kills domestic animals because they are trespassing is liable for their value. Wright v. Ramscot, 1 Saund. 83; Dodson v. Mock, 4 Dev. & Bat. 146; Tyner v. Cory, 5 Ind. 216 (Dogs). Ford v. Taggart, 4 Tex. 492. See, State v. Bates, 92 N. C. 784; Chappell v. State, 35 Ark. 345 (Cattle). Clark v. Keliher, 107 Mass. 406; Johnson v. Patterson, 14 Conn. 1 (Hens). So he is liable for injury to the dog of another by spikes set in trees on his land for the purpose. Dean v. Clayton, 7 Taunt. 489. See Ilott v. Wilkes, 3 B. & Ald. 304. In Maine, while a dog is recognized as property, it is not a domestic animal within a statute forbidding killing such animals. State v. Harriman, 75 Me. 562, 46

would be necessary to show that protection to human beings, or, to more valuable property, appeared to require it.⁶⁵

The liability of owners of dogs for injuries done by them has been greatly changed in some States by statutes.⁶⁶

Am. Rep. 423. Where the defendant set dogs on trespassing colts which drove the colts into a barbed wire fence and they were injured, he was held liable. *Aspergren v. Kotas*, 91 Ia. 497, 59 N.W. 273.

be of interest: *Alabama*. Smith *v. Causey*, 22 Ala. 568. Suit under statute giving double damages for injury to stock by dogs. Statute is highly penal and must be strictly construed. Negligence of defendant's servants does not render defendant liable under it.

65—See *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175, and cases, p. 700, n. 53. The law of *dog fights* is ably expounded in *Wiley v. Slater*, 22 Barb. 506. Where a statute authorizes "any person" to kill any dog going at large and not licensed and collared as provided by the act, another dog cannot assume to be "any person," and proceed to execute the law upon a delinquent, and if he does so, his owner will be responsible. *Hiesrodt v. Hackett*, 34 Mich. 283. If one keep a vicious dog, duly licensed, collared and confined, for the protection of the family, he may recover its market value from one who kills it without being attacked by it. *Uhlein v. Cromack*, 109 Mass. 273. But if one suffers his dog to prowl around his neighbor's house at night and annoy the family by howling, he cannot complain if the dog is regarded as a private nuisance and abated as such. *Brill v. Flagler*, 23 Wend. 354. Minks may be killed for the protection of fowls even when the statute does not permit them to be hunted. *Aldrich v. Wright*, 53 N.H. 398.

Connecticut. *Jones v. Sherwood*, 37 Conn. 466. Injury to sheep by dogs. Questions of construction of statute. *Woolf v. Chalker*, 31 Conn. 121. The statute dispenses with proof of *scienter* by defendant of dog's evil disposition.

Iowa. The statute makes the owner of the dog liable to the person injured, unless the latter was doing an illegal act at the time. *Held*, that the owner was liable, though the plaintiff was guilty of contributory negligence. *Shultz v. Griffith*, 103 Ia. 150, 72 N.W. 445, 40 L.R.A. 117. Also that a person harboring a dog was the *owner* thereof within the statute. *Ibid.* See *Sanders v. O'Callaghan*, 111 Ia. 574, 82 N.W. 969.

Kentucky The statute gives punitive damages if the defendant knew of the vicious character of the dog. *Koestel v. Cunningham*, 97 Ky. 421, 30 S.W. 970. Though the statute makes one, who owns, has or keeps a dog, liable for all damages done by it, contributory negligence is held to be a defense. *Bush v. Wathen*, 104 Ky. 548, 47 S.W. 599; *Wooldridge v. White*, 105 Ky. 247, 48 S.W. 1081.

66—To give these statutes would require too much space. The following decisions under them may

[*409] *Where the domestic animals of different owners unite in committing an injury, the wrong is not a joint wrong of the owners, but each owner must be sued separately

Maine. Smith *v.* Montgomery, may be in aggravation of damages; 52 Me. 178. Keeper of dog is to be deemed owner. Grant *v.* Rickert, 74 Me. 487. The member of a firm may be held as keeper of dog owned by firm. Prescott *v.* Knowles, 62 Me. 277. Action does not abate on death of plaintiff. Hussey *v.* King, 83 Me. 568, 22 Atl. 476. No *scienter* necessary.

Massachusetts. Le Forest *v.* Tolman, 117 Mass. 109. Statute giving action for injuries by dogs does not apply to injuries committed out of State. Buddington *v.* Shearer, 20 Pick. 477. Dogs of different owners united in injury, no joint action. McCarthy *v.* Guild, 12 Met. 291. Child injured by dog, parent may bring suit. Sherman *v.* Favour, 1 Allen, 191. Injury by dog frightening horse is within statute. Osborne *v.* Lenox, 2 Allen, 207. Remedy against town for injuries by dogs. Barrett *v.* Malden, &c., R. R. Co., 3 Allen, 101. Question who is to be deemed keeper of a dog. Pressey *v.* Wirth, 3 Allen, 191. Injury by dog; *scienter* need not be proved; computing double damages. Brewer *v.* Crosby, 11 Gray, 29. Remedy given for injury to *any person* includes injury to property. Hathaway *v.* Tinkham, 148 Mass. 85, 19 N. E. 18. Injury done in play is within the statute. Plaintiff must be free from contributory negligence.

Michigan. Swift *v.* Applebone, 23 Mich. 252; Trompen *v.* Verhage, 54 Mich. 304. Action for double damages for bite of dog: *scienter* need not be proved, but

New Hampshire. Orme *v.* Roberts, 51 N. H. 110. Action for double damages; proof of *scienter* dispensed with. Quimby *v.* Woodbury, 63 N. H. 370, but not proof of plaintiff's due care.

New York. Fish *v.* Skut, 21 Barb. 333. Proof of *scienter* dispensed with in case of injury by dogs to sheep. Osincup *v.* Nichols, 49 Barb. 145. If the injury is anything besides killing or wounding the sheep, *scienter* must be proved.

New Jersey. State *v.* Donohue, 49 N. J. L. 548, 10 Atl. 150. That dog is unmuzzled subjects owner to penalty, but is not a ground of action.

Pennsylvania. Kerr *v.* O'Conor, 63 Pa. St. 341. Injury by dogs to sheep; *scienter* need not be proved; if dogs of different owners unite in killing sheep, each owner is liable for all damage. Under an earlier statute, *scienter* was required to be proven. Campbell *v.* Brown, 19 Pa. St. 359.

Ohio. Gries *v.* Zeck, 24 Ohio St. 329. Person bitten by dog; *scienter* need not be proved. McAdams *v.* Sutton, 24 Ohio St. 333. Actions against owners of dogs, which had united in killing sheep, sustained.

Rhode Island. Kelly *v.* Alderson, 19 R. I. 544, 37 Atl. 12. For injury by dog in highway the own-

the *damage done by his own beasts.⁶⁷ But in Ohio [*410] ruling is otherwise.⁶⁸

Injuries by Wild Beasts. Lord HALE says in respect to injuries by beasts that "these things seem to be agreeable to law:

1. If the owner have notice of the quality of his beast, and doth anybody hurt, he is chargeable with an action for it.
2. Though he have no particular notice that he did any such g before, yet if it be a beast that is *ferae naturae*, as a lion, bear, a wolf, yea, an ape or a monkey, if he get loose and do n to any person, the owner is liable to an action for the age, and so I knew it adjudged in *Andrew Baker's Case*, se child was bit by a monkey that broke its chain and got 3.
3. And, therefore, in case of such a wild beast, or in case of ill or cow that doth damage, where the owner knows of it, he t at his peril keep him up, safe from doing hurt, for though

s absolutely liable and no ter is necessary.

rmont. Adams *v.* Hall, 2 Vt.

) Am. Dec. 690. Similar ac- to the last; held not sustain-

Remele *v.* Donahue, 54 Vt. But one owner may be held liable the whole damage.

sconsin. Tenney *v.* Lenz, 16 566. Remedy over against

. Kertschacke *v.* Ludwig, 28 430. Quere, whether statute

nses with proof of *scienter* her cases than those of inju-

to sheep; repeal of statute an end to actions under it.

ller *v.* Connors, 57 Wis. 321. e without *scienter* for dam-

o person or clothes.

—Adams *v.* Hall, 2 Vt. 9, 19 Dec. 690; Buddington *v.*

rer, 20 Pick. 477; Russell *v.* inson, 2 Conn. 206; Van

burgh *v.* Tobias, 17 Wend.

Auchmuty *v.* Ham, 1 Denio,

Partenheimer *v.* Van Order,

20 Barb. 479; Wilbur *v.* Hubbard, 35 Barb. 303; Denny *v.* Correll, 9 Ind. 72; Powers *v.* Kindt, 13 Kan. 74; Cogswell *v.* Murphy, 46 Ia. 44. The doctrine of these cases was approved in Little Schuylkill Nav. Co. *v.* Richards, 57 Pa. St. 142. It was there held that if several persons, by their individual action, without concert, throw rubbish into a stream, which is carried down and deposited on plaintiff's land, they cannot be united in an action brought for this nuisance.

68—McAdams *v.* Sutton, 24 Ohio St. 333; Jack *v.* Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298; Boyd *v.* Watt, 27 Ohio St. 259. If one allows another's cattle to be placed with his own on his part of a common enclosure, he is liable for their trespass. He is *pro hoc vice* their "owner" in such case. Montgomery *v.* Handy, 62 Miss. 16. As to injuries from diseased animals, see *post* p. *563.

he use his diligence to keep him up, if he escape and do harm the owner is liable to answer damages."⁶⁹

If this doctrine is good law at this day, it must be because the keeping of wild beasts accustomed to bite and worry mankind is unlawful. For, if the keeping of such beasts is [*411] not a *wrong in itself, then no wrong can come from it until some wrongful circumstance intervenes; in other words, until there is negligence.

In *May v. Burdett*, an action for an injury by the bite of a monkey was sustained, though no negligence was charged in the declaration.⁷⁰ In Connecticut, this case has been cited as authority to the point that the keeping of a vicious dog, after notice of his evil disposition, is wrongful and at the peril of the owner, "and, therefore *prima facie* the owner is liable to any person injured by such a dog, without any averment or proof of negligence in securing or taking care of it."⁷¹ But admitting the *prima facie* case, may not the keeper show that the animal was kept by him with due care and for some commendable purpose, and that he escaped under circumstances free from fault in him? The keeping of wild animals for many purposes has come to be recognized as proper and useful; they are exhibited through the country with the public license and approval; governments and municipal corporations expend large sums in obtaining and providing for them; and the idea of legal wrong in keeping and exhibiting them is never indulged. It seems, therefore, safe to say that the liability of the owner or keeper for any injury done

69—1 Hale, P. C. 430, pt. 1, c. '1 N. Y. 515; *Laverone v. Mangianti*, 41 Cal. 138.
23. See Bull. N. P. 77.

70—*May v. Burdett* 9 Q. B. (N. S.) 101. The decision in this case seems to be that the keeper of such an animal is *prima facie* responsible for the injuries done by it, but it is not decided that he may not meet the case by showing that he observed in respect to it proper care. See *Rex. v. Huggins*, Ld. Raym. 1583; *Besozzi v. Harris*, 1 F. & F. 92; *Van Leuven v. Lyke*,

71—*Woolf v. Chalker*, 31 Conn. 121, 130; *Laverone v. Mangianti*, 41 Cal. 138, 10 Am. Rep. 269; *Brooks v. Taylor*, 65 Mich. 208, 31 N. W. 837. So of a buck, kept in a park, which was not thoroughly tame. *Spring Co. v. Edgar*, 99 U. S. 645. And of a race horse. *Bell v. Leslie*, 24 Mo. App. 661, and cases p. *404 n. 1.

by them to the person or property of others must rest on the doctrine of negligence. A very high degree of care is demanded of those who have them in charge, but if, notwithstanding such care, they are enabled to commit mischief, the case should be referred to the category of accidental injuries, for which a civil action will not lie.⁷²

In a suit for injuries by an elephant, it was held by the Queen's Bench that one who keeps such an animal does so at his risk and is liable for any injury. BOWEN, L. J., says: "If, from the experience of mankind, a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damages it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal which he keeps is likely to

72—See, for some discussion of this subject, *Earl v. Van Alstine*, 8 Barb. 630, which was an action against the owner of bees for an injury inflicted by them upon plaintiff's horses as they were passing along the highway. It was held the defendant was not liable unless he had notice that the bees were accustomed to such mischief. See, also, *Canefox v. Crenshaw*, 24 Mo. 199, 69 Am. Dec. 427. It is no defense to claim for death by attack of a bear that he was partly tame, nor that he was provoked to attack by teasing of some person other than his victim. *Vredenburg v. Behan*, 33 La. Ann. 627.

As to the law respecting the keeping of wild beasts, we should say that the higher cultivation of the intellect of the mass of the people, as compared with two or

three centuries ago, and the recognition of wants in human nature then ignored, must have worked some changes, and that we must take up the common law of that period in this as in many other particulars more to locate accurately our point of departure than to fix definitely a stake to which we must tie and adhere. When wild animals are kept for some purpose recognized as not censurable, all we can demand of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him.

Where a horse is frightened by the mere appearance of an elephant, and mischief ensues, the owner of the elephant is not responsible. *Scribner v. Kelley*, 38 Barb. 14.

do mischief.'"⁷³ The keeper of a zoological park is not liable for injury by an escaped animal, unless he was negligent.⁷⁴ The rule of absolute liability for the keeping of wild animals is held not to apply to bees.⁷⁵ In the case cited, the defendant was held to be negligent in placing bee hives within twenty-five feet of a hitching post in the highway, and was held liable for the loss of horses stung to death while hitched to the post. The court expressed the view that the true basis of liability for injuries by wild animals is negligence and that the degree of care to be exercised varies with the natural propensities of the animals.⁷⁶

73—*Filburn v. People's Palace*, 283, 62 L. R. A. 132. See note on etc., Co., 25 Q. B. D. 258.

the liability of owners of bees

74—*Jackson v. Baker*, 24 App. Cas. D. C. 100. And see Congress

for injuries done by them in 62

& S. Spring Co. v. Edgar, 99 U. S. 651, 25 L. Ed. 487; *Marquet v. La Duke*, 96 Mich. 596, 55 N. W. 1006.

L. R. A. 132.

75—*Parsons v. Mauser*, 119 Ia. 88, 93 N. W. 86, 97 Am. St. Rep.

76—And see *Bostock-Ferari Amusement Co. v. Brocksmith*, 34 Ind. App. 566, 73 N. E. 281, 107 Am. St. Rep. 213.

INJURIES TO INCORPOREAL RIGHTS.

Incorporeal rights are said to exist merely in idea and abstract contemplation, though as regards many of them their effects, in which consists their value, are objects cognizable by the bodily senses. In the classification of property as real or personal, some of these rights are designated incorporeal hereditaments, either because they are or may be inheritable, or because they issue out of or are annexed to, or exercisable within corporeal hereditaments. Thus, at the common law offices, dignities, franchises, pensions and annuities may all be inheritable, and so may be the right to rents, and the right in the owner of one estate to pass and repass over the estate of his neighbor for the convenient enjoyment of his own. All these rights, it is perceived, are intangible rights; the right to rents is not a right in certain pieces of money, but it is a right to receive periodically a certain sum of money; and it is the satisfaction of the right to rents that creates the right in the money received thereby. All such rights have or may have a money value, and they are, therefore, with entire propriety, considered as property rights.

Rights corresponding to these may exist which are only personal property, since they are neither inheritable, nor are they in any manner connected with the realty. Among the chief of these is the right which one has to the productions of his intellect.

Copyrights and Patents. The governments of civilized countries have deemed it wise to make provision whereby the interests of authors and inventors may be subserved by securing to them for a certain length of time a monopoly in the publication or reproduction of that which they have produced, invented, or designed. This is done by copyright and patent laws,

[*414] *all of which name certain conditions, which, when complied with, will entitle the author, inventor, or designer to remedies by means of which he may protect himself in his monopoly during the period to which by law it is limited. The conditions in the case of a book, writing, or design are:

That the applicant for a monopoly be the author or designer, or the assignee thereof, and that he shall have applied for copyright in due form of law, and conformed to the requirements made for the application, one of which usually is, the payment of a small fee, and another the delivery of a copy to some national institution or library. In general, also, it is required that the applicant be a citizen, or at least a resident of the country.

The conditions in the case of an inventor are:

That the invention be new; that it be useful, and that, as in the case of books, writings, etc., all legal formalities be complied with.

When these appear, the proper certificate or patent is issued as evidence of the right, and the violation of the monopoly becomes a legal wrong, which is punished by penalties, or by the recovery of damages, or, perhaps, by both. But the legal protection will fail if it shall turn out that the book, design, etc., purporting to be original was not so in fact, or that the invention was not new. Such a monopoly, of course, cannot extend beyond the limits of the sovereignty granting it, though other countries, if they see fit, as they sometimes do, in consideration of reciprocity, may give a similar monopoly within their own limits.

Inventions not Patented. It may be, however, that the author or inventor will apply for no monopoly, and it then becomes important to know whether the common law recognizes in him any property in the productions of his intellect, and whether it affords him any redress in case his rights therein are disregarded. In touching upon this subject, it will be advisable to consider separately the case of inventions, because, as between these and the others mentioned, the law appears to have made distinctions, and there are grounds on which distinctions may very justly be supported. It seems to be proved, by observation, that the most

*striking and valuable inventions are approached gradually, and that often the merit of the inventor consists only in this: That he has first discovered and brought into use what, had he never lived, would only a little later have been discovered and brought into use by some one else. Often, indeed, the very greatest difficulty is encountered in determining with accuracy who is entitled to the merit of an invention, and a controversy arises which is contested before juries upon disputed facts. The difficulty of reaching a correct conclusion is very greatly increased if an invention is suffered to come into use before the title to it is claimed and passed upon by the proper authorities. Therefore the law refuses to recognize property in an invention after the inventor has suffered it to be published to the world without making, in the manner pointed out by law, a claim on his own behalf to an exclusive property therein.¹ In so doing it certainly escapes many difficulties, without at the same time imposing upon the inventor any unreasonable hardship. If he desires to secure and retain a property in the production of his genius or skill, it is not unreasonable to require that he shall formally claim it; and if, instead of doing so, he voluntarily allows his invention to come into use, he cannot complain of the presumption the law then makes that his purpose has been to make a gift of his invention to the world.² Where, however, he has simply delayed applying for letters patent until another has made the discovery known, or even brought it into use, this will not prevent the first discoverer securing his monopoly afterwards; for even if there be two independent discoveries, only the first is entitled to take out letters patent which shall protect him.³ But there is no monopoly until the letters are obtained.

1—*Bedford v. Hunt*, 1 Mason, 302; *Shaw v. Cooper*, 7 Pet. 292. Inventor has a property right in an unpatented invention which he

2—*Whittemore v. Cutter*, 1 Gall. 478; *Pennock v. Dialogue*, 2 Pet. 1; *Wyeth v. Stone*, 1 Story, 273; 2 Kent, 369, note. may assign with the right to a patent and which is sufficient to support a promise to pay royalty before as well as after a patent is obtained.

3—*Woodcock v. Parker*, 1 Gall. 438; *Bedford v. Hunt*, 1 Mason, 302; 2 Kent, 369, note. An in- Bezer *v. Hall Signal Co.*, 22 App. Div. 489, 48 N. Y. S. 203. If one sells an unpatented inven-

Literary and Artistic Productions. With writings, pictures, etchings, etc., it is different.⁴ The author of a particular [*416] book *does not anticipate any one else when he produces it. Of any important original work, it may confidently be affirmed that if the author had not produced it no one else would have done so. The author may have made use of ideas that would have occurred to and perhaps been used by others, but persons working independently would never produce the same identical book or picture, though they might, perhaps, reach the same identical discovery, and apply it in useful machinery. Moreover, disputes respecting the authorship of contemporary literary productions can seldom arise, or be troublesome when they do, and therefore no special embarrassment is experienced when a common law right in literary productions and works of art is recognized.

Still here, as in the case of inventions, no monopoly in publications is secured, except by compliance with the statute. But an author may keep his production by him indefinitely, and though others may see it, or hear it, or become familiar with it, they are not at liberty to publish it without his consent. As was said in the leading case of *Wheaton v. Peters*, "That an author,

tion to another and agrees that it shall belong to the vendee as a trade secret, he will be enjoined manufacturing the invention for sale or from disclosing the secret to others. *Westervelt v. National Paper & Supply Co.*, 154 Ind. 673, 57 N. E. 552.

4—A photograph may be copyrighted if it represents an original intellectual conception. *Lithographic Co. v. Sarony*, 111 U. S. 53. The man who takes it is the author. His employer cannot copyright it. *Nottage v. Jackson*, L. R. 11 Q. B. D. 627. So a painting which might readily be lithographed may be copyrighted. *Schumacher v. Schwenke*, 25 Fed. Rep. 466. But if an artist sells his picture absolutely, the pur-

chaser may reproduce it by lithography. *Parton v. Prang*, 3 Cliff 537. One who has made an electrotype copy of an important, substantial and material part of an illustrated copyrighted newspaper, and sold the plate to the proprietor of another paper published in the same city, knowing that it would be published therein, is liable as joint tort feasor just as if he had published it himself. *Harper v. Shoppell*, 28 Fed. Rep. 613. As to what is a design under Statutes 46 and 47 Vic. c. 57, see *LeMay v. Welch*, L. R. 28 Ch. D. 24. As to protection of plates and engravings in copyrighted books, see cases in brief printed in the report and the opinion, *Maple v. Junior, &c., Stores*, L. R. 21 Ch. D. 369.

at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted.⁵ He has no occasion to take out a copyright until publication, and he may therefore control his own productions and publish them or not, at his option; while an inventor, if he declines to take out a patent, cannot prevent others, who may have knowledge of his invention, from making use of it. A telegraph company is held to have a property right in market quotations which it has gathered, and sending them to its customers by tickers is held not to be a publication.⁶ *When, however, an author or an artist [*417] publishes his production, he is supposed to abandon it to the public, and he thereby licenses the public to reproduce copies indefinitely. The word publication, it should be remarked, is here employed in a somewhat narrow sense; certainly not in the broad sense which it bears in the law of libel and slander. A letter written by one person and delivered to another to be read, is publication of a libelous charge contained in it; but one may exhibit his literary productions to one person or many, without abandoning his rights therein as author, where such has not been his intention. A publication, to constitute an abandonment, must be literally one which puts the production before the general public. A teacher does not publish an original work in his department of study by instructing his pupils in its principles.⁷ Neither does a photographer publish his photograph by loaning

5—MCLEAN, J., *Wheaton v. Peters*, 8 Pet. 591, 657. See *Bartlett v. Crittenden*, 5 McLean, 32; *Ibid.*, 4 McLean, 300; *Bouicault v. Fox*, 5 Blatch., 87, 97; *Keene v. Clarke*, 5 Rob. (N. Y.) 38; *Palmer v. De Witt*, 40 How. Pr. 293; *Stern v. Rosey*, 17 App. D. C. 562; *Holmes v. Hurst*, 174 U. S. 82, 85.

6—*National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 56 C. C. A. 198; *Illinois Commission Co. v. Cleveland Tel. Co.*, 119 Fed. 301, 56 C. C. A. 205. Where a commercial agency printed a book containing information as to jewelers in the United States, and loaned it to subscribers on condition that the information should be treated as confidential, and returned at the end of the loan, but anyone could become a subscriber, it was held to be a publication. *Jewellers' Mercantile Agency v. Jewellers' Publishing Co.*, 155 N. Y. 241, 49 N. E. 872, 63 Am. St. Rep. 666, 41 L. R. A. 846.

7—*Bartlett v. Crittenden*, 4 Mc-

a copy to a friend;⁸ nor an author abandon his play to the public by allowing it to be publicly acted.⁹ In short, the writer of any

literary, dramatic, or musical composition or work of art
[*418] *is entitled of right to give it a restricted publication,

and to be still protected in his property, provided he gives evidence of a clear intent to make his publication a restricted one only. The right to the first general publication belongs to him; he may enjoin any attempt to take it from him; and if he see fit to do so, he may refuse any publication whatever. Nor is his death an abandonment of the right to publish, but his representatives may exercise and control it afterwards. Moreover, this common law right is not local, but would be protected in any country where the common law prevails, and probably wherever the civil law prevails also.

If the author elects to publish, and secures his copyright, this copyright may be violated by the republication of the whole or any distinct part thereof *verbatim*, by the publication of an abridgment, or by reproducing the whole or a part, with such alterations or disguises as are calculated and designed to give it

Lean, 300; S. C. 5 McLean, 32. the composition publicly. Chap-
While one may take notes at a
public lecture he may not publish
the lecture from them for profit.
Nicols v. Pitman, L. R. 26 Ch. D.,
374.

8—Mayall v. Higbey, 1 H. & C. 148.

9—Macklin v. Richardson, Amb. 694; Boucicault v. Fox, 5 Blatch. 87; Palmer v. De Witt, 40 How. Pr. 293. See Thomas v. Lennon, 14 Fed. Rep. 849; Goldmark v. Kreling, 25 Fed. Rep. 349. If an owner does not intend to dedicate the whole of a literary production the public may use only what he does dedicate. Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177. Publication, as a book, of songs and music before a public representation does not deprive the author of his sole right to perform

pell v. Boosey, L. R. 21 Ch. D. 232. But, see, The "Iolanthe" Case, 15 Fed. Rep. 439. One infringes the right of the owner of an unpub-
lished play if he attends a repre-
sentation, commits it to memory,
and afterwards writes it out and
presents it. Tompkins v. Halleck,
133 Mass. 32, 43 Am. Rep. 480.
Overruling Keene v. Kimball, 16 Gray, 545, 77 Am. Dec. 426. If all
of an opera but the orchestral
score and a piano score is pub-
lished, no part of the dramatic
properties remains, and another
may write an orchestral score for
it and produce the opera, provid-
ed it is not produced as having the
original orchestration. The "Mika-
do" Case, 25 Fed. Rep. 183. The
"Iolanthe" Case, 15 Fed. Rep. 439,
disapproving Thomas v. Lennon,

the character of a new work.¹⁰ In some cases it is a very nice question what amounts to a piracy of a work. "Thus, if large extracts are made therefrom in a review, it might be a question whether those extracts were designed to be *bona fide* for the mere purpose of criticism, or were designed to supersede the original work under pretense of a review, by giving its substance in a fugitive form. The same difficulty may arise in relation to an abridgment of an original work. The question in such a case must be compounded of various considerations; whether it be a *bona fide* abridgment, or only an evasion by the omission of some unimportant parts; whether it will, in its present form, *prejudice or supersede the original work; [*419] whether it will be adapted to the same class of readers; and many other considerations of the same sort which may enter as elements in ascertaining whether there has been a piracy or not. Although the doctrine is often laid down in the books that an abridgment is not a piracy of the original copyright, yet this proposition must be received with many qualifications. In many cases the question may naturally turn upon the point, not so

14 Fed. Rep. 849. See, further, Aronson *v.* Fleckenstein, 28 Fed. Rep. 75; Carte *v.* Evans, 27 Fed. Rep. 861; Fairlie *v.* Boosey, L. R. 4 App. Cas. 711. The free representation of a dramatic composition for the entertainment of nurses, &c., in a hospital is not a public representation and is no infringement of copyright. Duck *v.* Bates, L. R. 13 Q. B. D. 843.

10—Curtis on Copyrights, 238. To constitute infringement there must be a substantial copy of the whole or a part of a production. A map of Philadelphia made on the same plan as a map of New York does not infringe a copyright of the latter. Perris *v.* Hexamer, 99 U. S. 674. The copyright of a work on book-keeping confers no exclusive right to make, sell, and

use blank account books prepared on the plan set forth in such book. Baker *v.* Selden, 101 U. S. 99. An author has in the title or particular marks which designate his book a property like a trade mark and a court will protect him from infringement, and if the title and general appearance of another book is likely to mislead, its publication may be restrained. Metzler *v.* Wood, L. R. 8 Ch. D. 606; Robertson *v.* Berry, 50 Md. 591, 33 Am. Rep. 338; Estes *v.* Leslie, 27 Fed. Rep. 22. But after publication without copyright the author cannot restrain publication on the ground that he published under a *nom de plume*, which is entitled to protection like a trade mark. Mark Twain Case, 14 Fed. Rep. 728.

much of the quantity as of the value of the selected materials."¹¹ But a new plan, arrangement and illustration of old materials may not only be no piracy, but may entitle the author thereof to a copyright, as in the case of scientific works.¹² So may the translation of an original work.¹³

An author's rights in his publications may be injured in other ways than by pirating them. Thus, he may be libelled in respect to them, or the books themselves may be libelled by false state-

ments,¹⁴ and suggestions regarding their purpose or [^{*420}] tendency, *their originality or truthfulness, or by gar-

bled extracts or perversions of language or meaning in criticism. To publish, for example, that a work purporting to be original was, in fact, a translation, or was largely made up of plagiarisms, would, if false, be libelous, because it would not

11—*Gray v. Russell*, 1 Story, 11, 19, citing *Bramwell v. Halcomb*, 3 Myl. & Cr. 737; *Saunders v. Smith*, 3 Myl. & Cr. 711; *Wheaton v. Peters*, 8 Pet. 591. And, see *Folsom v. Marsh*, 2 Story, 100. An abridgment in which there is a substantial condensation of the original requiring intellectual labor and judgment is not an infringement. A mere selection or different arrangement of facts is not such abridgment, nor is a reprint of the text with notes by a new editor. *Lawrence v. Dana*, 4 Cliff. 1. One infringes a copyright who incorporates in a key material parts of a text book although the key may not be intended to supersede the book. *Reed v. Holliday*, 19 Fed. Rep. 325. Compiling from a telegraph cipher code a new one for private use is an infringement if most of the words are used, though with new meanings attached. *Ager v. Penin, &c., Co.*, L. R. 26 Ch. D. 637.

12—*Emerson v. Davies*, 3 Story, 768, citing *Lewis v. Fullarton*, 2

Beav. 6. So as to dramatic works. *Aronson v. Baker*, 43 N. J. Eq. 365, 12 Atl. 177. A compiler of statutes may be entitled to copyright on account of his skill in combination and analysis, but not for the publication of the laws merely. *Davidson v. Wheelock*, 27 Fed. Rep. 61. Law reporters have no copyright in portions of reports prepared by judges. *Chase v. Sanborn*, 4 Cliff. 306; *Banks v. Manchester*, 23 Fed. Rep. 143. Cannot prevent advance publication of reports. *Banks v. West Pub. Co.*, 27 Fed. Rep. 50.

13—*Stowe v. Thomas*, 2 Wall. Jr., 547. See *Shook v. Rankin*, 6 Biss. 477.

14—The plaintiff sold his copyright to defendant. The latter brought out a new edition, not edited by plaintiff, though purchasers would naturally suppose it was. The edition contained mistakes and errors. Such a publication, calculated to injure the reputation of the author, is actionable. *Archibald v. Sweet*, 5 C. & P. 219.

only be likely to affect injuriously the sale of the book, but would injure the reputation of the author also. So would an insinuation based on unfair deductions or garbled extracts, that its purpose or tendency was to inculcate bad morals.¹⁵ Fair criticism is allowable, but the author is entitled to substantial redress when malice inspires unjust and untruthful comments.¹⁶

Private Letters. Private letters often have a value for publication, and the question who, as between the writer and receiver, has the right to control their publication is sometimes the subject of litigation. For the purpose of an examination of the questions which may come up in such cases, letters may be classified as having value, pecuniarily or otherwise, as follows:

1. As literary productions.
2. As historical documents.
3. As evidence of facts important to individuals.
4. As a means of personal vindication to the writer or receiver.
5. As a means of inflicting injury on the writer or receiver.
6. As autographs.

Under the head of letters valuable as literary productions should be classed all those letters which, from their intrinsic literary merits, it might be deemed desirable to publish under an expectation of profit. Such were the letters of Horace Walpole, of Lord Chesterfield to his son, and many others. As regards the right to make use of such letters, the rule of law appears to be well settled. The literary property in them and the right to determine their publication is in the writer, not the receiver. This is so unless they are transmitted to the party addressed under circumstances from which may fairly be implied an understanding that he is to be at liberty to make use of them for publication; in other words, that they are given to [*421] him for that purpose.¹⁷

But though the property is in the writer, it is not clear how,

15—See *Reade v. Sweetzer*, 6 434; S. C. in error, 2 Denio, 293; Abb. Pr. (n. s.) 9, note. Macleod *v. Wakley*, 3 C. & P. 311.

16—*Cooper v. Greely*, 1 Denio, 347; *Cooper v. Stone*, 24 Wend. 17—*Pope v. Curl*, 2 Atk. 342.

under all circumstances, he is to avail himself of it. The decision in *Pope v. Curl* was that he might enjoin the publication by the receiver, but it was not said that he might recall the letters from the receiver for the purpose of publishing himself. Nor could such a doctrine be sanctioned. When one writes and sends a letter, he at least parts with the property in the paper on which the letter is written, and there is no implied reservation of a liberty to recall it. If the writer has retained copies, he has the means of making his literary property available; but if not, he would be powerless to obtain them by any legal process.

Where letters have a value as historical documents, they are likely also to possess what must be considered a literary value; that is, a value for publication with a view to profit. As such, they of course come under the preceding head. But it is not believed the literary property of the writer in them would prevent the receiver making use of them as historical evidence, or allowing others to make use of them for that purpose.

Where letters are of value only as they give evidence of private transactions which may become the subject of a legal controversy, the writer cannot be regarded as having in them any property whatever. He may compel their production as evidence in court whenever they will assist him in his suits, but so may any other person upon whose business transactions they may throw light. The property in such letters so far as there is any, must be in the receiver; the writer having only a contingent interest in them for the purposes of his litigation, but not a right that would prevent any disposition the receiver might see fit to make of them.

If the value of the letter consists in the means it may afford for the vindication of the writer against any unfounded charge, he is also without the power to make it available, except as the preservation of a copy may aid him. But the receiver may make use of them for his own vindication, subject, however, to the ordinary responsibility for libel in case he shall publish what shall prove untrue and defamatory respecting others.

As is intimated above, the method of protecting literary property in letters is usually by enjoining their publication by the receiver. This, it is true, is an im-

perfect remedy; it prevents others from making profit from their publication, but it does not enable the writer himself to obtain possession of them. It has been decided in New York that chancery will not enjoin the publication of private letters unless they possess a literary value.¹⁸ It was also held that if the contents of the letter were such that it could not be supposed the writer would consent to its publication, the conclusion must be that the letter has no value as a literary production.¹⁹ But this seems a remarkable *non sequitur*, especially as in the very case in which the decision was made the defendant had published the plaintiff's letters, surreptitiously obtained, expecting to derive a profit therefrom.²⁰ Mr. Justice STORY has strongly contended for the jurisdiction of equity to restrain the publication of private letters on the ground of violation of confidence and injury to the feelings;²¹ and this seems much the more sensible doctrine, and it receives countenance from cases cited in the margin.²²

18—*Wetmore v. Scovel*, 3 Edw. Ch. 515; *Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 49 Am. Dec. 178.

19—*Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 49 Am. Dec. 178.

20—The diary of PEPYS, so interesting and of such historical value, was carefully written down in a cipher supposed to be unintelligible to others, in order that the presentation of weaknesses and foibles there made might be concealed from the world; but its value is increased by the very circumstances that then induced the secrecy.

The doctrine of Chancellor WALTERS, in *Hoyt v. McKenzie*, involves the following conclusions as regards letters surreptitiously obtained, and which the purloiner proposes to publish:

1. The writer cannot restrain their publication where, from an inspection of their contents, it satisfactorily appears that the writer himself would not voluntarily have published them.

2. The receiver cannot restrain it, because his property is only in the paper on which the letters are written, and publication of copies will not affect that.

3. Third persons who might be injured cannot restrain it, because the only interest they can have is to be protected against defamation, and it is settled that courts will not enjoin the publication of defamatory matter, but will leave that to be dealt with after it is published. See *Gee v. Pritchard*, 2 Swanst. 402; *Brandreth v. Lance*, 8 Paige, 24, 34 Am. Dec. 368. Therefore nobody can restrain the lawless action of one who purloins the private letters of others and proposes to publish them.

For a case in which the publication of libelous matter was enjoined, see *Dixon v. Holden*, L. R. 7 Eq. 488.

21—2 Story, Eq. Juris. §§ 946-948.

22—*Woolsey v. Judd*, 4 Duer, 379; *Eyre v. Higbee*, 35 Barb. 502;

[*423] *Where a letter is valuable only as a curiosity or as an autograph, the property must be in the receiver. But we should say the receiver was under no obligation to treat such letters as a part of his general estate. They are to be made use of as property only at his option; they cannot be taken from him on execution or demanded from him by an assignee in bankruptcy.²³ Nobody can be compelled to make market wares of his private letters merely because they would sell in market. At his death they would be family papers which his administrator could not of right demand.²⁴ But it should be different with autographs which have been bought for a collection. If one has put his money in them, and no matter of personal confidence as between himself and the writer is involved, they ought to be regarded, as any other collection of curiosities might be, as constituting a part of the owner's general estate, and as being subject to all the incidents of personal property in general.

Wrongs in Respect to Trade Marks. Persons engaged in a reputable business, and who purpose to build up a good will therein which shall be valuable, usually carry on their business under some particular name or designation that soon becomes known, and constitutes an assurance to the public that those making use of the name or designation in that business continue to carry it on in the customary way. So a manufacturer adopts a device or label for his wares, intending thereby to distinguish them from all others, and the public who have been accustomed to deal with him purchase the article with this device or label, understanding that in doing so they are purchasing the same article to which the device or label has before been affixed. So a newspaper or magazine has its title, and a coach may be painted and named for a particular route, upon which the pub-

Grigsby *v.* Breckinridge, 2 Bush, 480, 92 Am. Dec. 509.

23—See Thompson *v.* Stanhope, Amb. 737; Gee *v.* Pritchard, 2 Swanst. 402; Earl of Grannard *v.* Dunkin, 1 Ball & B. 207.

24—See the case of Tobias Lear's Letters, Eyre *v.* Higbee, 35 Barb. 502. It is held in this case that

the administrator has no right to take possession of and sell the

private letters of his intestate. Also, that as between the heir and the widow, long possession of the letters by the latter after the husband's death will justify a presumption that they were given to her.

lie will understand it is to run, and will not after a time need to have the fact otherwise advertised.

Whatever name, designation, label, or device has thus in any^{*} manner been appropriated by a person or association [*424] of persons engaged in any lawful business becomes a trade mark, in the use of which he or they are entitled to be protected. The right to protection springs from two circumstances: *First.* That by adopting and making use of the trade mark a property right has been acquired therein which is valuable; and, *Second.* That another in making use of it practices a fraud, not only upon the public, who are thereby deceived into purchasing one article when they suppose they are getting another, but also upon the proprietor or proprietors of the trade mark, whose own dealings with the public are likely to be limited in proportion as the public are induced to deal with the fraudulent appropriator.²⁵ Therefore the law will protect the proprietor of a trade mark, not only by enjoining the use of it by another, but by giving damages for the violation of the right to its exclusive use.²⁶ A

25—*Davis v. Kendall*, 2 R. I. 556; *Walton v. Crowley*, 3 Blatch. 440; *McCartney v. Garnhart*, 45 Mo. 593, 100 Am. Dec. 397; *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275; *Amoskeag Manuf. Co. v. Spear*, 2 Sandf. 599; *Apollinaris Co. v. Scherer*, 27 Fed. Rep. 18. To constitute a trade mark the mark or symbol must have been adopted and used to designate origin; if it is used for some other purpose and only incidentally shows origin it is not a good trade mark. *Deering Harvester Co. v. Whitman & Barnes Mfg. Co.*, 91 Fed. 376, 33 C. C. A. 558. See also *Lawrence Mfg. Co. v. Tenn. Mfg. Co.*, 138 U. S. 537, 11 S. C. Rep. 396, 34 L. Ed. 997. One cannot create a trade mark except by use in the manufacture or sale of an article. Consequently one cannot by a contract confer the right to use certain words as a trade mark, if he has never used them as such himself. *Jeeger's Sanitary Woolen System Co. v. Le Boutellier*, 47 Hun, 521. 26—High on Injunctions, 673; *Hirst v. Denham*, L. R. 14 Eq. Cas. 542; S. C. 3 Moak, 833; *Coffeen v. Brunton*, 4 McLean, 516; Congress, &c., *Spring Co. v. Highrock, &c.*, *Spring Co.*, 45 N. Y. 291, 6 Am. Rep. 82; *Stonebreaker v. Stonebreaker*, 33 Md. 252; *Perry v. Truefitt*, 6 Beav. 66; *Waterman v. Shipman*, 130 N. Y. 301, 29 N. E. 111; *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337, 67 N. E. 722; *Pratt's Appeal*, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676; *Robinson v. Storm*, 103 Tenn. 40, 52 S. W. 880. The general principles governing the protection of trade marks cannot be better stated than in the language of an English decision: “The principle upon which relief

trade mark consists of a word, mark or device adopted by a manufacturer or vendor to distinguish his productions from other productions of the same article. "It must indicate, to those familiar with its use and purpose, by or for whom the article

is given in these cases is that one man cannot offer his goods for sale, representing them to be the manufacture of a rival trader. Supposing the rival to have obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price which the public are willing to give for them, rather than for goods of other manufacturers whose reputation is not so high. Where, therefore, a manufacturer has been in the habit of stamping the goods which he has manufactured with a particular mark or brand, so that thereby persons purchasing goods of that description know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp. By so doing he would be substantially representing the goods to be the manufacture of the manufacturer who had previously adopted the stamp or mark in question, and so would or might be depriving him of the profit he might have made by the sale of the goods which, *ex hypothesi*, the purchaser intended to buy.

"The law considers this to be wrong towards the person whose mark is thus assumed, for which wrong he has a right of action, or, which is the more effectual remedy, a right to restrain by injunction the wrongful use of the mark thus pirated.

"It is obvious that, in these

cases, questions of considerable nicety may arise as to whether the mark adopted by one trader is or is not the same as that previously used by another trader complaining of its illegal use, and it is hardly necessary to say that, in order to entitle a party to relief, it is by no means necessary that there should be absolute identity.

"What degree of resemblance is necessary from the nature of things, is a matter incapable of definition *a priori*. All that courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled.

"It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use." *Seixo v. Provezende*, L. R. 1 Ch. App. 191, 195. See, also, *McLean v. Fleming*, 96 U. S. 245.

For further cases, reference is made to *Wolfe v. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111; *Gillott v. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553; *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401; *Boardman v. Meriden, &c., Co.*, 36 Conn. 207; *Morrison v. Case*, 9 Blatchf. 548; *Stonebraker v. Stonebraker*, 33 Md. 252; *New Haven, &c., Co. v. Farren*, 51 Conn.

was made, produced, or prepared for sale. If such be not its purpose and meaning, it fails of being a legal trade mark. The right to it cannot exist as a mere abstract right, independent of or disconnected from the business in which it is used. It is not property, except as an incident to such business. It cannot be transferred, except with the business.^{26a} It is held that a trade mark which is not in some manner attached or affixed or stamped on the article indicated by it involves a contradiction in itself, the idea of some distinctive brand or mark being inherent in the expression itself.^{26b} The plaintiff discovered a new kind of candy which he called "What is it?" The name, however, was used only on the cards, posted in the plaintiff's store, and was not stamped on the candy nor was the candy put up in packages bearing the name. It was held not to be a trade mark.^{26c} "A symbol or label claimed as a trade mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained."²⁷ This principle is well illustrated by the following case: The plaintiff company had a mine of iron ore known as the "Prince Mine," the ore from which it used in the manufacture of a metallic paint known as "Prince's Metallic Paint," which it represented and warranted was made from ore taken from the Prince Mine. Afterwards the plaintiff acquired other similar mines, from which it also manufactured metallic paints and on which it used the same label, thus falsely representing

In the United States trade marks may be patented, and to take out letters patent may be a convenient way of avoiding difficulties. For the law, and decisions under the same, see Bump. on Patents, etc., 343. Filing a device or trade mark in the patent office is futile unless it is afterwards actually used as such. Siegert *v.* Abbott, 72 Hun, 243, 25 N. Y. S. 590.

Congress has no general power over trade marks as it has over patents. Its power is limited to marks as used in foreign or inter-

state commerce or that with Indian tribes. Trade Mark Cases, 100 U. S. 82; Schumacher *v.* Schwenke, 26 Fed. Rep. 818.

26a—Cigar Makers' Protective Union *v.* Conham, 40 Minn. 243, 245, 246, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125.

26b—Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467.

26c—Ibid.

27—Holzapfel's Comp. Co. *v.* Rahtjen's Am. Comp. Co., 183 U. S. 1, 22 S. C. Rep. 6, 46 L. Ed. 49.

that all its paints were made from ore taken from the Prince Mine. In a suit to enjoin an infringement of its trade mark and labels, relief was denied because of this fraudulent use of the same.²⁸

The right to a trade mark is not lost by a temporary discontinuance of its use, if there is no intent to abandon it. The defendant used the word "Knickerbocker" as a trade mark in connection with boots and shoes manufactured and sold by him in Massachusetts. His factory was burned down and, after working for others for four years, he resumed business on his own account, with a factory in New Jersey, and made use of the same trade mark. Meantime the plaintiff had used the word as a

28—*Prince Mfg. Co. v. Prince's* mark is a guaranty, and then without advising the public, substitute another material and sell that upon the credit of the true article, and justify the false use of the trade mark or label on the ground of similar quality. . . . And although the false article is as good as the true one, 'the privilege of deceiving the public even for their own benefit is not a legitimate subject of commerce.' pp. 37-39. To the same effect: *Lemke v. Deitz*, 121 Wis. 102, 98 N. W. 936; *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 23 S. C. 161, 47 L. Ed. 282; *California Fig Syrup Co. v. Putnam*, 69 Fed. 740, 16 C. C. A. 376; *California Fig Syrup Co. v. Frederick Stearns & Co.*, 73 Fed. 812, 20 C. C. A. 22. But the rule does not apply to an immaterial false statement. *Tarrant & Co. v. Hoff*, 76 Fed. 959, 22 C. C. A. 644; *Gluckman v. Strauch*, 99 App. Div. 361, 91 N. Y. S. 223. Words which assert a physiological impossibility, such as "One night cough cure," will not be protected as a trade mark. *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572, 8 C. C. A. 215.

trade mark in the same business. A bill to enjoin defendant's use of the trade mark was dismissed.²⁹

[*425] ***What May Be a Trade Mark.** In general, a man may adopt for a trade mark whatever he chooses; but when he asserts and seeks to enforce exclusive right therein, it becomes necessary to ascertain whether it is just to others that this be permitted. If the name, device, or designation is purely arbitrary or fanciful and has been first brought into use by him, his right to the exclusive use of it is unquestionable.³⁰ But the mere designation of a quality, as "nourishing,"

29—*Burt v. Tucker*, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112. See *post*, p. 732, note 49.

30—As the "New Era" newspaper; *Bell v. Locke*, 8 Paige, 75. See, also, *Hogg v. Kirby*, 8 Ves. 215; *Maxwell v. Hogg*, L. R. 2 Ch. App. 307; "Dr. Johnson's Yellow Ointment," *Singleton v. Bolton*, 3 Doug. 293; The "Vegetable Pain Killer," *Davis v. Kendall*, 2 R. I. 566; "Congress Spring," Congress, &c., Spring Co. v. High Rock, &c., Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; "Eureka Shirt," *Ford v. Foster*, L. R. 7 Ch. App. 611; "What Cheer House," *Woodward v. Lazar*, 21 Cal. 448, 82 Am. Dec. 751; "Revere House," as the designation of a coach to run to that house; *Marsh v. Billings*, 7 Cush. 322, 44 Am. Dec. 723; "Roger Williams Long Cloth," *Barrows v. Knight*, 6 R. I. 434, 78 Am. Dec. 452; "Sliced Animals," as applied to toys, *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169; "Alpine," as applied to textile fabrics, *In re Trade Mark "Alpine,"* L. R. 27 Ch. D. 879; "Pride," to cigars; *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; "Anti-Washboard," to soap; *O'Rourke v. Centr. City Soap Co.*, 26 Fed. Rep. 576; Number "523" in connection with other devices to show origin of goods; *Lawrence, &c., Co. v. Lowell, &c., Mills*, 129 Mass. 325; "Marvel," as applied to flour; *Listman Mill Co. v. Wm. Listman Mill Co.*, 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907; "Ideal," to fountain pens, *Waterman v. Shipman*, 130 N. Y. 301, 29 N. E. 111; "Nickel-In," applied to a brand of cigars, *Schendel v. Silver*, 63 Hun, 330, 18 N. Y. S. 1; "Pride of Rome," applied to canned goods, *Fort Stanwix Canning Co. v. McKinley Canning Co.*, 49 App. Div. 566, 63 N. Y. S. 704. Appropriation of "Samaritan" in one combination of words applicable to a medicine does not prevent its use in all other combinations; *Desmond's App.* 103 Penn. St. 126. "The mere idea represented by some figures on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be appropriated as a trade mark," said of a face reflected in a pan on a package of sapolio. *Enoch Morgans, &c., Co. v. Troxell*, 89 N. Y. 292, 42 Am. Rep. 294. And, see *Taylor v. Carpenter*, 3 Story, 458; *S. C. 2 Wood & M. 1*;

[*426] *applied to an article of drink, cannot be appropriated as a trade mark;³¹ neither can any general description, by words in common use, of a kind of article, or of its nature by qualities.³² "The office of a trade mark is to point out distinctively the origin or ownership of the article to which it is affixed, and no sign or form of words can be appropriated as a valid trade mark which, from the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose."³³ A word or name may be protected as a trade mark which is not descriptive of the article to which it is applied, although it may suggest more or less the composition, quality or characteristics thereof.³⁴ As a general thing, a man cannot acquire an exclusive right to his own name

Burnett *v.* Phalon, 3 Keyes, 594; Dunbar *v.* Glenn, 42 Wis. 118, 24 McAndrews *v.* Bassett, 10 Jurist, Am. Rep. 395; Choynski *v.* Cohen, (N. S.) 550; S. C. 12 W. R. 777; Falk *v.* Am. West Indies Trading Co., 71 App. Div. 320, 75 N. Y. S. 964.

31—Raggett *v.* Findlater, L. R. 17 Eq. Cas. 29; S. C. 7 Moak, 653. See Taylor *v.* Gillies, 59 N. Y. 331, 17 Am. Rep. 333; Stokes *v.* Landgraff, 17 Barb. 608; Caswell *v.* Davies, 58 N. Y. 223, 17 Am. Rep. 233; Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125; Burke *v.* Cassin, 45 Cal. 467, 13 Am. Rep. 204. Nor may the designation "A. C. A." to denote quality, be appropriated; Mfg. Co. *v.* Trainer, 101 U. S. 51, nor "Royal," Royal, &c., Co. *v.* Sherrell, 93 N. Y. 331, nor "National Sperm," *In re* Price L. R. 27 Ch. D. 681; nor "Health Preserving," Ball *v.* Siegel, 116 Ill. 137, 56 Am. Rep. 767. See Larabee *v.* Lewis, 67 Ga. 561, 44 Am. Rep. 735; Carbolic Soap Co. *v.* Thompson, 25 Fed. Rep. 625.

32—Gilman *v.* Hunnewell, 122 Mass. 139; Wolfe *v.* Goulard, 18 How. Pr. 64; Amoskeag Manuf. Co. *v.* Spear, 2 Sandf. Ch. 599;

Dunbar *v.* Glenn, 42 Wis. 118, 24 Am. Rep. 395; Choynski *v.* Cohen, 39 Cal. 501, 2 Am. Rep. 476; Burke *v.* Cassin, 45 Cal. 467, 13 Am. Rep. 204; Taylor *v.* Gillies, 59 N. Y. 331; Caswell *v.* Davis, 58 N. Y. 223, 17 Am. Rep. 233; Koehler *v.* Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576; Cooke & Cobb Co. *v.* Miller, 169 N. Y. 475, 62 N. E. 582; Alff *v.* Radam, 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145; Gessler *v.* Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20; Brown Chemical Co. *v.* Meyer, 139 U. S. 540, 11 S. C. Rep. 625, 35 L. Ed. 247; Beadleston *v.* Cooke Browning Co., 74 Fed. 229, 20 C. C. A. 405; Computing Scale Co. *v.* Standard Computing Scale Co. 118 Fed. 965, 55 C. C. A. 459; Bennett *v.* McKinley, 65 Fed. 505, 13 C. C. A. 25. So of "Worcestershire," as applied to sauce; Lea *v.* Dakin, 11 Biss. 23; see Connell *v.* Reed, 128 Mass. 477, 35 Am. Rep. 397. So of the word "tin"; Lorillard *v.* Pride, 28 Fed. Rep. 434.

33—Barrett Chemical Co. *v.* Stern, 176 N. Y. 27, 68 N. Y. 65.

34—Keasbey *v.* Brooklyn Chem-

as a trade mark, as against others of the same name who may see fit to engage in the same business,³⁵ though if the latter *resort to any such artifice or device, in connection with a use of the name, as shall be calculated to mislead the public, they may be restrained from such use; for it cannot be tolerated that one shall take advantage of the accidental circumstance of an identity of names to withdraw trade from a rival by practicing a deception upon the public.³⁶ "There are two classes of cases involving judicial interference with the use of names. *First*, Where the intent is to get an unfair and fraudulent share of another's business, and *second*, where the effect of defendant's action, irrespective of his intent, is to produce confusion in the public mind and consequent loss to the complainant. In both cases the courts of equity administer re-

- ical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623. 36—*Croft v. Day*, 7 Beav. 84; Rodgers *v. Nowill*, 5 M. G. & S. 109; *Burgess v. Burgess*, 3 De G. M. & G. 896; *Calladay v. Baird*, 4 Phil. 141; *Sykes v. Sykes*, 3 B. & C. 541; *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401; *Holmes v. Holmes, &c., Co.*, 37 Conn. 278, 9 Am. Rep. 324; *Blakely v. Sousa*, 197 Pa. St. 305, 47 Atl. 286, 80 Am. St. Rep. 821; *Robinson v. Storm*, 103 Tenn. 40, 52 S. W. 880; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 S. C. Rep. 625, 35 L. Ed. 247; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017, 17 C. C. A. 576; *Tarrant & Co. v. Hoff*, 76 Fed. 959, 22 C. C. A. 644; *Stuart v. F. G. Stewart Co.*, 91 Fed. 243, 33 C. C. A. 480; *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220. As where the plaintiff was proprietor of "Holloway's Pills," and the defendant commenced selling pills as "H. Holloway's Pills," but put up in boxes and pots, and with labels similar to the plaintiff's. Lord LANGDALE: "I think this as plainly and as clearly avowed a
- 35—*Rogers v. Taintor*, 97 Mass. 291; *Emerson v. Badger*, 101 Mass. 82; *Gilmann v. Hunnewell*, 122 Mass. 139; *Clark v. Clark*, 25 Barb. 79; *Faber v. Faber*, 49 Barb. 357; *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Rogers v. Rogers*, 53 Conn. 121, but see, *Rogers, &c., Co. v. Rogers Mfg. Co.*, 11 Fed. Rep. 495; *Harson v. Halkyard*, 22 R. I. 102, 46 Atl. 271; *Duryea v. National Starch Mfg. Co.*, 79 Fed. 651, 25 C. C. A. 139; *Turton v. Turton*, 42 L. R. Ch. 128. See *Caswell v. Hazard*, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833. But he will be protected in his exclusive use of it as against another of a different name. *Millington v. Fox*, 3 Myl. & Cr. 338; *Burke v. Cassin*, 45 Cal. 467, 13 Am. Rep. 204. A name alone is not a trade mark when it is understood to signify not the particular manufacture of a proprietor but the kind of thing manufactured. *Hostetter v. Fries*, 17 Fed. Rep. 620.

lief without regard to the existence of a technical trade mark."³⁷ In the case referred to, a newer New Jersey corporation was enjoined from the use in Pennsylvania of a corporate name the same as that of an older Pennsylvania corporation. And in general a corporation organized to carry on a particular business may not assume a name so similar to that of an older corporation in the same business as to deceive the public and injure the trade of the latter.³⁸ One Charles S. Higgins and son, after having been engaged in the manufacture and sale of soap for more than forty years under the firm name of Charles S. Higgins & Son, transferred the business to a corporation organized under the name of Charles S. Higgins Company. Charles S. Higgins having been ousted from the company, organized a new corporation under the name of the Higgins Soap Company and engaged in the same business. The new company was restrained

fraud as I ever knew. I do not mean to say that I have any sort of respect for this sort of medicines; I have none. But the law protects persons from fraudulent misrepresentations, and this is a species of property which the law does allow, and so long as the law recognizes it, it must be protected, and persons in the situation of the defendant will not be allowed to practice a fraud like that here complained of." *Holloway v. Holloway*, 13 Beav. 209, 213. Compare *Seixo v. Provezende*, L. R. 1 Ch. App. 191. In all such cases the vital question is, whether that which is done by the defendant is calculated to deceive and defraud. *Leather Cloth Co. v. Am. Leather Cloth Co.*, 11 H. L. Cas. 523; *Singer Manuf. Co. v. Wilson*, 2 Ch. Div. 434; S. C. 16 Moak, 827; *James v. James*, L. R. 13 Eq. 421; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125; *Gilman v. Hunnewell*, 122 Mass. 139; *Dela-* ware, &c., *Canal Co. v. Clark*, 13 Wall. 311; *Williams v. Brooks*, 50 Conn. 278; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Shaver v. Shaver*, 54 Ia. 208; *Marshall v. Pinkham*, 52 Wis. 572, 38 Am. Rep. 756; *Drummond Tob. Co. v. Randle*, 114 Ill. 412; *Massam v. Thorley's, &c., Co.*, L. R. 14 Ch. D. 748. One entering into competition with one of the same name having an old established business is bound to distinguish his goods so as to avoid confusion. *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220; *Tarrant & Co. v. Hoff*, 76 Fed. 959, 22 C. C. A. 644.

37—*American Clay Mfg. Co. of Pa. v. Am. Clay Mfg. Co. of N. J.*, 198 Pa. St. 189, 47 Atl. 936, citing *North Cheshire Brewery Co. v. Manchester Brewery Co.*, L. R. App. Cas. (1899) 83; *Holmes v. Holmes Mfg. Co.*, 37 Conn. 278; *Newby v. Ore. Cent. R. R. Co.*, 1 Deady, 609; *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462.

38—Ibid.; *Tuerk Hydraulic Pow-*

from using its name in its business in the State of New York.³⁹

It has been held in Illinois that a foreign corporation has no

er Co. v. Tuerk, 92 Hun, 65, 36 N. palm off the business as that of Y. S. 384; Employers' Liability Ass. Co. v. Employers' Liability Ins. Co. 61 Hun, 552, 16 N. Y. S. 397; Armington v. Palmer, 21 R. I. 109, 41 Atl. 1012, 79 Am. St. Rep. 786, 43 L. R. A. 95; R. W. Rogers Co. v. Wm. Rogers Mfg. Co. 70 Fed. 1017, 17 C. C. A. 576; Peck Bros. Co. v. Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251; North Cheshire & Manchester Brewing Co., Limited, v. Manchester Brewing Co., Limited, (1899) A. C. 83.

39—Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 43 Am. St. Rep. 769, 27 L. R. A. 42. The court says: "Any person may use in his business his family name, provided he uses it honestly and without artifice or deception, although the business he carries on is the same as the business of another person of the same name previously established, which has become known under that name to the public, and although it may appear that the repetition of that name in connection with the new business of the same kind, may produce confusion and subject the other party to pecuniary injury. The right of a person to use his family name in his business is regarded as a natural right of which he cannot be deprived, by reason simply of priority of use by another of the same name. (Meneely v. Meneely, 62 N. Y. 427.)

"But in such cases the courts require that the name shall be honestly used, and they permit no artifice or deceit, designed or calculated to mislead the public and

the person who first established it, and gave it its reputation. (Croft v. Day, 7 Beav. 84; Holloway v. Holloway, 13 Beav. 209; Cement Co. v. Le Page, 147 Mass. 206.) It is well settled that an exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another who assumes it for the purposes of deception, and even when innocently used without right to the detriment of another, and this right, which is in the nature of a right to a trade mark, may be sold or assigned. (Levy v. Walker, 10 Ch. Div. 436; Hoxie v. Chaney, 143 Mass. 592; Bassett v. Percival, 5 Allen, 345; Cement Co. v. Le Page, 147 Mass. 206; Millington v. Fox, 3 Myl. & Cr. 338.) In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion and to enable the later corporation to obtain, by reason of the similarity of names, the business of the prior one.

"Whether the court will interfere in a particular case must depend upon circumstances; the identity in similarity of the names; the identity of the business of the respective corporations; how far the name is a true description of the kind and quality of the articles manu-

standing in the courts of Illinois to contest the right of an Illinois corporation to the use of its name,⁴⁰ but a different view is taken in the federal courts.⁴¹

The name of a place cannot be appropriated as a trade mark as against others who may see fit to engage in the same business

at the same place,⁴² though it may be as against one who, [*428] at a different place, under* takes to appropriate it; as

where parties at Syracuse proposed to sell cement under the designation of "Akron," which was the name under which the cement produced at Akron had been previously sold.⁴³ But the defendant, though carrying on the same business as the plaintiff at the same place, may be restrained from making use of the name of the place in connection with his goods or business in such manner as to deceive and defraud the public.⁴⁴ Thus the

factured or the business carried on; the extent of the confusion which may be created or apprehended, and other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy." pp. 467-470.

40—Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339. But see People v. Rose, 219 Ill. 46.

41—Peck Bros. Co. v. Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251. A corporation may acquire a property right to the use of another than its corporate name as a trade mark. Goodyear Rubber Co. v. Goodyear's, &c., Co., 21 Fed. Rep. 276.

42—Glendon Iron Co. v. Uhler, 75 Pa. St. 467, 15 Am. Rep. 599; Candee v. Deere, 54 Ill. 439, 5 Am. Rep. 125; Brooklyn White Lead Co. v. Masury, 25 Barb. 416; Dunbar v. Glenn, 42 Wis. 118, 24 Am. Rep. 395; Canal Co. v. Clark, 13 Wall. 311; Laughman's Appeal, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599; Morgan Envelope Co. v. Wal-

ton, 86 Fed. 605, 30 C. C. A. 383; Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 S. C. Rep. 151, 37 L. Ed. 1144; Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 S. C. 270, 45 L. Ed. 365; Genesee Salt Co. v. Burnap, 73 Fed. 818, 20 C. C. A. 27. See Cady v. Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524; French Republic v. Saratoga Vichy Spring Co., 191 U. S. 427, 24 S. C. Rep. 145, 48 L. Ed. 247.

43—Newman v. Alvord, 49 Barb. 588; S. C. on Appeal, 51 N. Y. 189, 19 Am. Rep. 588. See Glen, &c., Manuf. Co. v. Hall, 61 N. Y. 226, 19 Am. Rep. 278. A St. Louis dentist may acquire right to use words "New York" in phrase "New York Dental Rooms," Sanders v. Utt, 16 Mo. App. 322; and use of "Newark Dental Rooms" may be restrained. Sanders v. Jacobs, 20 Mo. App. 96. So "U. S. Dental Association." Cady v. Schultz, 19 R. I. 193, 32 Atl. 915, 61 Am. St. Rep. 763, 29 L. R. A. 524.

44—Elgin National Watch Co. v. Illinois Watch Co. 179 U. S. 665,

United States Watch Company, engaged in the business of manufacturing watches at Waltham, Mass., in competition with the American Waltham Watch Company of the same place, was, at the suit of the latter company, restrained from advertising its watches as "Waltham Watches," also from marking its watches with the words "Waltham" or "Waltham, Mass.," "without some accompanying statement which shall distinguish clearly its watches from those made by the plaintiff."⁴⁵

There can be no trade mark in the color of a label,^{45a} nor in the method of wrapping goods,^{45b} nor in the size or shape of the bottle, box or package containing the goods.^{45c}

The trade mark may be applied to a natural product as well as to a manufacture, as in the case of the celebrated "Congress"

21 S. C. Rep. 270, 45 L. Ed. 365; Genesee Salt Co. v. Burnap, 73 Fed. 88, 20 C. C. A. 27; Lee v. Haley, L. R. 5 Ch. App. 155; Radde v. Norman, L. R. 14 Eq. Cas. 348; S. C. 3 Moak, 776; Wotherspoon v. Currie, L. R. 5 H. L. 508; McAndrew v. Bassett, 4 De G. J. & S. 380. See the subject examined in Del. & Hud. Canal Co. v. Clark, 13 Wall. 311.

45—American Waltham Watch Co. v. U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826. The court says: "In cases of this sort, as in so many others, what ultimately is to be worked out is a point or line between conflicting claims, each of which has meritorious grounds and would be extended further were it not for the other. It is desirable that the plaintiff should not lose custom by reason of the public mistaking another manufacturer for it. It is desirable that the defendant should be free to manufacture watches at Waltham, and to tell the world that it does so. The two desiderata cannot both be had to their full extent, and we have to fix the boundaries as best we can. On the one hand, the defendant must be allowed to accomplish its desideratum in some way, whatever the loss to the plaintiff. On the other, we think the cases show that the defendant fairly may be required to avoid deceiving the public to the plaintiff's harm, so far as is practicable in a commercial sense." Citing Brinsmead v. Brinsmead, 13 Times, L. R. 3; Reddaway v. Bonham, (1896) A. C. 199, 210; Singer Mfg. Co. v. Jewel Mfg. Co., 163 U. S. 169, 204; Allegretti Chocolate Cream Co. v. Keller, 85 Fed. Rep. 643; Montgomery v. Thompson, (1891) A. C. 217.

45a—Fleischmann v. Starkey, 25 Fed. 127.

45b—Davis v. Davis, 27 Fed. 490.

45c—Enoch Morgan's, etc., Co. v. Troxell, 89 N. Y. 292; Hoyt v. Hoyt, 143 Pa. St. 623, 22 Atl. 755, 24 Am. St. Rep. 575, 13 L. R. A. 343; Lafevre v. Weeks, 177 Pa. St. 412, 35 Atl. 693, 34 L. R. A. 172.

water,⁴⁶ the "Bethesda" water,⁴⁷ etc. The right to it may be sold with the business, but not without.⁴⁸ And it may be lost by being suffered, without objection, to come into common use in the trade.⁴⁹ An official inspector, who brands the packages inspected by him in his business with his official brand, cannot thereby acquire a private right in the brand as a trade mark.⁵⁰

[*429] *What Is an Infringement. In order to constitute an infringement it is not necessary that the imitation should be exact. It is sufficient that there is such a substantial similarity that the public would be likely to be deceived.⁵¹ Thus

46—*Congress, &c., Spring Co. v. High Rock, &c., Spring Co.*, 45 N. Y. 291, 6 Am. Rep. 82. And, see *Lee v. Haley*, L. R. 5 Ch. App. 155.

47—*Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395. The subject of trade marks is carefully and fully considered in this case, as it is also in *McLean v. Fleming*, 96 U. S. 245.

48—*Banks v. Gibson*, 34 Beav. 566; *Leather Cloth Co. v. Am. Leather Cloth Co.*, 11 H. L. 523; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 S. C. Rep. 625, 35 L. Ed. 247. See *Joeger's Sanitary Woolen System Co. v. Le Bouttier*, 47 Hun, 521. The sale of a business and good will is held to carry the right to trade marks in use at the time, without special mention. *Listman Mill Co. v. Wm. Listman Mill Co.*, 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

49—*Ford v. Foster*, L. R. 7 Ch. App. 611; S. C. 3 Moak, 538; *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233. There must be evidence of intent to abandon to warrant user on ground of loss of right by non-user. *Mouson v. Boehm*, L. R. 26 Ch. D. 298. See *In re Heaton*, L. R. 27 Ch. D. 570; *In re Ander-*

son, L. R. 26 Ch. D. 409; *Burt v. Tucker*, 178 Mass. 493, 59 N. E. 1111, 86 Am. St. Rep. 499, 52 L. R. A. 112. A mere trespasser upon original appropriation cannot enjoin the subsequent use by a third person. *O'Rourke v. Centr. City, &c., Co.*, 26 Fed. Rep. 576. After the expiration of a patent the patentee has no trade mark in the name of the patented article. *Singer Mfg. Co. v. Larsen*, 8 Biss. 151; *Linoleum, &c., Co. v. Nairn*, L. R. 7 Ch. D. 834; *Bull v. Singer Mfg. Co.*, 41 Ohio St. 127; *Wilcox, &c., Co. v. Gibbens Frame*, 17 Fed. Rep. 623. But see *Singer, &c., Co. v. Loog*, L. R. 8 App. Cas. 15; *Singer, &c., Co. v. Wilson*, L. R. 3 App. Cas. 376.

50—*Chase v. Mayo*, 121 Mass. 343. For further cases of more or less interest, reference is made to *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275; *Marsh v. Billings*, 7 Cush. 322, 44 Am. Dec. 723; *Gorham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639.

51—*Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200; *Coffeen v. Brunton*, 4 McLean, 516; *Taylor v. Carpenter*, 2 Sandf. Ch. 603; *Partridge v. Menck*, 2 Sandf. Ch. 622; *Popham v. Cole*, 66 N. Y. 69, 23

a change from "Hostetter's Celebrated Stomach Bitters" to "Holsteter's Celebrated Stomach Bitters" is manifestly merely colorable;⁵² and changes much more considerable might, nevertheless, leave the similarity sufficient to mislead. It has been said that when ordinary attention on the part of customers will enable them to discriminate between the trade marks of different parties the court will not interfere;⁵³ but where the evident purpose is to mislead, this is a rule that courts would not be likely to apply with much liberality in favor of a party attempting an unfair advantage.⁵⁴ "In order to support the action the imitation of the trade mark need not be exact or perfect. It may be limited and partial. Nor is it necessary that the whole should be pirated. Nor is it necessary to show that anyone has in fact been deceived. Nor is it necessary to prove intentional fraud. If the court sees that the plaintiff's trade marks are simulated in such a manner as probably to deceive customers or patrons of its trade or business, the piracy should be checked at once by injunction."⁵⁵

Am. Rep. 22; Royal, &c., Co. v. Davis, 26 Fed. Rep. 293; Anheuser, &c., Co. v. Clarke, 26 Fed. Rep. 410; Southern, &c., Co. v. Cary, 25 Fed. Rep. 123; Schendel v. Silver, 63 Hun, 330, 18 N. Y. S. 1; Fort Stanwix Canning Co. v. Wm. McKinley Canning Co., 49 App. Div. 566, 63 N. Y. S. 704; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722; Pratt's Appeal, 117 Pa. St. 401, 11 Atl. 878, 2 Am. St. Rep. 676; Pillsbury v. Pillsbury-Washburn Flour Mills Co., 64 Fed. 841, 12 C. C. A. 432. See Siegert v. Findlater, L. R. 7 Ch. D. 801; Alexander v. Morse, 14 R. I. 153, 51 Am. Rep. 369; State v. Hagen, 6 Ind. App. 167, 33 N. E. 223; Stokes v. Allen, 56 Hun, 526, 9 N. Y. S. 846; Woodcock v. Guy, 33 Wash. 234, 74 Pac. 358. If goods have acquired a name from a part of a trade mark, another may not attach to his goods a device likely to lead to giving the same name to his goods, even though the name is not the only one by which the first goods have been known. Orr Ewing v. Johnston, L. R. 13 Ch. D. 434, and though no one has actually been misled. Johnston v. Orr Ewing, L. R. 7 App. Cas. 219.

52—Hostetter v. Vowinkle, 1 Dill. 329.

53—Popham v. Cole, 66 N. Y. 69, 23 Am. Rep. 22; Ball v. Siegel, 116 Ill. 137, 56 Am. Rep. 767; Heintz v. Lutz, 146 Pa. St. 592, 23 Atl. 314; Radam v. Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

54—Boardman v. Meriden, etc., Co., 35 Conn. 402, 95 Am. Dec. 270; Coswell v. Davis, 58 N. Y. 223, 17 Am. Rep. 233; Gorham Co. v. White, 14 Wall. 511, 528.

55—Listman Mill Co. v. Wm.

Aliens resident in the country will be given protection in their trade marks, as well as citizens,⁵⁶ but a trade mark that in itself is fraudulent and deceptive cannot be the subject of property, and will not be protected. Thus, where the trade mark in Spanish, of cigars made in New York, contained the representation that they were made in Havana, a bill to restrain the use of an imitation was dismissed. “The maxim which is generally expressed, ‘He who comes into equity must come with clean hands,’ but sometimes in stronger language, ‘He that hath committed in-

iquity shall not have equity,’ has been often applied
[*430] *to bills to restrain by injunction the counterfeiting of

trade marks. The ground on which the jurisdiction of equity in such cases is rested is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another.⁵⁷ ‘It is perfectly manifest,’ said Lord LANGDALE, ‘that to do this is a fraud, and a very gross fraud.’ It is plain that there is no class of cases in which the maxim referred to can be more properly applied. The party who attempts to deceive the public by the use of a trade mark which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the defendant. He certainly can have no claim to the extraordinary interposition of a tribunal constituted to administer equity, for the purpose of securing to him the profits arising from his fraudulent act.”⁵⁸

Listman Mill Co., 88 Wis. 334, 342, 60 N. W. 261, 43 Am. St. Rep. 907. To constitute piracy of a trade mark, the resemblance need not be exact; it is sufficient if a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief. Seixo v. Provezende, L. R. 1 Ch. App. 191, 196; Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204.

56—State v. Gibbs, 56 Mo. 133; Taylor v. Carpenter, 3 Story, 458; LaCroix v. May, 15 Fed. Rep. 236. See LaCroix v. Escobal, 37 La. Ann. 533.

57—Citing Croft v. Day, 7 Beav. 84.

58—SHARSWOOD, J., in Palmer v. Harris, 60 Pa. St. 156, 160, 100 Am. Dec. 557, citing Piddington v. How, 8 Sim. 477; Flavel v. Harrison, 1 Hare, 467; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523; Manhattan Med.

The Union Label. The Cigar Makers' International Union of America adopted a label, containing the following: "This certifies that the cigars contained in this box have been made by a first class workman, a member of the etc., an organization 'opposed to inferior, rat-shop, coolie, prison or filthy tenement house workmanship.' Any member of the union could use the label and any manufacturer could affix it to union made goods. It indicated merely that the goods so labeled were made by some member of the union. The Supreme Court of Minnesota holds that this label is not a trade mark and, consequently, that it is not entitled to the protection of a trade mark and assigns the following reasons for its conclusion: "*First.* It is not adopted nor used to indicate by what person the articles are made, but merely to indicate membership of a certain association. *Second.* Its use is not enjoyed as an incident to any business, and the right to use it cannot be transferred, even with the transfer of the business in which it may have been employed; the right to use it can be acquired only by becoming a member of one of the unions or employing those who are members, and lost only by ceasing to be a member or to employ members. *Third.* There is no exclusiveness in the use, or right to use, which is necessary to a legal trade mark. Any one of many thousands of persons, no way connected in business, and perhaps unknown to each other, has an equal right to its use."⁵⁹ So in Massachusetts and Pennsylvania.⁶⁰

Co. *v.* Wood, 108 U. S. 218; Siegert v. Abbott, 61 Md. 276, 48 Am. Rep. 101; Connell *v.* Reed, 128 Mass. 477, 35 Am. Rep. 397; Buckland *v.* Rice, 46 Ohio St. 526; Seabury *v* Grosvenor, 14 Blatchf. 262; New York, &c., Co. *v.* Union, &c., Co., 39 Hun, 611. But see, Funke *v.* Dreyfus, 34 La. Ann. 80, 44 Am. Rep. 413; Ins., &c., Co. *v.* Scott, 33 La. Ann. 946; Laird *v.* Wilder, 9 Bush, 131, 15 Am. Rep. 707. See, also, as to deceptive trade marks, Perry *v.* Truefitt, 6 Beav. 66. In French Republic *v.* Saratoga Vichy

Spring Co., 191 U. S. 427, 24 S. C. Rep. 145, 48 L. Ed. 247, the French Republic sued to enjoin the use of the word "Vichy" by the defendant and the suit appears to have been entertained without objection.

59—Cigar Makers' Protective Union *v.* Conham, 40 Minn. 243, 247, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125.

60—Weener *v.* Brayton, 152 Mass. 101, 8 L. R. A. 640; McVey *v.* Brendel, 144 Pa. St. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377.

Other courts have held that the union label is entitled to protection as a trade mark.⁶¹

Good Will of a Business. Unfair Competition in Trade. What has been said about the infringement of rights in trade marks will apply to all devices by means of which one endeavors to deprive another of the value of the good will of his business by deceiving the public. The good will of a business is often very valuable property,^{61a} and the use of a trade mark is only one method of building it up. Other deceptions besides the piracy of a trade mark may be equally effectual in destroying its value in some cases; and here, as in other cases of fraud, it is not the means the law regards so much as the end which the deception is intended to accomplish. To steal or to injure the good will of a business by any species of deception is a wrong which will be redressed by remedies appropriate to the circumstances.

One person may not, by means of an imitation of the marks, labels, wrappers or packages of a rival dealer, or by any other device palm off his goods upon the public as those of such rival dealer, and any such fraudulent imitation and device is known as "unfair competition," and is an actionable wrong, though a

61—*Hetteman Bros. & Co. v. Powers*, 102 Ky. 133, 43 S. W. 180, D. 513, note, where "New Carriage Bazaar" as a sign was restrained at suit of one who for years had near by used a sign "Carriage Bazaar." *Civil Service, &c., Ass. v. Dean*, Id. 215; *Myers v. Kal. Buggy Co.*, 54 Mich. 215; *Braham v. Beachim*, L. R. 7 Ch. D. 848. So

61a—Questions concerning property in the good will of a business were considered in the following cases: *Bradford v. Peckham*, 9 R. I. 250; *Cruess v. Fessler*, 39 Cal. 336; *Senter v. Davis*, 38 Cal. 451; *Musselman v. Clarkson*, 62 Penn. St. 81; *Elliott's Appeal*, 60 Penn. St. 161; *Rupp v. Over*, 3 Brewster, 133; *Succession of Journe*, 21 La. Ann. 391; *Spier v. Lambdin*, 45 Geo. 319. As to use of similar trade name, see *Boulnois v. Peake*, L. R. 13 Ch.

fraudulent representation, by means of deceptive imitations of label and packing, that they are those of another to the latter's damage, is an actionable injury to the latter apart from question of a trade mark in the name used in the label. *Miller, &c., Mfry. v. Commerce*, 45 N. J. L. 18, and may be enjoined. *Avery v. Meigle*, 81 Ky. 73. See *Trask Fish Co. v. Worcester*, 28 Mo. App. 408.

technical trade mark may not be involved.⁶² "Unfair competition in trade is not confined to the imitation of a trade mark, but takes as many forms as the ingenuity of man can devise. It may consist of the imitation of a sign, a trade name, a label, a wrapper, a package, or almost any other imitation by a business rival of some distinguishing ear mark of an established business, which the court can see is calculated to mislead the public and lead purchasers into the belief that they are buying the goods of the first manufacturer."⁶³ Where a technical trade mark is imitated that fact itself constitutes a ground for relief.

- 62—*Sartor v. Schaden*, 125 Ia. 696, 101 N. W. 511; *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, 24 Atl. 658; *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040; *Brown v. Doscher*, 147 N. Y. 647, 42 N. E. 268; *Kinney Tobacco Co. v. Maller*, 53 Hun, 340, 6 N. Y. S. 389; *Rechitt & Sons v. Kellogg*, 28 App. Div. 111, 50 N. Y. S. 888; *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337, 67 N. E. 722; *Robinson v. Storm*, 103 Tenn. 40, 52 S. W. 880; *Offerman v. Waterman*, 94 Wis. 583, 69 N. W. 569; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 S. C. Rep. 966, 37 L. Ed. 847; *Saxlehuer v. Eisner & M. Co.*, 179 U. S. 19, 21 S. C. Rep. 7, 45 L. Ed. 60; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 Fed. 869, 23 C. A. 554; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 86 Fed. 608, 30 C. C. A. 386; *Centaur Co. v. Neathery*, 91 Fed. 891, 34 C. C. A. 118; *Paris Medicine Co. v. W. H. Hill & Co.*, 102 Fed. 148, 42 C. A. 227; *Williams v. Mitchell*, 106 Fed. 168, 45 C. C. A. 265; *Sterling Remedy Co. v. Spermine Med. Co.*, 112 Fed. 1000, 50 C. C. A. 657; *Russia Cement Co. v. Fraunhar*, 133 Fed. 518, — C. C. A. —; *Scriven v. North*, 134 Fed. 366, — C. C. A. —; *Bickmore Gall Cure Co. v. Karns*, 134 Fed. 833, — C. C. A. —; *Reddaway v. Banham*, (1896) A. C. 199; *Birmingham Vinegar Brewing Co. v. Powell*, (1897) A. C. 710; *Powell v. Birmingham Vinegar Brewing Co.*, (1896) 2 Ch. 54. "The adoption of deceiving, imitative devices, irrespective of trade-mark infringement, whereby the public is misled and the person who has built up a trade is defrauded of the fruits of his labor and skill, is an actionable wrong for which the person injured is entitled to an injunction." *Rains & Sons v. White*, 107 Ky. 114, 52 S. W. 970. "The cardinal rule upon the subject (of unfair competition) is that no one shall, by imitation or any unfair device, induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his own products or merchandise." *Proctor & Gamble Co. v. Globe Ref. Co.*, 92 F. 357, 361, 34 C. C. A. 405.
- 63—*Manitowoc Malting Co. v. Mil. Malting Co.*, 119 Wis. 543, 97 N. W. 389.

In cases of unfair competition, so called, courts of equity proceed on the ground of preventing fraud upon the public and upon the complainant.⁶⁴ "Positive proof of fraudulent intent is not required if the simulation is clearly shown. Although the differences between the labels and packages may be readily seen on comparison; yet if the infringing device be such that persons exercising ordinary caution are liable to be misled into purchasing the article bearing the objectionable device when they intend to purchase the other one, an injunction will be allowed."⁶⁵ A Chicago dealer procured flour made in Wisconsin and branded and sold it as "Best Minnesota Patent, Minneapolis, Minn." It was held to be unfair competition and he was enjoined at the suit of a Minneapolis manufacturer of Minnesota patent flour.⁶⁶ The plaintiff had made and sold for some years a belting under the name "Camel Hair Belting," which name had come to mean in the trade the plaintiff's belting and nothing else. The defendant thereupon made a belting from the yarn of camel's hair and stamped and sold it as "Camel Hair Belting," so as to mislead purchasers into the belief that it was the plaintiff's manufacture. It was held that the defendant should be enjoined from using the words "camel hair" without something to clearly distinguish its belting from the plaintiff's. "One man has no right," says the court, "to put off his goods for sale as the goods of a rival trader and he cannot therefore be allowed to use names, marks, letters, or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."⁶⁷

[*431] ***Rights of Common.** A right of common consists in the right to have some definite common enjoyment with the owner in certain real estate. The rights of common possessed by tenants of a manor in many cases furnish suitable illustrations. Belonging to the lord of the manor were, perhaps, pasture lands, on which, from time immemorial, the inhabitants had been accustomed to pasture their beasts in common, or wood

64—Drake Medicine Co. v. Gless- Mills Co. v. Eagle, 86 Fed. 608, 30
ner, 68 Ohio St. 337, 67 N. E. 722. C. C. A. 386.

65—Ibid. p. 358.

67—Reddaway v. Banham,

66—Pillsbury-Washburn Flour (1896) A. C. 199.

lands, from which they had in common taken wood for domestic purposes, or turf beds, from which they had taken fuel, or there were waters, from which in common they had taken fish; and the immemorial custom to enjoy this privilege had fixed their right, not only as against each other, but as against the lord of the manor also. To exclude one of them, or disturb him in the equal enjoyment of the right, was an actionable wrong and an excessive appropriation was a wrong to all, and might be enjoined as such. Of late the policy of English legislation has been in the direction of diminishing the number and extent of these rights; but we have no occasion to examine it here.

The circumstances attending the settlement of America were not favorable to the establishment of similar rights. The cultivators of land for the most part acquired and owned independent estates. In the New England Colonies lands were indeed granted in common to those who planted a new town, and some of these lands, under a town proprietorship, were for a considerable period made use of in common by the inhabitants. Perhaps, also, such rights of property as existed within the limits of a town were properly to be regarded as rights of common participation in that of which the body of the inhabitants constituting the town *were proprietors. So the taking of shell-fish [*432] along the shores of tidewater, between high and low water mark, was and is of common right to the people, except where by colonial ordinance, the riparian proprietorship was extended to low water mark.⁶⁸ The same may be said of the taking of sea weed thrown up by the sea and deposited between high and low water mark,⁶⁹ with the same exception, that where the shore proprietorship is extended to low water mark, an entry by any

68—Even then they may be taken if no trespass is committed in going upon the flats. Weston *v.* Sampson, 8 Cush. 347. See Packard *v.* Ryder, 144 Mass. 440, 51 Am. Rep. 101, and cases cited.

69—Emans *v.* Turnbull, 2 Johns. 313, 3 Am. Dec. 427; Mather *v.* Gifford, 2 Allen 549.

Chapman, 40 Conn. 382, 16 Am. Rep. 46; Peck *v.* Lockwood, 5 Day, 22. But not where it is cast above the high water mark. Church *v.* Meeker, 34 Conn. 421. See Barker *v.* Bates, 13 Pick. 255, 23 Am. Dec. 678; Anthony *v.*

other than the proprietor for the purpose of gathering it would be a trespass.⁷⁰

It is important, however, to distinguish between what are properly rights in common and the right to participate with the general public in the enjoyment of those rights which pertain to the sovereignty. The latter are not rights of common, and the idea of ownership has no place when they are in question; their enjoyment is only a part of the civil rights of the people. Of these are the right to make use of the public highways, commons, parks and boulevards, the right to take fish in public waters, the right to visit and have the customary benefit of public offices, records, etc. These emanate from the sovereignty, and their equal enjoyment by all will be protected by it.⁷¹ No doubt where they are susceptible of being made available for profit, as in this case of fisheries, exclusive rights may be granted in them by the State, if that shall seem the best method of making them available for the common benefit; but that is exclusively a matter of sovereign discretion.

In the case of any of these public rights one might be wronged in being excluded therefrom by another, or in being impeded in its enjoyment; as if one were to have his fishing nets

[*433] torn up *through another's malice or carelessness.⁷² But

it would be difficult to plant an action against another for a merely excessive appropriation of that which was common to the use of all; as, for example, if one, by his enterprise and energy, should appropriate the chief benefits of a fishery, without at the same time interfering with the operations of others.⁷³ In the absence of legislation limiting his operations, the limit would only be found where they obstructed others.

One's right to the use of highways might be invaded by exclu-

70—Phillips *v.* Rhodes, 7 Met. son, 8 CUSH. 347, 45 Am. Dec. 764; 322; Hill *v.* Lord, 48 Me. 83; Packard *v.* Ryder, 144 Mass. 440, Nudd *v.* Hobbs, 17 N. H. 527. See 51 Am. Rep. 101, as to rights between high and low water mark. Blundell *v.* Catterall, 5 B. & Ald. 268; Kenyon *v.* Nichols, 1 R. I. 71—Crandall *v.* Nevada, 6 Wall. 106; Hall *v.* Lawrence, 2 R. I. 35. 218, 47 Am. Dec. 715; Parker *v.* Cutler Mill Dam Co., 20 Me. 353, 37 Am. Dec. 56; Weston *v.* Sampson, Saltash, L. R. 7 App. Cas. 646. 72—See *ante*, p. *391. 73—See Goodman *v.* Mayor, &c.

ing him from it, or rendering access to it difficult, as where a railroad company constructs a high embankment, or makes a deep excavation in the highway in front of one's premises;⁷⁴ *or where it occupies a street with its cars unreasonably, or annoys adjoining proprietors by unnecessarily sounding its whistles or bells. But these cases will more properly be referred to when nuisances are under consideration.

In order that there may be equal enjoyment of the public highway, it is usual to provide by law that when two persons

74—*Haynes v. Thomas*, 7 Ind. Rep. 67, it is said: “It is * * * well settled, both here and elsewhere, that the owners of lots ‘have a peculiar interest in the adjacent street, which neither the local nor general public can pretend to claim—a private right, in the nature of an incorporeal hereditament, legally attached to their contiguous ground—an incidental title to certain facilities and franchises assured to them by contract and by law,’ and which are as inviolable as the property in the lots themselves.” Citing *Lexington, &c., R. R. Co. v. Applegate*, 8 Dana, 294, 33 Am. Dec. 497; *Haynes v. Thomas*, 7 Ind. 38; *Rowan v. Portland*, 8 B. Mon. 232; *Le Clercq v. Gallipolis*, 7 Ohio, 217, 28 Am. Dec. 641; *Cincinnati v. White*, 6 Pet. 431. See, further, *Tate v. Ohio, &c., R. R. Co.*, 7 Ind. 479; *Hutton v. Indiana Cent. R. R. Co.*, 7 Ind. 522; *Stetson v. Chicago, &c., R. R. Co.*, 75 Ill. 74; *Stone v. Fairbury, &c., R. R. Co.*, 68 Ill. 394, 18 Am. Rep. 556; *Mix v. Lafayette &c., R. R. Co.*, 67 Ill. 319. The access of light to an adjoining owner who does not own the fee of the street may not be cut off by an elevated railroad without compensation. *Story v. New York, &c., Co.*, 90 N. Y. 122, 43 Am. Rep. 146.

So in *Elizabethtown, &c., R. R. Co. v. Combs*, 10 Bush, 382, 19 Am.

meet they shall turn to the right of the middle of the main traveled path; and in the absence of any statute, perhaps this requirement may be considered a part of the common law of the land. If one is injured by reason of the failure of another to observe this rule, he has his action for the recovery of the damages suffered, provided he was himself free from fault. But one who finds that another whom he is about to meet is not turning out as he should, must endeavor to avoid collision, and if he takes no pains to do so and a collision occurs, he may lose his remedy through his contributory negligence.⁷⁵

Injuries to Rights in Easements. Easements owe their increase, variety, and importance to modern civilization: they have become so numerous that it is difficult even to classify them. A few of the more important will be named.

Where adjoining or neighboring lands might be affected in value by the use that may be made of a particular lot, or by the manner in which it is built upon, contracts are sometimes entered into which control the building or the use. Such contracts establish rights in the nature of easements, which may be enforced in equity at the instance of the owners of the lands for the benefit of which they are established, and which, in respect to

them, may be called the dominant tenements.⁷⁶ So the [*435] proprietor *of a town plat may, in the deeds he gives, insert a provision respecting the use of the premises, or the character of the buildings that may be erected thereon, or the

75—*Baker v. Portland*, 58 Me. 199, 4 Am. Rep. 274; *Daniels v. Clegg*, 28 Mich. 32. The middle of the road means the middle of the wrought part of the road. *Clark v. Commonwealth*, 4 Pick. 125; *Daniels v. Clegg*, *supra*. Compare *Commonwealth v. Allen*, 11 Met. 403, and see cases, p. 274, n. 77, *supra*.

76—*Hills v. Miller*, 3 Paige, 254; *Gilbert v. Peteler*, 28 Barb. 488; *Trustees, &c., v. Cowen*, 4 Paige, 510. If during the joint ownership of two parcels a service is

character and the discontinuance of such service would obviously involve a substantial rearrangement of that part of the estate in whose favor the service was imposed in order to its use as comfortably as before, then the implication is that the use is to be continuous. *Scott v. Moore*, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749. So where a house is partly on another lot from that covered by a mortgage, upon foreclosure the mortgagee has a per-

location of buildings; such as that a business regarded as offensive shall never be permitted on the premises,⁷⁷ or that the buildings shall be constructed a certain distance from the street.⁷⁸ In contemplation of equity, all the purchasers from such a proprietor, and their privies, acquire rights in such stipulations, and may enforce them by injunction should their violation be attempted or threatened.⁷⁹ There would be difficulty in maintaining actions at law in such cases—indeed the relief in equity is awarded in part because the law can afford none.⁸⁰

A more common easement is that of right to pass or repass over the land of another. This may come into existence by grant, in which case it is necessary that the way be defined and located, either by the grant itself or by the acts of the parties; and if not located by grant or consent, the grantee may select the route for it.⁸¹ Or it may be established by prescription; and in such case the user itself must determine the location. An indefinite right of passage cannot be thus acquired.⁸² Or the way may come into existence as a way of necessity. This happens where one grants a parcel of land so surrounded by other lands owned by himself that access to it except over such lands

petual easement in the other lot. John Hancock, &c., Co. v. Patterson, 103 Ind. 582, 53 Am. Rep. 550.

77—*Kemp v. Sober*, 1 Sim. (N. S.) 517; *Barrow v. Richard*, 8 Paige, 351. If an owner sells by a plat showing a part of his land a park, he will be enjoined from selling the park for building sites. *Lennig v. Ocean City Ass.*, 41 N. J. Eq. 606. So if one has bought a lot abutting on a public square, as platted by a former owner of the tract, and with the public has used the square as a highway, he may enjoin a railway from laying its track through the square without compensating him. *Pratt v. Buffalo, &c., Co.*, 19 Hun, 30.

78—*Hubbell v. Warren*, 8 Allen, 173. See *Gillis v. Bailey*, 21 N. H. 149; *Tulk v. Moxhay*, 2 Phil. 774;

Mann v. Stephens, 15 Sim. 377; *Coles v. Sims*, 5 DeG. M'N. & G. 1; *Western v. McDermott*, L. R. 1 Eq. 469; S. C. L. R. 2 Ch. App. 72; *Whatman v. Gibson*, 9 Sim. 196; *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679; *Greene v. Creighton*, 7 R. I. 1; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Coleman v. Coleman*, 19 Pa. St. 100.

79—*Mann v. Stephens*, 15 Sim. 377; *High on Injunctions*, § 547.

80—*Brewer v. Marshall*, 19 N. J. Eq. 539, 543.

81—*Hart v. Connor*, 25 Conn. 331.

82—*Jones v. Percival*, 5 Pick. 485, 16 Am. Dec. 415. See *Atwater v. Bodfish*, 11 Gray, 150; *Haag v. Delorme*, 30 Wis. 591; *Belknap v. Trimble*, 3 Paige, 577.

is impracticable; or where he grants lands so *surrounding [*_436] a parcel retained by himself that the latter is practically inaccessible except over that he has granted. In the former case, by implication he grants a right of way over his own lands to that he has sold, and in the latter he reserves such a right.⁸³ In either case the owner of the tenement over which the way must extend may locate it, but he must exercise the right reasonably and with due regard to the other's convenience.⁸⁴ If he refuses, on request, to locate the way, or locates it unfairly, the party entitled to the easement may locate it himself.⁸⁵ In any case when a way is once located, it is fixed permanently and for all purposes, and neither party can change it except by mutual consent.⁸⁶ A right of way by necessity is strictly construed and it extends no farther than the necessity which creates it.⁸⁷ The necessity must be a positive one and it is not enough that a way over the land granted or retained would be more convenient.⁸⁸ "Such right is founded upon the doctrine of implied grant. And implied grants of this kind are looked upon

83—*Kitchey v. Welsh*, 149 Ind. 507; *Kitchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; *Estép v. Hammons*, 104 Ky. 144, 46 S. W. 715; *Jay v. Michael*, 92 Md. 198, 48 Atl. 61; *Morse v. Benson*, 151 Mass. 440, 24 N. E. 675; *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; *Wooldridge v. Coughlin*, 46 W. Va. 345, 33 S. E. 233. The right is held to exist in case of partition. *Kitchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653.

84—*Kitchey v. Welsh*, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653.

85—*Ibid.*

86—*Holmes v. Seely*, 19 Wend. 507; *Brice v. Randall*, 7 Gill & J. 349; *Powers v. Harlow*, 53 Mich.

214, 48 N. E. 1031, 40 L. R. A. 105; *Dudgeon v. Bronson*, 159 Ind. 562, 64 N. E. 910, 65 N. E. 752, 95 Am. St. Rep. 315; *Morse v. Benson*, 151 Mass. 440, 24 N. E. 675.

87—*Kingsley v. Gouldsborough L. I. Co.*, 86 Me. 279, 29 Atl. 1074, 25 L. R. A. 502; *Morse v. Benson*, 151 Mass. 440, 24 N. E. 675. In the latter case a way of necessity had been used to a certain highway. The highway was discontinued at this point and a new one laid out. It was held that there was no way of necessity to the new highway or right to pass along the old highway to the new one.

88—*Turnbull v. Rivers*, 3 McCord, 131, 15 Am. Dec. 622; *McDonald v. Lindall*, 3 Rawle, 492; *Gayetty v. Bethune*, 14 Mass. 49,

with jealousy, construed with strictness, and are not favored except in cases of strict necessity, and not from mere convenience.⁸⁹ Hence when the land conveyed abuts upon the ocean or upon navigable water, it is held that there is no way of necessity by land.⁹⁰ There is a difference of opinion as to whether the right ceases when the necessity ceases. Some courts hold that it does⁹¹ and others that where once fixed it is permanent and that it does not cease though the grantee buys another outlet.⁹²

Besides the right of way for the passage of persons, beasts, and vehicles, there may be a right of way for pipes to carry water, gas, steam, etc., or for drains, and for any purpose whatsoever, for which one might have occasion to make use of a passage

7 Am. Dec. 188; *Suffield v. Brown*, 4 DeG. J. & S. 185; *Burns v. Gallagher*, 62 Md. 462; *Outerbridge v. Phelps*, 13 Abb. N. C. 117; *Frances' App.* 96 Pa. St. 200. So of an easement to use a chimney in common. *Buss v. Dyer*, 125 Mass.

287. A right to pass to a well held not thus necessary when it did not appear that the person claiming the right had not, or with moderate cost, could not have, a well on his own land. *O'Rorke v. Smith*, 11 R. I. 259, 23 Am. Rep. 440. The fact that the only way to reach the second story of one's building is over stairs outside the bounds of his lot, does not give a right of way of necessity over the stairs. *Stillwell v. Foster*, 80 Me. 333, 14 Atl. 731. Similar facts held to create a way by necessity, in *Galloway v. Bonesteel*, 65 Wis. 79, 56 Am. Rep. 616. The plaintiff had an easement in a stairway of a building adjoining his own for access to his upper floor. Both buildings were destroyed by fire and were rebuilt with a sim-

ilar stairway. It was held that the easement ceased with the destruction of the buildings and that the plaintiff had no right to use the new stairway. *Douglas v. Coonley*, 84 Hun, 158, 32 N. Y. S. 444.

89—*Kingsley v. Gouldsborough L. I. Co.*, 86 Me. 279, 29 Atl. 1074, 25 L. R. A. 502.

90—Ibid.; *Hildreth v. Googins*, 91 Me. 227, 39 Atl. 550; *Lawton v. Rivers*, 2 McCord, 445, 13 Am. Dec. 741; *Turnbull v. Rivers*, 3 McCord, 131, 15 Am. Dec. 622. See *Burlew v. Hunter*, 41 App. Div. 148, 58 N. Y. S. 453.

91—The easement of a right of way of necessity ceases when the party acquires by subsequent purchase, a convenient way over his own lands. *Holmes v. Goring*, 2 Bing. 76. See *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653.

92—*Estep v. Hammons*, 104 Ky. 144, 46 S. W. 715. See *Morse v. Benson*, 151 Mass. 440, 24 N. E. 675.

across his neighbors land for the greater or more convenient enjoyment of his own. These also may be acquired by grant or prescription, under the rules already given, but they do not come into existence as ways of necessity strictly, though they often arise by implication from grants the benefits of which cannot be enjoyed without them, and must therefore be understood

to have contemplated them.⁹³ An illustration is where [*437] the owner *of two estates conveys one of them, over

which a drain has been constructed and is then in existence for the benefit of the other. If this drain is known to the grantee at the time he receives his conveyance, and is essential to the reasonable enjoyment of the estate retained, an easement may arise by implication, because the presumption that the parties understood it was to exist will be reasonable.⁹⁴ Easements of light and air, and for the support of buildings, frequently come into existence by implication from grants in the same way.⁹⁵

Grants of right of way are to be so constructed as not needless-
ly to restrict the enjoyment of his estate by the owner of the ser-
vant tenement. The owner of the easement is entitled to the
fair enjoyment of his privilege, but nothing more,⁹⁶ and there-

93—Where one grants lands bounding them on a highway where there is none, he thereby conveys to the grantee a private right of way along the supposed street, if he is owner of the soil. See *Wyman v. New York*, 11 Wend. 487; *Smith v. Lock*, 18 Mich. 56.

94—*Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688; *Rome Gas-light Co. v. Meyerhardt*, 61 Ga. 287. See *Sanderlin v. Baxter*, 76 Va. 299; *McPherson v. Ackee*, 4 Mac Arth. 150. The doctrine that if an owner sells part of a tract he impliedly includes such easements in what he keeps as are necessary for the enjoyment of the grant, applies to flow of water in an irrigating canal. *Cave v.* Crafts, 53 Cal. 135. As to right to change location or enlarge size of water pipes. *Chandler v. Jamaica Pond Aq.*, 125 Mass. 544; *Onthank v. Lake Shore, &c., Co.*, 71 N. Y. 194, 27 Am. Rep. 35.

95—No easement of light and air can be acquired by prescrip-tion in this country. *Kennedy v. Burnap*, 120 Cal. 488, 52 Pac. 843, 40 L. R. A. 476; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544; *Oldstein v. Firemen's Building Ass.*, 44 La. Ann. 492, 10 So. 928; *Mathewson St. M. E. Church v. Shepard*, 22 R. I. 112, 46 Atl. 402; *Bailey v. Gray*, 53 S. C. 503, 31 S. E. 354.

96—*Atkins v. Bordman*, 2 Met. 457, 37 Am. Dec. 100.

fore the owner of the servient tenement may erect gates at the termini of a private way, when it is not unreasonable to do so.⁹⁷

Any obstruction to an easement, any encroachment upon it, or any disturbance of the soil, or of that by means of which the easement is enjoyed, is an actionable wrong, provided damage is caused by it.⁹⁸ It is to be observed in respect to easements that possession of the lands over which they are enjoyed, or which are subject to them, is in the owner of the land, and not in the party who has the easement, and therefore the latter cannot bring ejectment against a disturber; and those acts which would constitute trespasses on lands are not trespasses in respect to his easement. Therefore, any intermeddling with the lands to which the easement attaches is not a wrong to him unless in some manner it affects him injuriously in the enjoyment of the easement. But if the act be one which, if persisted in, may at length ripen into an adverse right, an injury will be presumed. Thus, if a drain be stopped, or *a fence be erected across a private way, or a water-course be diverted, and the like, an injury is presumed, because these, if persisted in, may extinguish the easement.⁹⁹ But where the easement is for a special and tem-

97—*Maxwell v. McAtee*, 9 B. Mon. 20, 48 Am. Rep. 409; *Garland v. Furber*, 47 N. H. 301; *Boyd v. Bloom*, 152 Ind. 152, 52 N. E. 751; *Ames v. Shaw*, 82 Me. 379, 19 Atl. 856; *Brill v. Brill*, 108 N. Y. 511, 15 N. E. 538; *Johnson v. Borson*, 77 Wis. 593, 46 N. W. 815, 20 Am. St. Rep. 146; *Dyer v. Walker*, 99 Wis. 404, 75 N. W. 79. He may change form of cover of a reservoir if no harm is done to the owner of the aqueduct. *Olcott v. Thompson*, 59 N. H. 154, 47 Am. Rep. 184. See *Matthews v. Del., &c., Canal Co.*, 20 Hun, 427. Where an easement is created by grant the rights of the parties depend upon the construction of the grant. *Arnold v. Fee*, 87 Hun, 502, 34 N. Y. S. 1028. But where it is ac-

quired by prescription it is limited and defined by the user. *North Fork Water Co. v. Edwards*, 121 Cal. 662, 54 Pac. 69.

98—*Quinlan v. Noble*, 75 Cal. 250, 17 Pac. 69; *Stallard v. Cushing*, 76 Cal. 479, 18 Pac. 427; *Hardin v. Sin Claire*, 115 Cal. 460, 47 Pac. 363; *Jones v. Sanders*, 138 Cal. 405, 71 Pac. 506; *Jay v. Michael*, 92 Md. 198, 48 Atl. 61; *Blood v. Millard*, 172 Mass. 65, 51 N. E. 527; *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020; *Chloupek v. Perotka*, 89 Wis. 551, 62 N. W. 537, 46 Am. St. Rep. 858.

99—*Wood v. Waud*, 3 Exch. 748; *Nicklin v. Williams*, 10 Exch. 259; *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191, 57 Am. Dec. 85; *Roundtree v. Brantley*, 34 Ala.

porary purpose only, as a right of way to repair a house, there could not, in contemplation of law, be an obstruction, except at such time as there was occasion to make use of the way,¹ and therefore nothing done at other times could support an adverse claim.

Whoever is owner of the dominant tenement at the time an easement is disturbed, or has any interest therein which entitles him to the enjoyment of the easement, may maintain an action for the injury,² and where the dominant tenement is under lease, the reversioner may also sue, if the injury is one that affects his rights as reversioner.³ Suit may be brought against the owner of the servient tenement if the injury was done by him or with his permission; and if it consists in an obstruction or encroachment, which is continued by his successor in the title, the latter may be held responsible if he fails to remove it within a reasonable time after notice.⁴ As an obstruction or encroachment would constitute a private nuisance, the owner of the easement may, wherever it is practicable, and under the rules applicable to the abatement of nuisances in general, pro[*439] ceed to abate it.⁵ But *if in doing this, or in the enjoyment of the easement, he exceeds his right, he thereby

544, 73 Am. Dec. 470; *Welton v. Rathbun*, 46 Mich. 303. As to Martin, 7 Mo. 307; *Clifford v. Hoare*, L. R. 9 C. P. 362; S. C. 9 Moak, 449; *ante*, pp. *68-*73.
1—*Phipps v. Johnson*, 99 Mass. 26. See *Noyes v. Hemphill*, 58 N. H. 536.

2—*Hastings v. Livermore*, 7 Gray, 194.
3—*Kidgill v. Moor*, 9 C. B. 364; *Queen's College v. Hallett*, 14 East, 489; *Battishill v. Reed*, 18 C. B. 696; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Tinsman v. Belvidere R. R. Co.*, 25 N. J. 255. The grantee of the original grantee of the dominant tenement may restrain acts of the grantee of the original owner of the servient tenement. *McConnell* 88; *Thornton v. Smith*, 11 Minn. 15; *Grigsby v. Clear Lake*, 40 Cal. 396; *Dodge v. Stacy*, 39 Vt. 558; *Caldwell v. Gale*, 11 Mich. 77. 5—*Amick v. Tharp*, 13 Grat. 564, 67 Am. Dec. 787; *Great Falls Co. v. Worster*, 15 N. H. 412; *Hutchinson v. Granger*, 13 Vt. 386; *Adams v. Barney*, 25 Vt. 225; *Ballard v. Butler*, 30 Me. 94; *Jewell v. Gardiner*, 12 Mass. 312; *Rhea v. Forsyth*, 37 Pa. St. 503, 78 Am. Dec. 441. Superintendent

becomes a trespasser.⁶ So in abating the nuisance he must, at his peril, see that he causes no injury to a third person, for the wrong of one man cannot justify visiting upon an innocent person the consequences.⁷

Party Walls. A party wall is a wall on the division line of estates which each proprietor is at liberty to use as a support to his building. When such a wall stands in part on the land of each it is presumed to be owned by the two, unless the contrary is shown.⁸ At the common law no person was under obligation to unite with his neighbor in building a party wall, or even to furnish his proportion of the land for it to stand upon; but an erection might be made a party wall by agreement, and if one person allowed another to make use of his wall for the support of a building, and to continue the use for twenty years, the grant of a right to do so was presumed, and the wall became a party wall by prescription. The inconveniences of the common law rule have been obviated to some extent by statutes which permit a proprietor to build into his neighbor's wall for the support of his own building, provided the wall is sufficient for the purpose, on making payment of the just proportion of the cost. These statutes establish the rule of the civil law.

Where a party wall is built by agreement, the strict rule of law requires a deed, but if the agreement was by parol only, the case would be a very strong one for the application of the doctrine of equitable estoppel, and no doubt a dissatisfied proprietor would be enjoined from repudiating the arrangement and interfering with his neighbor's enjoyment of the wall as a party wall after-

of streets may abate an obstruction to public easement.

Gordon *v.* Taunton, 126 Mass. 349. May enter upon adjoining land to remove obstruction which throws back water upon highway. Johnson *v.* Dunn, 134 Mass. 522.

6—Ganley *v.* Looney, 14 Allen, 40. See Dyer *v.* Depui, 5 Whart. 584; Wright *v.* Moore, 38 Ala. 593, 82 Am. Dec. 731; Heath *v.* Williams, 25 Me. 209, 43 Am. Dec. 265.

7—Amick *v.* Tharp, 13 Grat. 564, 67 Am. Dec. 787.

8—Campbell *v.* Mesier, 4 Johns. Ch. 334; Matts *v.* Hawkins, 5 Taunt. 20. A party wall may be wholly on the land of one proprietor. Dorsey *v.* Habersack, 84 Md. 117, 35 Atl. 96. When partly on the land of each, each owns his part in severalty with cross easement of support. Fidelity Lodge *v.* Bond, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825.

wards.⁹ If one erects a block of houses or shops, and then conveys them separately to purchasers, the walls between [*440] them *become party walls for the mutual benefit.¹⁰

Where a party wall exists, each proprietor has an easement in the land of the other for its use, repair and support; but the extent of his rights may be limited by the contract between them with respect to the wall, or by the user or the statute under which it was built or is owned.¹¹ Rights in party walls pass with the land to heirs or assignees without being specially mentioned in the conveyance.¹² Each proprietor owes to the other the duty to do nothing that shall weaken or endanger it,¹³ and though each may rightfully, when he finds it for his interest to do so, increase its height, sink the foundations deeper, or on his own side add to it,¹⁴ yet it seems that in doing so he is insurer

9—See *Bell v. Rawson*, 30 Ga. 712. If one abutter in such case by digging causes it to fall, he is liable. *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753; *Briggs v. Klosse*, 5 Ind. App. 129, 31 N. E. 208, 51 Am. St. Rep. 238.

10—*Matts v. Hawkins*, 5 Taunt. 20; *Richards v. Rose*, 9 Exch. 218; *Webster v. Stevens*, 5 Duer, 553; *Wheeler v. Clark*, 58 N. Y. 267. The owner may not enlarge such party wall to make a dwelling house into a family hotel. *Musgrave v. Sherwood*, 60 How. Pr. 339.

11—*Brooks v. Curtis*, 4 Lansing, 283; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Fidelity Lodge v. Bond*, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825; *Briggs v. Klosse*, 5 Ind. App. 129, 31 N. E. 208, 51 Am. St. Rep. 238. A flue in a party wall is presumably for common use, though mainly on one side of the wall. *Weil v. Baker*, 39 La. Ann. 1102, 3 So. 361.

12—See *Standish v. Lawrence*, 111 Mass. 111; *Brooks v. Curtis*,

4 Lansing, 283. See *Warner v. Rogers*, 23 Minn. 34.

13—*Eno v. Del Vecchio*, 6 Duer, 17; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Dowling v. Hennings*, 20 Md. 179, 83 Am. Dec. 545; *Hieatt v. Morris*, 10 Ohio St. 523, 78 Amer. Dec. 280; *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753. One may not tear down such wall because it turns out to be wholly on his own ground. *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Schile v. Brockhahus*, 80 N. Y. 614; *Miller v. Brown*, 33 Ohio St. 547. See *West. Nat. Bank's App.* 102 Penn. St. 171. One who has erected a wall under an agreement that it is to be used as a party wall is liable to adjoining owner for damage done by him by its fall before he has used it. *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234; *Beidler v. King*, 209 Ill. 302, 70 N. E. 763.

14—*Matts v. Hawkins*, 5 Taunt. 20; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep.

against damages to the other proprietor.¹⁵ If the wall becomes ruinous, and ceases to answer the purposes of support, the easement is at an end, and each proprietor may [*441] build as he pleases upon his own land without any obligation to accommodate the other.¹⁶

545; *Price v. McConnell*, 27 Ill. 255; *Dorsey v. Habersack*, 84 Md. 117, 35 Atl. 96. He may increase its thickness and height if he does not impair the other's right. *Andrae v. Haseltine*, 58 Wis. 295, 46 Am. Rep. 635. If he builds it up it must be of the same kind as below, e. g. it may have no windows above if none below. *Dauenhauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627. If he builds a structure on top of the wall the other joint owner may knock the structure down. *Watson v. Gray*, L. R. 14 Ch. D. 192.

15—*Webster v. Stevens*, 5 Duer, 553; *Eno v. Del Vecchio*, 4 Duer. 53; *Dorsey v. Habersack*, 84 Md. 117, 35 Atl. 96; *Everett v. Edwards*, 149 Mass. 588, 22 N. E. 52, 14 Am. St. Rep. 462, 5 L. R. A. 110. See *Phillips v. Bordman*, 4 Allen, 147; *Potter v. White*, 6 Bosw. 644; *Hieatt v. Morris*, 10 Ohio St. 523; *Dowling v. Hennings*, 20 Md. 179; *Bradbee v. Christ's Hospital*, 4 M. & G. 714; *Levy v. Fenner*, 48

La. Ann. 1389, 20 So. 895; *Negus v. Becker*, 143 N. Y. 303, 38 N. E. 290, 42 Am. St. Rep. 724, 25 L. R. A. 667. But the plaintiff cannot recover for damages which he might readily have prevented by due care of his own property. *Hartford Deposit Co. v. Calkins*, 186 Ill. 104, 57 N. E. 863.

16—*Partridge v. Gilbert*, 15 N. Y. 601; *Sherred v. Cisco*, 4 Sandf. 480; *Campbell v. Mesier*, 4 Johns. Ch. 334; *Orman v. Day*, 5 Fla. 385. So if the wall is destroyed by fire. *Antomachi v. Russell*, 63 Ala. 356. Or if the building is destroyed but the wall left standing. *Hoffman v. Kuhn*, 57 Miss. 746. According to some authorities either party may rebuild when necessary to make the wall answer the purposes for which it was built. *Putzel v. Drovers and Mechanics Nat. Bank*, 78 Md. 349, 28 Atl. 276, 44 Am. St. Rep. 298, 22 L. R. A. 632; *Dorsey v. Habersack*, 84 Md. 117, 35 Atl. 96; *Partridge v. Lyon*, 67 Hun, 29, 21 N. Y. S. 848.

NEGLECTS OF OFFICIAL DUTY.

Offices Are Trusts. Although the incumbent of a public office has a property right in it, yet the office itself is a public trust, and is conferred, not for his benefit, but for the benefit of the political society.¹ It is therefore from the standpoint of public interest that any failure in duty is to be regarded, and the remedy for such failure must be indicated by the nature of the duty, and the purpose intended to be accomplished in imposing it.

Classification. Official duties are supposed to be susceptible of classification under the three heads of legislative, executive and judicial, corresponding to the three departments of government bearing the same designations; but the classification cannot be very exact and there are many officers whose duties cannot properly, or, at least, exclusively, be arranged under either of these heads. A single case may suffice as an illustration. The officers chosen to levy and apportion taxes for the inferior municipal subdivisions of the State, are in some cases authorized: 1, to determine what taxes shall be levied within the municipality for the year, 2, to value the property which is to be assessed for these taxes, 3, to apportion the taxes as between the several items of property assessed; and 4, to receive from their superior officers the statements of taxes to be assessed for more general purposes, and to apportion these in the same way. The first of these duties partakes of the legislative, the second of the judicial, the third and fourth of the executive; but in strictness, none of them can be classed as belonging specially to either department of the government, and the officers who perform them are usually designated administrative officers. Those officers, on the other hand, who merely execute the commands of superiors, are properly denominated ministerial.

1—Beebe *v.* Robinson, 52 Ala. 66; *Ex parte Lambert*, 52 Ala. 79.

***Classification of Duties.** While offices are established [*443] and filled on public reasons, the incumbents of some are required to perform duties which specially concern individuals, and only indirectly concern the public. The case of the sheriff will furnish us with an apt illustration here. This officer serves criminal process, arrests and confines persons accused of crime, preserves order in court, and is conservator of the public peace, but he serves civil process also. The nature of the duty in any case suggests the remedy in case of neglect. If the duty he has failed to perform is a duty to the State, he is amenable to the State for his fault; while for the neglect of duties to individuals, only the person who is injured may maintain suit. It is, however, as a general thing, only against ministerial officers that an action will lie for neglect of official duty. The reason generally assigned is, that in the case of other officers, it is inconsistent with the nature of their functions that they should be made to respond in damages for failure in satisfactory performance. In many cases this is a sufficient reason, but in others it is inadequate.

If we take the case of legislative officers, their rightful exemption from liability is very plain. Let it be supposed that an individual has a just claim against the State which the legislature ought to allow, but neglects or refuses to allow. In such a case there may be a moral wrong, but there can be no legal wrong. The legislature has full discretionary authority in all matters of legislation, and it is not consistent with this that the members should be called to account at the suit of individuals for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. This remark is not true, exclusively, of legislative bodies proper, but it applies also to inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like.² When such bodies neglect and refuse to proceed to the discharge of their duties, the courts may interpose to set them in motion; but they cannot require them to

2—*Baker v. State*, 27 Ind. 485. See *Morris v. People*, 3 Denio, 381.

reach particular conclusions, nor, for their failure to do so, impose the payment of damages upon them, or upon the municipality they represent.³

[*444] *It is only when some particular duty of a ministerial character is imposed upon a legislative body, in the performance of which its members severally are required to act—no liberty of action being allowed, and no discretion—that there can be a private action for neglect. Such ministerial duties are sometimes imposed upon the members of subordinate boards, like supervisors and county commissioners, and when they are, if they are imposed for the benefit of individuals, the members may be personally responsible for failure in performance.

If we take next the case of executive officers, the rule will be found to be the same. The governor of the State is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws; but neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforcement of the laws. The executive, in these particulars, exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department, and this would be inconsistent with the theory of republican institutions. Each department, within its province, is and must be independent.

Taking next the case of the judicial department, the same rule still applies. For mere neglect in judicial duties no action

3—*Wells v. Atlanta*, 43 Ga. 67. Even the allegation of fraud cannot be listened to for the purpose of establishing such a liability. *Wilson v. New York*, 1 Denio, 595; *Freeport v. Marks*, 59 Pa. St. 253; *Buell v. Ball*, 20 Iowa, 282. The motives of councilmen in passing an ordinance cannot be inquired into. *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508. A penalty is sometimes imposed on members of such boards for neglect to perform specific duties, even when they seem to partake of the judicial. See *Morris v. People*, 3 Denio, 381.

can lie. A judge cannot be sued because of delaying his judgments, or because he fails to bring to his duties all the care, prudence and diligence that he ought to bring, or because he decides on partial views and without sufficient information. His selection for his office implies that he is to be governed in it by his own judgment; and it is always to *be as- [*445] sumed that that judgment has been honestly exercised and applied.

Ministerial Action by Judicial Officers. Nevertheless, all judges may have duties imposed upon them which are purely ministerial, and where any discretionary action is not permitted.⁴ An illustration is to be found in the *habeas corpus* acts. These, generally, make it imperative that a judge, when an application for the writ is presented which makes out a *prima facie* case of illegal confinement, shall issue the writ forthwith; and the judge is expressly made responsible in damages if he fails to obey the law. A similar liability arises when a justice of the peace refuses to issue a summons to one who lawfully demands it, or an execution on a judgment he has rendered,⁵ or to enter up a judgment he has determined upon,⁶ or to perform any other official act which in its nature is purely ministerial;⁷ or when, in per-

4—The principle was very fully examined and discussed in *Ferguson v. Earl of Kinnoull*, 9 Cl. & Fin. 251. The action was brought against a member of a Scotch Presbytery for the refusal of the Presbytery to take the plaintiff, who was presentee to a church, on his trials. The court sustained the action, holding that the Presbytery acted ministerially in respect to the particular duty, and had no discretion to refuse. Also, that the members were liable individually and collectively for the refusal.

5—*Place v. Taylor*, 22 Ohio St. 317; *Gaylor v. Hunt*, 23 Ohio St. 255. For the general rule see *Wilson v. New York*, 1 Denio, 595;

Rochester White Lead Co. v. Rochester, 3 N. Y. 463, 53 Am. Dec. 316; *Noxon v. Hill*, 2 Allen, 215; *Way v. Townsend*, 4 Allen, 114. If the justice issues an invalid execution, he is liable to plaintiff for nominal damages, but not for the costs of a levy or of an attempt to collect, those being too remote. *Noxon v. Hill*, 2 Allen, 215.

6—*Fairchild v. Keith*, 29 Ohio St. 156.

7—Such as to return in due time the papers on an appeal taken from his judgment. *Peters v. Land*, 5 Blackf. 12. Or to take security on issuing a writ of replevin. *Smith v. Trawl*, 1 Root, 165. Or security on an appeal.

forming an official duty he is guilty of misconduct, to the prejudice of a party, as where he makes a false return to a writ of *certiorari*.⁸

[*446] *But, while in cases of merely discretionary powers, it is sufficiently manifest that there can be no responsibility to individuals for the manner in which they are performed, there are many cases of powers not discretionary, in which the right to exemption from liability is equally plain. The sheriff, for example, in the execution of a convict, is allowed no discretion; but the idea of responsibility to individuals for any neglect of duty in respect to the execution, or for any improper conduct, would be a manifest absurdity. It is not, then, solely because the duties are discretionary that officers are exempt from civil suits in respect to their performance, and some further reason must be sought for. The reason in the case instanced is plain enough; for the duty neglected or improperly performed is a public duty exclusively, and no single individual of the public can be in any degree legally concerned with the manner of its performance. Now, no man can have any ground for a private action until some duty owing to him has been neglected; and if the officer owed him no duty, no foundation can exist upon which to support his action. But had the sheriff received from him for service an execution against the goods and chattels of his debtor, the case would have been different. The sheriff's duty would have been the same in nature—that is, it would still have been ministerial—but it would have been a duty owing to the individual, and for a failure in performance the individual must be entitled to appropriate redress.

When Officers Liable to Private Suits. The rule of official

Tompkins *v.* Sands, 8 Wend. 462, 24 Am. Dec. 46. The general rule is, that when judicial officers are required to perform ministerial acts, they may be sued for neglect to do so. Ferguson *v.* Earl of Kinnoull, 9 Cl. & Fin. 251; Noxon *v.* Hill, 2 Allen, 215. The justice who issues an attachment without the statutory prerequisites is a trespasser. Vosburg *v.* Welch, 11 Johns. 174. For the refusal of a probate judge to issue a liquor license when all the requirements of law have been complied with, his bondsmen are liable. Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

8—Pangburn *v.* Ramsay, 11 Johns. 141, or an appeal. Brooks

responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution.⁹ On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.¹⁰ "The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its non-performance."¹¹

*The case of discretionary powers may be brought [*447] under this rule as well as all others, for these are only

v. St. John, 25 Hun, 540. So highway commissioners for such return to a certiorari. *Rector v. Clark*, 78 N. Y. 21.

9—For a supervisor to assess in defiance of a statutory regulation all the property in his township is not a private wrong. *Moss v. Cummings*, 44 Mich. 359. Persons directed by law to establish a penitentiary are not liable to one injured in working therein. *Alamango v. Supervisors*, 25 Hun, 551. To same effect, *O'Hara v. Jones*, 161 Mass. 391, 37 U. S. 371.

10—Persons chargeable with the duty in such case are liable for misfeasance. *Bennett v. Whitney*, 94 N. Y. 302. Whether they are for mere nonfeasance, as in case of repair of roads, has been much questioned. In *Lampert v. La-Clede Gaslight Co.*, 14 Mo. App. 376, the cases are fully discussed by THOMPSON, J. There defendant was under a contract to keep the city lamp posts in repair, and from neglect so to do a citizen

was injured. The court says: "The defendant being thus charged with a public duty for the benefit of the city's inhabitants distributively, the citizen specially injured may proceed on the ground of the non-performance of such duty, and set up the contract by way of inducement;" and see, *Piercy v. Averill*, 37 Hun, 360.

11—*Gage v. Springer*, 211 Ill. 200, 71 N. E. 860, 103 Am. St. Rep. 191. The neglect or refusal of a public officer to perform a ministerial duty, or the improper discharge thereof renders him liable in damages to an one injured thereby. *Wright v. Shanahan*, 149 N. Y. 495, 44 N. E. 74; *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826. "Officials in the performance of the duty imposed by law cannot be held in damages for acts done strictly within the lines of official duty." *Thibodaux v. Thibodaux*, 46 La. Ann. 1528, 16 S. 450.

conferred where the duties to be performed are public duties; concerning the public primarily and specially, and individuals only incidentally. This is readily perceived in the case of powers conferred upon legislative bodies. Members of these bodies are not chosen to perform duties to individuals, but duties to the State. The performance of these may benefit individuals, and the failure to perform them may prejudice individuals, but this is only incidental. The State expends moneys in draining extensive tracts of low lands; this benefits the land owner living near the land drained, but it was not in his interest that the improvement was provided for, but for the general benefit. The State relieves a certain class of property from taxation; this may prejudice those who own no such property, but it violates no duties which the legislators owed to any individual. In any such legislation, the citizen can be supposed to have no individual rights whatsoever; and it will be made, amended, or repealed without the necessity of considering in any manner his private interest. It is the same when a private claim is allowed and its payment ordered: this benefits the claimant, but the allowance is made in the interest of the State at large, and because it is for the public good that all just claims upon the State should be recognized and provided for. If the claim should be rejected instead of being allowed, there would still be the same presumption that the public interest had been consulted, and that the claim was rejected because it had no just foundation. In either case the duty which was imposed on the members of the legislature—which was a duty to the public only—is supposed to have been performed.¹²

The case of the judge is not essentially different. His doing justice as between particular individuals, when they [*448] have a controversy before him, is not the end and object which were in view when his court was created, and he

12—Where a city council refuses to approve a bond for a license, which it was legally bound to approve and was afterwards compelled to approve by a mandamus, it was held that no action would lie for the refusal either against the municipality or the individual members who opposed it. *Ampersee v. Kalamazoo*, 75 Mich. 228,

was selected to preside over or sit in it. Courts are created on public grounds; they are to do justice as between suitors, to the end that peace and order may prevail in the political society, and that rights may be protected and preserved. The duty is public, and the end to be accomplished is public: the individual advantage or loss results from the proper and thorough or improper and imperfect performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice as between individuals, he may be called to account by the State in such form and before such tribunal as the law may have provided. But as the duty neglected is not a duty to the individual, civil redress, as for an individual injury, is not admissible. This, as we shall see hereafter, is not the sole reason for judicial exemption from individual suits, but it is one reason, and a very conclusive one.

The dignity of the office is sometimes supposed to have something to do with this immunity from private suits; but this is a mistake. The rule stated does not depend at all on the grade of the office, but exclusively upon the nature of the duty. This may be shown by taking as an illustration the case of the policeman; one of the lowest in grade of public officers. His duty is to serve criminal warrants; to arrest persons who commit offenses in his view, to bring night-walkers to account, and to perform various offices of similar nature. Within his beat he should watch the premises of individuals, and protect them against burglaries and arsons. But suppose he goes to sleep on his beat, and while thus off duty a robbery is committed or a house burned down, either of which might have been prevented had he been vigilant,—who shall bring him to account for this neglect of duty? Not the individual who has suffered from the crime, certainly, for the officer was not his policeman; was not hired by him, paid by him, or controlled by him; and consequently owed to him no legal duty.¹³ The duty imposed upon the

42 N. W. 821, 13 Am. St. Rep. 13—In *Butler v. Kent*, 19 Johns. 432; *Ampersee v. Winslow*, 75 Mich. 234, 42 N. W. 823. 223, 10 Am. Dec. 219, a public lottery commissioner was sued by

[*449] officer was a *duty to the public—to the State, of which the individual sufferer was only a fractional part, and incapable as such of enforcing obligations which were not individual but general. If a policeman fails to guard the premises of a citizen with due vigilance, the negleet is a breach of duty of exactly the same sort as when, finding the same citizen indulging in riotous conduct, he fails to arrest him; and if the citizen could sue him for the one neglect, he could also for the other. And here it will be noted that the duty neglected in either case is in no proper sense discretionary.

What has been said is true also of officers to whom is entrusted the power to lay out, alter, or discontinue highways. They may decline to lay out a road which an individual desires, or they may conclude to discontinue one which it is for his interest to be retained. There is in such a case a damage to him but no wrong to him. In performing or failing to perform a public duty, the officer has touched his interest to his prejudice. But the officer owed no duty to him as an individual: the duty performed or neglected was a public duty. An individual can never be suffered to sue for any injury which technically is one to the public only: he must show a wrong which he specially suffers, and damage alone does not constitute a wrong.¹⁴

It may be said that the case of the highway commissioner who

one who had purchased several lottery tickets to sell again, and who complained that by the carelessness and mismanagement of the commissioner public confidence in the fairness of the drawing was destroyed, and the market value of the tickets diminished. The court held that the action would not lie. The plaintiff showed no loss peculiar to himself; the duty neglected was a public duty; besides the allegation of damage was vague and indefinite; it was like a general averment in *Iveson v. Moore*, 1 Salk. 16, that plaintiff lost customers by reason of a bad

name being applied to his wife—no particulars being given to show the loss.

14—*Waterer v. Freeman*, Hob. 266. See ante, p. *66. Where a highway was laid out through the plaintiff's barn yard contrary to statute and the defendant, a highway commissioner, in his return to a writ of certiorari to review the proceedings, falsely stated that it did not run through any barn yard whereby the proceedings were confirmed, the defendant was held liable in damages. *Beardslee v. Dolge*, 143 N. Y. 160, 38 N. E. 205, 42 Am. St. Rep. 707.

improperly opens or discontinues a road, to the prejudice of an individual, is like that of one who commits a public nuisance to the injury of an individual. In each case there is a public wrong and also a private damage. But the two cases differ in this: the common law imposes upon every one a duty to his neighbor as well as to the public not to make his premises a nuisance; but the duties imposed upon the road officer, in laying out and discontinuing roads, are only that he shall faithfully serve the public. If it shall be found that in his official action he has failed *to regard sufficiently the interests of individuals, [*450] proof of the fact does not make out a right of action, because, there being no duty to the individual, there would be nothing of which the injured party could complain except of the breach of public duty. But the State must complain of this, not individuals.¹⁵ The road officer, however, owes to every individual the duty not to proceed illegally to his prejudice; and, therefore, if the steps taken for laying out a highway are not in accordance with the law, the officer becomes a trespasser if he relies upon them in entering upon the lands of individuals.

Another illustration of the general rule is that of the quarantine officer. His duty requires him to take the proper steps to prevent the spread of contagion, and he will be culpable in a very high degree if he neglects to do so, because the duty is a public duty of the very highest importance and value. Let it be supposed that a neglect occurs, and that a great number of persons are infected in consequence. Not one of these persons can demand of the officer a personal redress. The reason is obvious: the duty was laid on the officer as a public duty—a duty to protect the general public—but the office did not charge the incumbent with any individual duty to any particular person. If one rather than another was injured by the neglect, it was only that the consequences of the public wrong chanced to fall upon him rather than upon another; just as the ravages of war may chance to reach one and spare another, though the purpose of the government is to protect all equally.¹⁶

15—*Sage v. Laurain*, 19 Mich. 137. 16—See *White v. Marshfield*, 48 Vt. 20; *Brinkmeyer v. Evansville*,

A county superintendent of schools is not liable for refusing a license to teach, if done in the honest exercise of his discretion,¹⁷ but otherwise if he acts maliciously.¹⁸

Recorder of Deeds. On the other hand there are offices, which, though created for the public benefit, have duties devolved upon their incumbents which are duties to individuals exclusively. In other words, in these cases, instead of individuals being benefited by the performance of public duties, the public is to be incidentally benefited by the performance of duties to [*451] individuals. *One conspicuous illustration is that of the recorder of deeds. The office may be said to be created because it is for the general public good that all titles should appear of record, and that all purchasers should have some record upon which they may rely for accurate information. But although a public officer is chosen to keep such a record, the duties imposed upon him are for the most part duties only to the persons who have occasion for his official services. He is simply required to record for those who apply to him their individual conveyances, and to give to them abstracts or copies from the record if they request them and tender the legal fees. All these are duties to individuals, to be performed for a consideration; the State is not expected to enforce the performance,

29 Ind. 187; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Western College, &c., v. Cleveland*, 12 Ohio St. 375; *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451; *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407; *Pontiac v. Carter*, 32 Mich. 164. See *Summers v. People*, 109 Ill. App. 430. For an unauthorized fumigation of a fruit-laden vessel damaging the cargo, a health officer is liable to the shipper. *Beers v. Board of Health*, 35 La. Ann. 1132, 48 Am. Rep. 256. So if a health officer causes the plaintiff's animal to be killed as one diseased, when it is not so, he will be liable. *Miller v. Horton*,

152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116; *Sahr v. Scholle*, 89 Hun, 42, 35 N. Y. S. 97.

17—*Branaman v. Hinkle*, 137 Ind. 496, 37 N. E. 546.

18—*Elmore v. Overton*, 104 Ind. 548, 4 N. E. 197. For acts done in good faith in the enforcement of a law or ordinance, afterwards declared void, it is held an officer is not liable. *Anheuser-Busch Brewing Ass. v. Hammond*, 93 Ia. 520, 61 N. W. 1052; *Goodwin v. Guild*, 94 Tenn. 486, 29 S. W. 721, 45 Am. St. Rep. 743, 27 L. R. A. 660. But see *Waterloo Woolen Mfg. Co. v. Shanahan*, 58 Hun, 50, 11 N. Y. S. 829.

nor does it generally provide for punishing as a breach of the public duty the failure in performance. But the right to a private action on breach of the duty follows as of course.¹⁹ The breach is an individual wrong, and resulting damage must be presumed, whether it is or is not susceptible of proof.

An actionable wrong may be committed by the recorder by refusing to receive and record a conveyance when it is tendered to him for recording accompanied with the proper fees. He may also be chargeable with a like wrong if, in undertaking to record a deed, he commits an error which makes the conveyance appear of record to be something different from what it is; for his duty is to record it accurately. In this last case the question of difficulty would concern, not so much the existence of a right of action, as the person entitled to maintain it; in other words, who the party is who is wronged by the recorder's mistake.

The authorities are not agreed on the question who should sustain the loss when the grantee in a deed has duly left it for record, and the recorder has failed to record it correctly. The question in such a case would commonly arise between the grantee in such a deed and some person claiming under a subsequent *conveyance by the same grantor, which has [*452] been put upon record while the error in the other remained uncorrected. In some cases it has been held that the grantee in the first deed is not to be prejudiced by the recorder's error. The reason has been given in one case as follows: The person seeking to take advantage of the error, it is said, "is, in effect, claiming to enforce a statute penalty imposed upon the grantee in the deed by reason of his having omitted to do something the law required him to do to protect himself and preserve

19—A ministerial officer charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to an action if he refuse to perform it, notwithstanding his disobedience may be prompted by an honest belief that the statute is unconstitutional. *Clark v. Miller*, 54 N. Y. 528. His motive, whether honest or malicious, is immaterial. *Keith v. Howard*, 24 Pick. 292. An action as at common law accrues on breach of the duty, if the statute fails to prescribe the remedy. *Commissioners v. Duckett*, 20 Md. 468.

his rights. The law never intended a grantee should suffer this forfeiture if he has conformed to its provisions. The plaintiff claiming the benefit of this statute, being, as it is, in derogation of the common law, and conferring a right before unknown, he must find in the provisions of the statute itself the letter which gives him that right. To the statute alone we must look for a purely statutory right. All that this law required of the grantee in the deed was, that he should file his deed for record in the recorder's office, in order to secure his rights under the deed. When he does that, the requirements of the law are satisfied, and no right to claim this forfeiture can be set up by a subsequent purchaser. The statute does not give to the subsequent purchaser the right to have the first deed postponed to his, if the deed is not actually recorded, but only if it is not filed for record.²⁰ Here, it is perceived, the court finds that the grantee has brought himself strictly within the letter of the statute, and has performed all that the statute in terms makes requisite for his protection. He has duly filed his deed for record, and the statute required no more. A like decision was made in Alabama under a statute which made the deed "operative as a record" from the time it was delivered by the grantee for the purpose.²¹

[*453] *Where such is the rule of law, it would seem that the recorder could hardly be responsible in damages to the grantee for failing correctly to record his deed,²² unless, in con-

20—BREESE, J., in *Merrick v. Wallace*, 19 Ill. 486, 497. The same view, in effect, is taken by Judge DRUMMOND in *Polk v. Cosgrove*, 4 Biss. 437, and *Riggs v. Boylan*, Ibid. 445. See, also, *Garrard v. Davis*, 53 Mo. 322. The statute under which the Illinois decisions were made provided that "all deeds and other title papers which are required by law to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and

subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall have been filed for record in the county where the said lands may lie."

21—*Mims v. Mims*, 35 Ala. 23. See *M'Gregor v. Hall*, 3 Stew. & Port. 397.

22—Except, of course, to the extent of what had been paid to him for making a record which he has failed to make.

sequence of something which subsequently takes place, an actual damage is suffered which can be shown. Such damage might befall, if afterwards he should negotiate a sale, and find the erroneous record to stand in the way of its completion; but as the deed, if still in existence, could be recorded over again on payment of the statutory fees, it may reasonably be said that the cost of a new record would be the measure of recovery, provided that, in the meantime, nothing else had occurred to endanger the title by reason of the error. If, however, the deed were lost or destroyed, a second recording would be impossible, and the question of remedy might then be more serious. As the inconvenience the grantee would suffer in such a case, and the danger to his title would result from the conjunction of the two circumstances—first, the error in the record, and second, the loss of the deed—the question of remote and proximate cause would be involved, and it is not easy to say what damage can be said to have followed, as a natural consequence, directly and proximately from the recorder's fault.

On the other hand, there are many cases in which it has been decided that every one has a right to rely upon the record actually made as being correct, and that, if it is erroneous, the peril is upon him whose deed has been incorrectly recorded. These cases, like those previously given, are planted upon the statute. The leading case was one in which a mortgage of three thousand dollars was recorded as one for three hundred dollars only. The statute provided that "no mortgage should defeat or prejudice the title of any *bona fide* purchaser, unless the same shall have been duly registered." Said Chancellor KENT: "The true construction of the act appears to be that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee; and if a mistake occurs to his *prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The act, in providing that all persons

might have recourse to the registry, intended *that* as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy of the statute.²³ Many decisions to the same effect have been made in other States.²⁴

Sometimes the error of the recorder consists in not indexing the conveyance, or in indexing it incorrectly. Here, also the effect of error must depend upon the statute, and the purpose it has in view in requiring an index to be made. In general, the purpose probably is to facilitate the examination of the records by the officer; not to protect the interests of those whose conveyances are recorded;²⁵ and where such is the fact, an error in the index, or a failure to index a deed, would not prejudice the title of the grantee.²⁶ But some statutes require the

23—*Frost v. Beekman*, 1 Johns. Ch. 288, 298. The case was reversed on another ground. *Beekman v. Frost*, 18 Johns. 544, 9 Am. Dec. 246. See, also, N. Y. Life Ins. Co. v. White, 17 N. Y. 469.

24—*Sanger v. Craigie*, 10 Vt. 555; *Baldwin v. Marshall*, 2 Humph. 116; *Heister's Lessee v. Fortner*, 2 Binn. 40, 4 Am. Dec. 417; *Lally v. Holland*, 1 Swan. 396; *Shepherd v. Burkhalter*, 13 Geo. 444; *Miller v. Bradford*, 12 Iowa, 14; *Chamberlain v. Bell*, 7 Cal. 292; *Parrett v. Shaubhut*, 5 Minn. 323; *Barnard v. Campau*, 29 Mich., 162; *Terrell v. Andrew County*, 44 Mo. 309; *Brydon v. Campbell*, 40 Md. 331; *Jenning's Lessee v. Wood*, 20 Ohio, 261. The defects in these cases were various. In the Ohio case the name of

the grantor was incorrectly given, and in the Minnesota case the name of one of the witnesses was not copied into the record. Where a recorder negligently recorded a lien for \$500 as one for \$200, it was held the plaintiff was entitled to only nominal damages, unless he showed that the difference could not be collected from the person obligated to pay the amount. *State v. Davis*, 117 Ind. 307, 20 N. E. 159.

25—See *Schell v. Stein*, 76 Penn. St. 398, 18 Am. Rep. 416.

26—*Curtis v. Lyman*, 24 Vt. 338, 58 Am. Dec. 174; *Commissioners v. Babcock*, 5 Ore. 472; *Schell v. Stein*, 76 Penn. St. 398, 18 Am. Rep. 416; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533.

index to give information of the contents of the deed, and particularly what land is conveyed by it; and where this is the case, the record is not constructive notice of the conveyance of anything which the index does not indicate.²⁷

*In order to understand what rights of action might [*455] arise from errors in records, we may suppose a case arising in a State where the statute puts upon the grantee himself the responsibility to see that his deed is correctly recorded. Suppose the deed to be so recorded, that the record fails to describe the land actually conveyed, and the grantor then sells the land a second time to one having no knowledge of the prior conveyance, thereby cutting off the first conveyance. There would be under such circumstances, a direct loss to the first grantee of the whole value of the land, and it is plain that he must be entitled to a remedy against some one for the recovery of compensation. That he might treat the second conveyance by the grantor as one made in his interest, and sue and recover from him the amount received from the second grantee, we should say would be clear. This would be only the ordinary case of one affirming a sale, wrongfully made by another, of his property, and recovering the proceeds thereof; the familiar case of waiving a tort and suing in *assumpsit* for the money received. But in many cases such redress might be inadequate, because less than the value of the land would be likely to be received on a second sale made, as it would be, with knowledge on the part of the vendor that he had no title; and no reason is perceived why the real owner might not sue in tort for the value of that which he has lost, if that should promise more satisfactory redress.²⁸ If one, knowing he has already conveyed away certain lands, gives a new deed, which defeats the first, this is a gross and palpable fraud, and, though like the selling of property in market overt, it may pass the title, it cannot protect

27—*Scoles v. Wilsey*, 11 Iowa, 261; *Breed v. Conley*, 14 Iowa, 269, 81 Am. Dec. 485; *Gwynn v. Turner*, 18 Iowa, 1. Recorder is liable for failure to index to one injured thereby. *Ian*, 98 Ind. 114; *Norton v. Kumpe*, 121 Ala., 446, 25 So. 841; *First Nat. Bank v. Clements*, 87 Ia. 542, 54 N. W. 197.

28—See *Hanold v. Bacon*, 36 Mich. 1.

the seller when called upon by the owner to account for the property of which the latter has been defrauded.²⁹ But the question of a remedy against the recorder would, in this case as well as that before suggested, be complicated as a question [*456] of proximate and remote cause, and would require a consideration which, up to this time, it has never, so far as we are aware, received. Does the loss of the estate result from the error of the recorder? or does that merely furnish the opportunity for another event, to which the loss is in fact attributable as the proximate cause? The question would be still further complicated if, before the second conveyance by the original grantor, the first grantee had himself disposed of the land, so that the loss would fall, not upon the party whose deed was defectively recorded, but upon one claiming under him. Here the damage, instead of following directly the recorder's misfeasance, follows it only after two intermediate steps; a conveyance by the first grantee, and another by the first grantor which has the effect to defeat it.

The recorder of deeds may also injure some person by giving him an erroneous certificate. The liability for this is clear if the giving of the certificate was an official act; otherwise not. It was an official act if it was something the person obtaining it had a right to, and which it was the recorder's duty to give.³⁰ Thus one has a right to call for copies to be made from the records, and for official statements of what appears thereon; and he is entitled to have these certified to him correctly. But he is not entitled to call upon the recorder for a certificate that a particu-

29—Andrews *v.* Blakeslee, 12 Iowa, 577. The second grantee would of course get no title if he took his deed with notice of the first; and in that case he might be liable to the first grantee if he should sell to a *bona fide* purchaser, and thereby defeat the real owner. The principle may be stated as follows: That when one is placed in circumstances which put it into his power wrongfully

to convey another man's estate away from him, the law imposes upon him the duty to abstain from doing so; and for a breach of this duty an action lies to recover the value of what is lost.

30—Liable for search certified by his clerk. Van Schaick *v.* Sigel, 60 How. Pr. 122. Liable for negligence in abstracting under contract. Smith *v.* Holmes, 54 Mich. 104.

lar title is good or bad; and such certificate, if given, would not be official. The reason for this is that a certificate to that effect must necessarily cover facts which the record cannot show; and a title may be good or be defective for reasons which cannot, under any recording laws, appear of record. Therefore, if the register certifies that a title is good, he only expresses an opinion on facts, some of which he may officially know, but others of which he cannot know as recorder, and to which, therefore, he cannot officially certify.

But suppose the register's certificate to cover nothing he might not be required to certify officially, and, therefore, to be properly and strictly an official act, but incorrect, and suppose the person who applies for and receives it is not injured by it, but a subsequent purchaser, to whom he has delivered it with his title deeds, is injured—has such subsequent purchaser a right of action *against the recorder? In other words, if it be [*457] conceded that it is a duty the recorder owes to every one who may have occasion to rely upon his records, to see that they are correctly made, is it also his duty to every one who may have occasion to rely upon his certificates to see that they are correct also?

The difference between the two cases may be said to be this: That the records are for public and general inspection, and are required to be kept that all prsons may have, by means of them, accurate information concerning the titles; while the giving of a certificate respecting something recorded is a matter between the recorder and the person calling for it, and legally concerns no one else. The recorder knows that his records are to be seen, and titles to be made in reliance upon them; he is not bound to know that his certificate is for the use or reliance of any one but the person who receives it, nor can it be assumed that he gives it for any other use. He contracts with the person who requests it and pays for it to give a certificate which shall state the facts, but he enters into no relation of contract or otherwise in respect to it with any other person, and if another relies upon it to his injury, he cannot have redress from the recorder, because the recorder assumed no duty for his protection. It has, therefore,

been decided that the recorder is responsible only to the party procuring his certificate, though another may have acted in reliance upon it and been injured by his error.³¹

The recorder may also be responsible for recording papers not entitled to record, provided the record, when made, may cause legal injury, and, provided further, he is aware that the record is unauthorized. Thus, a paper he knows to be forged he has no right to record, and if he puts it upon record to the damage of any one, the misfeasance is actionable.³² So it would seem the recorder should be liable if he were knowingly to put upon record a deed purporting to be acknowledged before a proper officer, when in fact the person purporting to take the acknowledgment was not an officer at all.³³ But the case is one which has never yet, so far as we are aware, been the subject of judicial decision.

[*458] ***Inspectors.** The case of inspector of provisions is also one in which duties are imposed in respect to the public and also in respect to individuals. The requirement of inspection is an important sanitary regulation, and to some extent the public depend upon it for protection against the diseases that might be engendered or disseminated by the sale of unwholesome food. But it is also important to individual purchasers; they have a right to rely upon it, and if they are betrayed by such reliance

31—*Housman v. Girard Building, &c., Association*, 81 Pa. St. 256. Compare *Ware v. Brown*, 2 Bond, 267. If, however, the certificates were purposely and knowingly made false with fraudulent intent, no doubt the recorder might be liable to one defrauded by it. *Wood v. Ruland*, 10 Mo. 143.

32—*Ramsey v. Riley*, 13 Ohio, 157.

33—In many, perhaps most, of the States the recorder is to take notice of the official character and signature of those assuming to have authority to take acknowledgment of deeds. If he records a deed the acknowledgment of

which is certified by some one not such officer as he represents himself to be, a purchaser under it may buy a worthless title. Is the recorder liable in such a case? Probably not, unless he knew the want of official character. *Ramsey v. Riley*, 13 Ohio, 157. But the question suggests the absurdity and danger of requiring an officer to act upon an assumption of facts in respect to which he will often have no knowledge, and where to him personally it is matter of indifference whether the facts are or are not as he assumes them to be.

they may have their action.³⁴ Other officers performing similar services come under the same liability.³⁵

Postmasters. The case of the postmaster affords a similar illustration. It was decided at an early date that the duties of the Postmaster General were exclusively public; that the post office was an institution of the government, established and regulated by law; that all of its officers and agents were officers and agents of the government and not of the Postmaster General; that as between the Postmaster General or any officer or agent of the post office on the one hand, and the public accommodated by it on the other, there were no implied contract relations; and that while each officer and agent might be liable in a proper form of action to any individual who suffered from his neglect of duty, no one of them was liable for the default of another and therefore the Postmaster General could not be held responsible for the loss of a letter containing exchequer bills which was opened and the bills taken out in the London post office.³⁶ But *the local postmaster unquestionably has [*459] imposed upon him duties to individuals as well as to the public. He is to receive and forward mail to other offices; to keep correct accounts with the department, and perhaps with contractors; to draw money orders, etc. But in respect to mail

34—*Hayes v. Porter*, 22 Me. 371; *Nickerson v. Thompson*, 33 Me. 433; *Tardos v. Bozant*, 1 La. Ann. 199. In *Seaman v. Patten*, 2 Caines, 312, it is held that the inspector is only liable when malice or corruption is alleged and proved. The fact that the statute imposes a penalty on the officer for neglect of duty will not preclude a private action. *Hayes v. Porter*, 22 Me. 371.

35—So held of a building inspector who negligently permitted the construction of a building adjoining the plaintiff's house, not in accordance with the ordinance, in consequence of which it fell on the plaintiff's house and killed his in-

fant child. *Merritt v. McNally*, 14 Mont. 228, 36 Pac. 44. A statute made an oil inspector civilly and criminally liable if "guilty of any fraud, deceit, misconduct or culpable neglect in the discharge of his official duties." He was held not liable for the false branding of oils unless it was intentionally done. *Hatcher v. Dunn*, 102 Ia. 411, 70 N. W. 603, 36 L. R. A. 689.

36—*Lane v. Cotton*, 1 Ld. Raym. 646; S. C. 12 Mod. 471, 1 Salk. 17. See *Smith v. Powditch*, Cowp. 182; *Rowning v. Goodchild*, 2 W. Bl. 906; *Whitfield v. Le DeSpencer*, Cowp. 754, 765; *Hutchins v. Brackett*, 22 N. H. 252.

matter received at his office for delivery, a duty is fixed upon him in behalf of the several persons to whom each letter, paper or parcel is directed. When the proper person calls for what is there for delivery, the postmaster must deliver it, and his refusal to do so is a tort.³⁷ The postmaster is also liable to the person entitled to it for the loss, through his own carelessness or that of any of his clerks or servants, of any letter or other mail matter which shall have come to his official custody.³⁸ But it has been held in several cases that the postmaster is not liable for the loss or abstraction of a letter by one of his sworn assistants, whose appointment must be approved and can at any time be terminated by the department.³⁹ Neither is a mail carrier responsible for the loss of mail matter through the carelessness or dishonesty of one of his sworn assistants,⁴⁰ but he is liable if the loss is attributable to his own servant, or to any unsworn assistant.⁴¹

Clerks of Courts, etc. The clerk of a court may be liable to the party damaged for neglecting to put a case on the docket

when his duty required it,⁴² for failure to enter up a [*460] judgment *upon the roll;⁴³ for neglect to issue a summons to the sheriff on a petition and praecipe to review a judgment;⁴⁴ for taking upon himself without

37—Teall *v.* Felton, 1 N. Y. 537, 49 Am. Dec. 325; S. C. in error, 12 How. 284.

38—Bishop *v.* Williamson, 11 Me. 495; Bolan *v.* Williamson, 1 Brev. 181; Coleman *v.* Frazier, 4 Rich. 146; Christy *v.* Smith, 23 Vt. 663; Ford *v.* Parker, 4 Ohio St. 576; Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213.

39—Schroyer *v.* Lynch, 8 Watts, 453; Wiggins *v.* Hathaway, 6 Barb. 632; Bolan *v.* Williamson, 2 Bay, 551; Raisler *v.* Oliver, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213.

40—Hutchens *v.* Brackett, 22 N. H. 252; Conwell *v.* Voorhees, 13 Ohio 523, 42 Am. Dec. 206.

41—Sawyer *v.* Corse, 17 Grat. 230, 99 Am. Dec. 445. Where there

is a city delivery if a carrier loses or misappropriates a letter, doubtless he may be held responsible; but he could not be considered the servant of the postmaster so as to make the latter liable. The postmaster would be liable, however, if he gave orders which were obeyed, that delivery should not be made until some inadmissible condition was complied with; as, for instance, payment for making delivery. Barnes *v.* Foley, 1 W. Bl. 643; S. C. Burr. 2149.

42—Brown *v.* Lester, 21 Miss. 392.

43—Douglass *v.* Yallop, Burr. 722. To certify and send up record on appeal. Collins *v.* McDaniel, 66 Ga. 203.

44—Baltimore, etc., R. R. Co. *v.*

the sanction of the court to issue an order for the release of a judgment debtor;⁴⁵ for wrongfully approving of an appeal bond, the penalty in which was less than that required by law;⁴⁶ for negligently approving an insufficient bond;⁴⁷ for wrongfully issuing a supersedeas upon an improper bond;⁴⁸ and for any similar misfeasance or nonfeasance.⁴⁹ So a highway commissioner is liable who willfully neglects to return as paid a highway tax which has been paid in labor.⁵⁰ So a commissioner of customs is liable to an importer for refusal to sign a bill of entry except upon payment of excessive fees.⁵¹ So an action will lie against a supervisor who, being required by law to report a claim to the county board for allowance, neglects to do so.⁵² So an election inspector may be liable for refusal to receive the vote for an elector; but the circumstances which create such liability will be considered in the next chapter.

Sheriffs. The case of a sheriff is also that of an officer upon whom the law imposes duties to individuals as well as to the

Weeden, 78 Fed. 584, 24 C. C. A. 249.

45—Robinson *v.* Gell, 12 C. B. 191.

46—Billings *v.* Lafferty, 31 Ill. 318; or stay bond. Hubbard *v.* Switzer, 47 Ia. 681.

47—Field *v.* Wallace, 89 Ia. 597, 57 N. W. 303.

48—Wade *v.* Miller, 104 Ala. 604, 16 So. 517. And see Eslava *v.* Jones, 83 Ala. 139, 3 So. 317, 3 Am. St. Rep. 699.

49—See, further, Wright *v.* Wheeler, 8 Ired. 184; Anderson *v.* Johett, 14 La. Ann. 614. A father may not recover from a clerk for issuing without his assent a license for the marriage of his daughter under 18. Holland *v.* Beard, 59 Miss. 161, 42 Am. Rep. 360. For a deputy's filing a paper, properly indorsed, in the wrong place, whereby a creditor lost a dividend from an insolvent estate, the

clerk is liable. Rosenthal *v.* Davenport, 38 Minn. 543, 38 N. W. 618. As to liability of clerk of district court for false certificate as to liens on real estate, as shown by the records in his office, see United States Wind Engine & P. Co. *v.* Linville, 43 Kan. 455, 23 Pac. 597; Mallory *v.* Ferguson, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99. Where a clerk negligently left the record books out of the vault during the vacation of court and the same were injured by fire, he was held liable to the county for the expense of transcribing them. Toncray *v.* Dodge County, 33 Neb. 802, 51 N. W. 235.

50—Strickfaden *v.* Zipprick, 49 Ill. 286.

51—Barry *v.* Arnaud, 10 Ad. & El. 646, citing and relying upon Schinotti *v.* Bumsted, 6 T. R. 646; Lacon *v.* Hooper, 6 T. R. 224.

52—Clark *v.* Miller, 54 N. Y. 528.

public. In so far as he acts as a peace officer, and in the service of criminal process, individuals are concerned only that he shall commit no trespass upon them or their property. In the service of civil process, however, the sheriff is charged with duties only to the party to the proceedings. Thus, he is liable to the plaintiff for refusal or neglect to serve process, or want of diligence in service,⁵³ [*461] for the escape of a defendant *who was lawfully arrested on civil process, either mesne or

53—*Howe v. White*, 49 Cal. 658; to the plaintiff in the execution. *State v. Lawrence*, 64 N. C. 483; *Pike v. Colvin*, 67 Ill. 227. See *Harris v. Kirkpatrick*, 35 N. J. 392. As to the liability of the sheriff for failure to proceed with due diligence to collect a judgment, see *Kimbrow v. Edmondson*, 46 Ga. 130; *Noble v. Whetstone*, 45 Ala. 361; *Lowe v. Ownby*, 49 Mo. 71. He must exercise reasonable skill and diligence under the circumstances of the case. *Crosby v. Hungerford*, 59 Ia. 712; *Elmore v. Hill*, 51 Wis. 365; *Farwell v. Leland*, 82 Mo. 260; *State v. Blanch*, 70 Ind. 204. Not liable for not levying on an interest in land not of record, defendant not being in possession. *Force v. Gardiner*, 43 N. J. L. 417. Nor if plaintiff's attorney, when asked, withholds information. *Batte v. Chandler*, 53 Tex. 613. As to his right to demand indemnity in cases of doubt, see *Bonnell v. Bowman*, 53 Ill. 460; *Smith v. Cicotte*, 11 Mich. 383. If an officer returns process long before the return day, to protect him it must appear that he failed after using due diligence to find any property. *Henry v. Com.* 107 Penn. St. 361. The fact that after levy the property is taken by United States Marshal against his protest will not exonerate him nor will ignorance of the law. *Ansonia Brass Co. v. Babbitt*, 74 N. Y. 395.

A sheriff or constable, having a *ad fieri facias*, is compelled to act at his peril. If the property seized is not that of the defendant, he incurs liability by levying and taking the property. On the other hand, if the property is that of the defendant, and he knows of it, or can know it by reasonable effort, and is required by the plaintiff to levy on it, and he fails or refuses to do so, he becomes liable

[*462] final;⁵⁴ for neglect or refusal to return process⁵⁵ for

54—*Farnsworth v. Tilton*, 1 D. Chip. 297; *Middlebury v. Haight*, 1 Vt. 423; *Wait v. Dana, Brayt*. 37; *Cravy v. Turner*, 6 Johns. 51; *Kellogg v. Gilbert*, 10 Johns. 220, 6 Am. Dec. 335; *Currie v. Worthy*, 3 Jones (N. C.), 315; *Lash v. Ziglar*, 5 Ired. 702; *Faulkner v. State*, 6 Ark. 150; *Hopkinson v. Leeds*, 78 Penn. St. 396; *Lantz v. Lutz*, 8 Penn. St. 405; *Browning v. Rittenhouse*, 38 N. J. 279; *Crane v. Stone*, 15 Kan. 94; *Brown Co. v. Butt*, 2 Ohio, 348; *Hootman v. Shriner*, 15 Ohio St. 43; *State v. Mullen*, 50 Ind. 598; *Pease v. Hubbard*, 37 Ill. 257. *Swan v. Bridgeport*, 70 Conn. 143, 39 Atl. 110; *Hoagland v. State*, 22 Ind. App. 204, 40 N. E. 931, 72 Am. St. Rep. 298; *Eads v. Wynne*, 79 Hun, 463, 29 N. Y. S. 983; *Cortis v. Dailey*, 21 App. Div. 1, 47 N. Y. S. 454. Every liberty given to a prisoner, not authorized by law, is an escape. *Colby v. Sampson*, 5 Mass. 310; *Hoagland v. State*, 22 Ind. App. 204, 40 N. E. 931, 72 Am. St. Rep. 298. So is a removal of the prisoner out of the county without authority. *McGruder v. Russell*, 2 Blackf. 18. Only the act of God or of the public enemy can excuse an escape. *Saxon v. Boyce*, 1 Bailey, 66; *Cook v. Irving*, 4 Strob. 204; *Smith v. Hart*, 2 Bay, 395; *Shattuck v. State*, 51 Miss. 575, 24 Am. Rep. 624; *Eads v. Wynne*, 79 Hun, 463, 29 N. Y. S. 983. The sheriff need not go behind a writ fair on its face to inquire into the regularity of the judgment. *Watson v. Watson*, 9 Conn. 140; *Webber v. Gay*, 24 Wend. 485; *Wilmarth v. Burt*, 7 Met. 257. But in an action for an escape he may show that the

prisoner was privileged from arrest. *Bissell v. Kip*. 5 Johns. 89; *Scott v. Shaw*, 13 Johns. 378. And it is of course a defense that the process was void. *Content v. Chapman*, 2 Q. B. D. 771; *Albee v. Ward*, 8 Mass. 79; *Howard v. Crawford*, 15 Ga. 423; *Ray v. Hogeboom*, 11 Johns. 433; *Phelps v. Barton*, 13 Wend. 68; *Carpenter v. Willett*, 31 N. Y. 90. And for the purposes of any such action the process is to be considered void, even though good on its face, if in fact it was unlawfully issued. Therefore the sheriff is not liable who suffers a prisoner arrested on a warrant to escape, though the warrant is fair on its face, if it issued without the preliminary showing required by statute. *Housh v. People*, 75 Ill. 487. Of course whatever shows that the plaintiff has suffered no damage, or damage only to a nominal amount, will limit the recovery; as, that the prisoner was insolvent. *Hootman v. Shriner*, 15 Ohio St. 43; *State v. Mullen*, 50 Ind. 598. See *Williams v. Mostyn*, 4 M. & W. 145; *Smith v. Hart*, 2 Bay, 395; *Lovell v. Bellows*, 7 N. H. 375; *Burrell v. Lithgow*, 2 Mass. 526; *Crane v. Stone*, 15 Kan. 94.

For a discussion of the liability of the sheriff for making an insufficient levy, see *French v. Snyder*, 30 Ill. 339.

55—*State v. Schar*, 50 Mo. 393. Not liable in Missouri for failure to return unless damage is shown. *State v. Case*, 77 Mo. 247. But to the contrary see *Bachman v. Fenztermacher*, 112 Penn. St. 331; *Atkinson v. Heer*, 44 Ark. 174. Consent of plaintiff to his retain-

making a false return;⁵⁶ for negligently caring for goods, whereby some of them are lost,⁵⁷ for neglect to pay over moneys collected,⁵⁸ and the like.^{58a} The rules applicable to the case of a constable are the same, and need not be separately examined.⁵⁹

The same act or neglect of a sheriff may sometimes afford ground for an action on behalf of each party to the writ; as where, having levied upon property, he suffers it to be lost or destroyed through his negligence. In such a case the plaintiff may be wronged, because he is prevented from collecting his debt, and the defendant may be wronged because a surplus that would have remained after satisfying the debt is lost to him. The

ing execution after return day does not exonerate. *Ansonia Brass Co. v. Babbitt*, 74 N. Y. 395. But the sheriff can only be liable to the person to whom the particular duty was owing: "the party to whom he is bound by the duty of his office." *Harrington v. Ward*, 9 Mass. 251.

56—*Duncan v. Webb*, 7 Ga. 178; *Kearney v. Fenn*, 87 Mo. 310, even though no damage is shown; *State v. Case*, 77 Mo. 247; *Dunham v. Reilly*, 110 N. Y. 366, 18 N. E. 89.

57—*Jenner v. Joliffe*, 9 Johns, 381; *Conover v. Gatewood*, 2 A. K. Marsh. 568; *Cresswell v. Burt*, 61 Ia. 590; *Burns v. Lane*, 138 Mass. 350. So for negligently giving up goods attached. *Mooney v. Broadway*, 2 Arizona, 107, 11 Pac. 114; *De Yampert v. Johnson*, 54 Ark. 165, 15 S. W. 363. Where goods are destroyed by fire while in the possession of the sheriff under a writ of attachment, he is not liable unless negligent. *State ex rel Barnett v. Dalton*, 69 Miss. 811, 10 So. 578.

58—*Norton v. Nye*, 56 Me. 211. Even if collected after the return of the writ. *Nash v. Muldoon*, 16

Nev. 404. If he delivers the goods, he is liable for the price whether he has received money or not. *Robinson v. Brennan*, 90 N. Y. 208; *Disston v. Strauck*, 42 N. J. L. 546; and although plaintiff's attorney consents to a delay in payment. *Disston v. Strauck*, 42 N. J. L. 546; see, *State v. Spencer*, 74 Mo. 314.

58a—An action lies against an officer for negligently approving an insufficient replevin bond. *Stern v. Knowlton*, 184 Mass. 29, 67 N. E. 869; *Shull v. Barton*, 56 Neb. 716, 77 N. W. 132, 71 Am. St. Rep. 698. Where a sheriff paid over money on an order of court, which was void for lack of jurisdiction in the court to make it, the order is no defense to a suit for the money. *Linck v. Troll*, 84 Mo. App. 49.

59—The following cases consider the liability of a jailor for escapes: *Alsept v. Eyles*, 2 H. Bl. 108; *Elliott v. Norfolk*, 4 T. R. 789; *Fuller v. Davis*, 1 Gray, 612; *Way v. Wright*, 5 Metc. 380; *Wilkins v. Willet*, 1 Keyes, 521; *Shattuck v. State*, 51 Miss. 575. The sheriff in this country is generally the jailer, either in person or by deputy.

officer owed to each the duty to keep the property with *reasonable care; and there is a breach of duty to each [*463] when he fails to do so.⁶⁰

Wrongs to the defendant in the process are committed either by the service upon him of process issued without authority, or otherwise void, or by disregard of some privilege the law gives him, or by abuse of the process in service. The case of void process has been referred to in another place. All the provisions which are made by law in regulation of the officer's proceedings on civil process, which can be of importance to the defendant's interest, are supposed to be made for his benefit, and they establish duties in his behalf. One of the most important provisions made in his interest is that which sets apart certain specified property of which he may be owner, and wholly exempts it from levy on execution or attachment. In some States this exemption is a mere privilege, and will be waived if not claimed;⁶¹ but in others the law absolutely, and of its own force, wholly exempts the property, and the officer will be a trespasser if he proceeds in disregard of the provisions of law which require him to take steps to have the property set apart for the debtor, even though the debtor remains passive.⁶² So a defendant when under arrest

- 60—*Jenner v. Joliffe*, 9 Johns. 381, 385; *Bank of Rome v. Mott*, 17 Wend. 554; *Bond v. Ward*, 7 Mass. 123, 129; *Purrington v. Loring*, 7 Mass. 388; *Barrett v. White*, 3 N. H. 210, 224, 14 Am. Dec. 352; *Weld v. Green*, 10 Me. 20; *Franklin Bank v. Small*, 24 Me. 52; *Mitchell v. Commonwealth*, 37 Pa. St. 187; *Hartleib v. McLane*, 44 Pa. St. 510, 84 Am. Dec. 464; *Gilmore v. Moore*, 30 Ga. 628; *Banker v. Caldwell*, 3 Minn. 94; *Tudor v. Lewis*, 3 Met. (Ky.) 378; *Abbott v. Kimball*, 19 Vt., 551, 47 Am. Dec. 708; *Fay v. Munson*, 40 Vt. 468; *Cresswell v. Burt*, 61 Ia. 590; *Burns v. Lane*, 138 Mass. 350. If a bailee of the officer misuses the property the officer is liable. *Briggs v. Gleason*, 29 Vt. 78; *Gilbert v. Crandall*, 34 Vt. 188; *Austin v. Burlington*, 34 Vt. 506.
- 61—If the claim is made and the officer disregards it he will be liable. *Hamilton v. Fleming*, 26 Neb. 240, 41 N. W. 1002; *Smith v. Johnson*, 43 Neb. 754, 62 N. W. 217; *Castile v. Ford*, 53 Neb. 507, 73 N. W. 945; *Ahearn v. Connell*, 72 N. H. 238, 56 Atl. 189.
- 62—See *Jones v. Alsbrook*, 115 N. C. 46, 20 S. E. 170. The statutes on this subject are so different that space cannot be allowed here for presenting their peculiar features and pointing out the different consequences when their provisions are disregarded by the officer. They are collected, and

is generally entitled to certain privileges in the law, among which, in the cases in which it is given by statute, is the privilege of jail limits. But in any case he is entitled to be treated with ordinary humanity, and any unnecessary severity could not be justified by the writ.

It would be an abuse of process if the officer having an execution against property should himself become purchaser [*464] of goods *sold under it,⁶³ or if he should make sale without giving the notice required by law, the purpose of notice being to attract the attention and invite the presence of parties desiring to purchase.⁶⁴ Or if he sells more than is sufficient to satisfy the demand and costs,⁶⁵ or if he makes an excessive levy.⁶⁶

Wrongs by a sheriff to others than the parties to suits are generally a consequence of his mistakes or his carelessness. Thus, he may on an execution against one person by mistake seize the goods of another. He must at his peril make no mistakes here.⁶⁷

cases in the several States referred to, in Smyth on Homestead and Exemptions, Ch. XIV.

63—Giberson *v.* Wilber, 2 N. J. 410, though it is through a dummy. Downey *v.* Lyford, 57 Vt. 507.

64—Carrier *v.* Esbaugh, 70 Penn. St. 239; Hayes *v.* Buzzell, 60 Me. 205; Sawyer *v.* Wilson, 61 Me. 529. The plaintiff may hold him for such sale. Sheehy *v.* Graves, 58 Cal. 449. Or should he sell at a different time from that stated in the notice. Smith *v.* Gates, 21 Pick. 55; Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396. Or at a different place. Hall *v.* Ray, 40 Vt. 576, 94 Am. Dec. 440. See Ross *v.* Philbrick, 39 Me. 29; Blake *v.* Johnson, 1 N. H. 91.

65—Aldred *v.* Constable, 6 Q. B. 370, 381; Stead *v.* Gascoigne, 8 Taunt. 526. The sheriff is liable in trover for the excessive sale in

such case, but cannot be treated as trespasser *ab initio*. Shorland *v.* Govett, 5 B. & C. 485.

66—Barfield *v.* Barfield, 77 Ga. 83. Where by statute property seized on a writ of *detinue* was to be returned to the defendant after the expiration of ten days, if a certain bond was not given in the meantime, the officer will be liable to the defendant for the value of the property if he fails to return it as required. Elrod *v.* Hammer, 120 Ala. 463, 24 So. 882, 74 Am. St. Rep. 43.

67—Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057; Schluter *v.* Jacobs, 10 Colo. 449, 15 Pac. 813; Johnson *v.* Jones, 16 Colo. 138, 26 Pac. 584; Holton *v.* Taylor, 80 Ga. 508, 6 S. E. 15; Waldrop *v.* Almond, 94 Ga. 623, 19 S. E. 994; Hanchett *v.* Williams, 24 Ill. App. 56; Whitney *v.* Preston, 29 Neb. 243, 45 N. W. 619; Thomas *v.*

It might be urged that, in such cases, the sheriff should have the ordinary protection of judicial officers; for he must inquire into the facts, and he must decide upon the facts who the owner is. But this does not render the functions of the sheriff judicial. Ownership is matter of fact, and the officer is supposed capable of ascertaining who is the owner of goods, just as any one may learn who is proprietor of a particular shop, or member of a specified corporation or partnership, or alderman of a city, etc. *It is difficult to name any subject in respect [*465] to which questions may not be raised; and if the existence of a question could be the test between judicial and ministerial action, there would be very little that could be classed as ministerial. Judicial action implies not merely a question, but a question referred for solution to the judgment or discretion of the officer himself. If the sheriff is commanded to levy upon the goods of a named person, the fact of his obedience is determined by ascertaining whether or not he has done so; if a magistrate is required to decide justly the controversy between two named

Markman, 43 Neb. 823, 62 N. W. 206; Cole *v.* Edwards, 52 Neb. 711, 72 N. W. 1045; Southern Ry Co. *v.* Sarratt, 58 S. C. 98, 36 S. E. 504; Davis *v.* Jenkins, 11 M. & W. 745; Screws *v.* Watson, 48 Ala. 628; Duke *v.* Vincent, 29 Iowa, 308; Wintringham *v.* Lafoy, 7 Cow. 735; Welman *v.* English, 38 Cal. 583; Jones *v.* People, 19 Ill. App. 300. He is liable for the error, though the names are the same. Jarmain *v.* Hooper, 6 M. & G. 827. He is not relieved by showing that he only sold the interest in the goods of the judgment debtor. Rankin *v.* Ekel, 64 Cal. 446. Nor does he reduce damages by releasing the levy without returning the goods. Kreher *v.* Mason, 20 Mo. App. 29. Trespass lies for seizing the goods of a stranger to the writ, notwithstanding they are so intermingled with the goods of the debtor that the officer cannot distinguish them, if the owner is present and offers to select his own. Yates *v.* Wormell, 60 Me. 495. But if the sheriff attaches the goods of the wrong person, and while they are in his hands attaches them on a subsequent writ, the last attachment is no trespass; the goods at the time having been in the custody of the law. Ginsberg *v.* Pohl, 35 Md. 505. Not liable for going upon premises of third person to seize goods of debtor if he enters without needless force and remains no longer than necessary. Link *v.* Harrington, 23 Mo. App. 429. He is liable if he sells the entire property when the judgment debtor only has a part interest. Michalover *v.* Moses, 19 App. Div. 343, 46 N. Y. S. 456; Spalding *v.* Allred, 23 Utah, 355, 64 Pac. 1100.

persons, or if the assessor is required to value in just proportion the property of two named persons, no one can know whether or not the requirement has been obeyed unless he can look into the officer's mind and by thus ascertaining what was his real judgment, determine whether he has actually obeyed it in giving decision or in making the assessment. The difference is that the sheriff is to obey an exact command, but the judicial officer is to follow his judgment. Even when the sheriff is embarrassed by the fact that the name of the defendant in the writ is the same with that of others in the neighborhood, he must at his peril ascertain who the real defendant is, and make service upon him.⁶⁸

The sheriff in seizing property upon his writ must always respect the liens of third persons. Thus, if he be authorized on a writ against a mortgagor, to levy upon the goods mortgaged, he can only take them subject to the superior rights of the mortgagee, and all his subsequent proceedings must be in subordination to such right.⁶⁹ So, where mechanics' or any other liens exist, he must recognize and take in subordination to them, and whatever he may do that prejudices the lien is wrongful.

Where a prisoner is entitled to be discharged upon giving sufficient bail to the sheriff and the latter refuses to permit him to obtain bail, he is liable in case.⁷⁰ A sheriff is not liable for an assault upon a prisoner by a fellow prisoner,⁷¹ nor for his death at the hands of a mob⁷² if he was guilty of no fraud or negligence in the matter. No action lies against the sheriff for taking the photograph of a prisoner, his height, weight, description, etc., if no physical violence is used.⁷³

It has been stated in another place that a sheriff is responsible

- 68—*Jarmain v. Hooper*, 6 M. & G. 827, 847.
69—*Hobart v. Frisbie*, 5 Conn. 592; *O'Neal v. Wilson*, 21 Ala. 588; *Merritt v. Niles*, 25 Ill. 282; *Worthington v. Hanna*, 23 Mich. 530; *Saxton v. Williams*, 15 Wis. 292; *Schrader v. Wolfin*, 21 Ind. 238; *Wootton v. Wheeler*, 22 Tex. 338; *Jordan v. Wells*, 104 Ala. 383, 16 So. 23; *Koch v. Peters*, 97 Wis. 492, 73 N. W. 25.
70—*Taylor v. Smith*, 104 Ala. 537, 16 So. 629.
71—*Gunther v. Johnson*, 36 App. Div. 437, 55 N. Y. S. 869.
72—*State v. Wade*, 87 Md. 529, 40 Atl. 104, 40 L. R. A. 628.
73—*State v. Clausmeier*, 154 Ind. 599, 57 N. E. 541, 77 Am. St. Rep. 511, 50 L. R. A. 73.

for the misfeasance and nonfeasance of his deputies. This is the general rule.⁷⁴ Where, however, the deputy is employed to do something not connected with his office although he may be employed because of the office, he must be regarded as a mere *private agent, and the sheriff is not responsible for [*466] his conduct. An illustration is where a chattel mortgage is delivered to the deputy to foreclose by seizing the property mortgaged. As any agent might do this, it is plainly not an official act.⁷⁵ The same is true of a deputy serving a distress warrant,⁷⁶ or doing any other act which the law does not require the sheriff officially to perform.⁷⁷

Nor is the sheriff liable where, by consent of the plaintiff in the writ, the deputy does something not within his official authority, such as giving credit on an execution sale;⁷⁸ or accepting in payment something besides money;⁷⁹ nor in any case is he liable to the plaintiff for acts of the deputy which the plaintiff himself, or his attorney, directed or advised,⁸⁰ or in respect to which they gave discretionary authority to the deputy, within which he confined his action.⁸¹

Notaries Public. A notary public, by assuming to perform any official duty on request of a party concerned, impliedly undertakes to discharge it faithfully, and is liable to the extent of any resulting injury if he fails to do so.⁸² An illustration is,

- 74—See *Frizzell v. Duffer*, 58 Ark. 612, 25 S. W. 1111; *Foley v. Martin*, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123; *Elwell v. Reynolds*, 6 Kan. App. 545, 51 Pac. 578; *Shields v. Pflanz*, 101 Ky. 407, 41 S. W. 267; *ante*, p. 222.
- 75—*Dorr v. Mickley*, 16 Minn. 20.
- 76—*Moulton v. Norton*, 5 Barb. 286.
- 77—*Harrington v. Fuller*, 18 Me. 277, 36 Am. Dec. 719, citing *Knowlton v. Bartlett*, 1 Pick. 271; *Cook v. Palmer*, 6 B. & C. 739.
- 78—*Gorham v. Gale*, 7 Cow. 739, 17 Am. Dec. 549; *Armstrong v. Garrow*, 6 Cow. 465.
- 79—*Moore v. Jarrett*, 10 Tex. 210.
- 80—*Cook v. Palmer*, 6 B. & C. 739; *Marshall v. Hosmer*, 4 Mass. 60; *Tobey v. Leonard*, 15 Mass. 200; *Smith v. Berry*, 37 Me. 298; *Acker v. Ledyard*, 8 Barb. 514; *Humphrey v. Hathorn*, 24 Barb. 278; *Stevens v. Colby*, 46 N. H. 163. *Eastman v. Judkins*, 59 N. H. 576; *Odom v. Gill*, 59 Ga. 180. 81—*DeMoranda v. Dunkin*, 4 T. R. 120; *Strong v. Bradley*, 14 Vt. 55.
- 82—*Stork v. Am. Surety Co.*, 109 La. 713, 33 So. 742.

where commercial paper is delivered to him for protest and notice to the endorsers;⁸³ or where he undertakes to certify to the acknowledgment of a conveyance.⁸⁴ Where, by reason of the failure of a notary to properly attest a will, the will was declared void and the plaintiff lost a legacy, he was held liable.⁸⁵

[*467] ***Taxing Officers.** Officers whose duty requires them to levy a tax to satisfy a judgment, and who refuse or neglect to do so, though commanded to proceed by competent judicial authority, are liable to the judgment creditor for their failure. "The rule," it is said, in such a case, "is well settled, that where the law requires absolutely a ministerial act to be done by a

83—*Bank of Mobile v. Marston*, 7 Ala. 108; *Bowling v. Arthur*, 34 Miss. 41; *May v. Jones*, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637. But the notary is not liable if he obeys directions, even though they prove erroneous. *Commercial Bank v. Varnum*, 49 N. Y. 269. Nor where by the neglect of the holder of the note to keep good his rights as they then existed, the notary lost a valuable right of subrogation. *Emmerling v. Graham*, 14 La. Ann. 389. Nor where the endorser has voluntarily made payment after the neglect of the notary to fix his liability. *Warren Bank v. Parker*, 8 Gray 221. Nor where, independent of the notice which the notary has failed to give to the endorser, the holder of the paper can hold the endorser on other grounds. *Franklin v. Smith*, 21 Wend. 623.

84—*Joost v. Craig*, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 374; *State v. Grundon*, 90 Mo. App. 266. Notary held responsible for not certifying to the facts requisite to make out a sufficient acknowledgment. *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714. See *Bank v. Murfey*, 68 Cal. 455. No recov-

ery under California statute, when if no mistake had been made the deed would have been worthless because the land was. *McAllister v. Clement*, 75 Cal. 182, 16 Pac. 775. None in Iowa, unless he acted knowingly as well as negligently. *Scotten v. Fegan*, 62 Ia. 236. Intentional dereliction must appear, the act is a judicial one. *Com. v. Haines*, 97 Pa. St. 228, 39 Am. Rep. 805. His motive must have been malicious or corrupt. *Henderson v. Smith*, 26 W. Va. 829. The notary who gives a false certificate of acknowledgment is liable to the grantee only; not to a subsequent purchaser under him, who may find his title defective in consequence. *Ware v. Brown*, 2 Bond, 267. When a notary takes the acknowledgment of a person unknown to him, he can protect himself from liability only by complying strictly with the statute. *Joost v. Craig*, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 374; *People v. Bartels*, 138 Ill. 322, 27 N. E. 1091; *State v. Grundon*, 90 Mo. App. 266.

85—*Weintz v. Kramer*, 44 La. Ann. 35, 10 So. 416.

public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty, and honest intentions, will not excuse the offender.⁸⁶ Where assessors erroneously assessed a poll tax against the plaintiff, in consequence of which he was arrested and compelled to pay the tax and costs, the assessors were held liable for the arrest and damages.⁸⁷

Want of Means to Perform a Duty. Where a ministerial officer is charged with a duty which is only performed by an expenditure of public funds, he cannot be in fault unless the funds are provided for the purpose, or unless, by virtue of his office, he may raise the necessary means by levying a tax, or in some other mode.⁸⁸ But when the funds are at his command, and the duty is still neglected, there is no reason why he should not be held responsible to parties injured. In New York, on this ground, the superintendent of canal repairs, who neglected to perform his duty, was held liable to parties who *were prevented from making use of the canal, or de- [*468] layed in its use in consequence.⁸⁹ So commissioners who have charge of cutting and keeping open public drains, while they could not be liable to individuals for any neglect to cause drains to be cut, inasmuch as they could not be chargeable with a duty to any particular individual in respect thereto, yet when

86—SWAYNE, J., in *Amy v. Supervisors*, 11 Wall. 136, 138; *St. Joseph, &c., Co. v. Leland*, 90 Mo. 177, 59 Am. Rep. 9. In the case of an official neglect, the delinquent officer could only be liable for the actual damages. *Tracy v. Swartwout*, 10 Pet. 80. And if the duty consisted in giving credit for moneys, he would not be chargeable in damages beyond the interest on the moneys. *Kendall v. Stokes*, 3 How. 87.

Where an officer fails to perform a plain duty imposed upon him by law, no question of contributory

negligence can arise, because it is impossible that the party concerned can contribute to his neglect. *Strickfaden v. Zippnick*, 49 Ill. 286.

87—*Allison v. Hobbs*, 96 Me. 26, 51 Atl. 245.

88—See *Threadgill v. Board of Comr's*, 99 N. C. 352, 6 S. E. 89.

89—*Adsit v. Brady*, 4 Hill, 630, 40 Am. Dec. 305; *Shepherd v. Lincoln*, 17 Wend. 250; *Griffith v. Follett*, 20 Barb. 620; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Insurance Co. v. Baldwin*, 37 N. Y. 648.

the drains are actually cut, they are chargeable with a duty to every person who would be injured by neglect to keep them open; and if they suffer them to become obstructed, to the injury of neighboring lands, when they have the means at their command for keeping them open, the right of action against them is complete.⁹⁰

Highway Officers. There seems to be a little difficulty in determining whether, where an officer is charged with the duty of making and repairing highways and public bridges, this duty can be regarded as a duty to individuals who may have occasion to use the public way, or whether, on the other hand, it is to be considered a duty to the public only. In New York it was decided in an early case, that an action would not lie against an overseer of highways, at the suit of a party injured in consequence of a bridge within his jurisdiction being out of repair. The decision was grounded in part upon the fact that the declaration did not show that the overseer had in his hands or under his control the means for performing the duty of repair, and in part upon a doubt whether the superior officers, the commissioners of highways, were not the parties in fault; but the reasoning goes to the full extent, that the duty of repair was a duty to the public, not to individuals.⁹¹ The doctrine of that case has been fully approved in South Carolina,⁹² Indi-

90—See *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Parker v. Lowell*, 11 Gray, 353; *Barton v. Syracuse*, 37 Barb. 292; *Hover v. Barkhoof*, 44 N. Y. 113; *Wallace v. Muscatine*, 4 Greene (Iowa), 373; *Phillips v. Commonwealth*, 44 Pa. St. 197.

91—*Bartlett v. Crozier*, 17 Johns. 439, 8 Am. Dec. 428, reversing same case, 15 Johns. 250.

92—*M'Kenzie v. Chovin*, 1 McMul. 222. In this case, as in *Bartlett v. Crozier*, importance was attached to the fact that the duties of the officer were compulsory and uncompensated. “The duty of

keeping the roads and bridges in repair is prescribed and regulated by the statute, a duty imposed on the commissioners under a penalty for refusing to serve, as well as for not repairing, recoverable by indictment; and it would be against every principle of justice and right to hold them responsible, out of their private estates, for every injury that an individual may sustain, as well as liable to be indicted for every neglect of duty; to compel them to serve, and then subject them to a liability from which their constituents and employers are exempt. We cannot

[*469] *ana,⁹³ Ohio,⁹⁴ and Nebraska.⁹⁵ Later New York cases, where suits have been brought against commissioners of highways, lay down a different doctrine, and hold them responsible for injuries caused by their neglect to keep the public ways in repair, provided they have the means of doing so.⁹⁶ The rule of law on the subject in that State, as it is now settled, is very tersely stated in a leading case: "That commissioners of highways, having the requisite funds in hand, or under their control, are bound to repair bridges which are out of repair, they having notice of their condition; and they are bound to repair them with reasonable and ordinary care and diligence, and if they omit this duty, they are liable to individuals who sustain special damages from such neglect. I do not mean to limit the rule to cases where they have actual notice of the condition of the bridges, because there may be cases where their ignorance of their condition would be culpable. And public policy favors this rule. Defective bridges are dangerous, and travelers generally have no means of knowing whether they are safe or not. They have to rely upon the fidelity and vigilance of the highway commissioners, who are the only persons whose duty it is to see that the bridges are in repair. The burden imposed upon these officers by this rule is not too great. All it requires of them is, that they shall, with reasonable care and fidelity, discharge the duties which they have solemnly sworn to perform."⁹⁷

suppose such was the intention of the legislature." See, also, the previous case of *Young v. Commissioners*, 2 Nott & McCord, 537.

93—*Lynn v. Adams*, 2 Ind. 143. The reasoning in this case was similar to that in the cases above noted, and the same remark may be made of the two which follow.

94—*Dunlap v. Knapp*, 14 Ohio St. 64, 82 Am. Dec. 468.

95—*McConnell v. Dewey*, 5 Neb. 385. And see *Neville v. Viner*, 115 Ill. App. 364.

96—*Smith v. Wright*, 24 Barb. 170. This case was disapproved

in *Garlinghouse v. Jacobs*, 29 N. Y. 297; but the principle was affirmed as sound in *Hover v. Barkhoof*, 44 N. Y. 113; *Bryant v. Randolph*, 133 N. Y. 70, 30 N. E. 657.

97—*Hover v. Barkhoof*, 44 N. Y. 113, 125, per Earl, Comr. A judgment against a commissioner is not a town charge. *People v. Town Aud.*, 74 N. Y. 310, 75 N. Y. 316. To be exempt the commissioners must have tried in vain to raise funds. *Warren v. Clement*, 24 Hun, 472. Where a bridge crosses a stream on the dividing line between towns, the commis-

[*470] A similar *liability is recognized as being imposed by statute in North Carolina.⁹⁸ Such liability is held to exist on common law grounds in recent California cases.⁹⁹ In one of the cases cited, the trustees and street commissioner of a municipality were held jointly and severally liable for personal injuries to the plaintiff by reason of a defective street. The court says: "Such officers are liable for acts of nonfeasance or for the negligent performance of a duty when the duty is plain, when the means and ability to perform it are shown, and when its performance or nonperformance, or the manner of its performance, involves no question of discretion. In short, when the duty is plain and certain, if it be negligently performed, or not performed at all, the officer is liable at the suit of a private individual especially injured thereby."¹ So in Iowa.²

sioners of the two towns may be joined as defendants in a suit for injury caused by neglect to keep the bridge in repair. *Bryan v. Landon*, 3 Hun, 500. That a commissioner who constructs a bridge is liable for negligently leaving it in a dangerous condition, see *Rector v. Pierce*, 3 N. Y. Sup. Ct. (T. & C.) 416.

98—*Hathaway v. Hinton*, 1 Jones (N. C.), 243. In *Huffman v. San Joaquin Co.*, 21 Cal. 426, the county was sued for such an injury. FIELD, Ch. J., says: "If any remedy exists for injuries resulting from neglecting to keep such bridges in repair, it must be sought either against the road overseers or supervisors personally." See, also, *Sutton v. Board of Police*, 41 Miss. 236. In Maryland it was decided, in *County Commissioners v. Duckett*, 20 Md. 468, that the county commissioners, being clothed in their corporate capacity with charge of and control over the property owned by

the county, and over the county roads and bridges, with power to levy the needful taxes to keep them in repair, and with such power and control over the road supervisors as was sufficient to render the supervisors, in the eye of the law, their agents, were liable for damages resulting from the defective condition of the public roads. Subsequently a statute was passed making the supervisors liable, and requiring them to give bond, which might be sued for the benefit of any person suffering for the supervisor's neglect. This statute did not relieve the county commissioners of their previous liability. *County Commissioners v. Gibson*, 36 Md. 229.

99—*Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922; *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707; 77 Am. St. Rep. 171.

1—*Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171.

2—*Gould v. Schermer*, 101 Ia. 582, 70 N. W. 697. See *Bowden v.*

De facto Officers. What has been said respecting the liability of officers will apply to those who are such *de facto* only, as well as to those who hold the office of right.³ Indeed so far as one has actually exercised the functions of a public officer, he would be estopped to deny that he was prop*erly [*471] filling it, for the purpose of escaping liability;⁴ though

Derby, 97 Me. 536, 55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223. Bowden *v.* Derby, 99 Me. 208, 58 Atl. 993; Bates *v.* Horner, 65 Vt. 471, 27 Atl. 134, 22 L. R. A. 824.

3—A *de facto* officer cannot be compelled to act, and incurs no liability by refusing to act. Olmstead *v.* Dennis, 77 N. Y. 378. As to who are officers *de facto*, see O'Brian *v.* Knivan, Cro. Jac. 552; Harris *v.* Jays, Cro. Eliz. 699; Parker *v.* Kett, Ld. Raym. 658; Cocke *v.* Halsey, 16 Pet. 71; Fowler *v.* Beebee, 9 Mass. 231, 6 Am. Dec. 62; Taylor *v.* Skrie, 3 Brev. 516; Parker *v.* Baker, 8 Paige, 428; Wilcox *v.* Smith, 5 Wend. 231, 21 Am. Dec. 213; People *v.* Kane, 23 Wend. 414; People *v.* White, 24 Wend. 520; Burke *v.* Elliott, 4 Ired. 355, 42 Am. Dec. 142; Brown *v.* Lunt, 37 Me. 423; State *v.* Bloom, 17 Wis. 521; People *v.* Bangs, 24 Ill. 184; Munson *v.* Minor, 22 Ill. 594; Barlow *v.* Standford, 82 Ill. 298; Clark *v.* Commonwealth, 29 Pa. St. 129; Commonwealth *v.* McCombs, 56 Pa. St. 436; Kimball *v.* Alcorn, 45 Miss. 151; Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; State *v.* McFarland, 25 La. Ann. 547; Keeler *v.* Newbern, 1 Phil. (N. C.), 505; Kreidler *v.* State, 24 Ohio St. 25; Johns *v.* People, 25 Mich. 499; Darrow *v.* People, 8 Col. 417; Cary *v.* State, 76 Ala. 78; Campbell *v.*

Com., 96 Pa. St. 344; Nashville *v.* Thompson, 12 Lea, 344; Yorty *v.* Paine, 62 Wis. 154. There can be none when the office has been abolished and there is none to fill. *In re Hinkle*, 31 Kan. 712. The acts of such officers within the authority of the office are perfectly good, so far as the public and third persons are concerned, and can only be questioned in a direct proceeding to try their title, or in some suit in which they seek to establish in their own favor some right growing out of or dependent upon the official character. See cases above cited. Also, Bucknan *v.* Ruggles, 15 Mass. 180, 8 Am. Dec. 98; Attorney General *v.* Lothrop, 24 Mich. 235; Blackstone *v.* Taft, 4 Gray, 250; Samis *v.* King, 40 Conn. 298; Downer *v.* Woodbury, 19 Vt. 329; *Ex parte Strang*, 21 Ohio St. 610; Gregg *v.* Jamison, 55 Penn. St. 468; Cabot *v.* Given, 45 Me. 144; State *v.* Tolan, 33 N. J. 195; Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; Leach *v.* Cassidy, 23 Ind. 449; McCormick *v.* Fitch, 14 Minn. 252, and cases, p. 629, n. 23, *supra*.

4—Longacre *v.* State, 3 Miss. 637; Marshall *v.* Hamilton, 41 Miss. 229; Borden *v.* Houston, 2 Texas, 594; Billingsley *v.* State, 14 Md. 369. The principle has often been applied to persons who have assumed the functions of

doubtless he might abandon the office into which he had intruded at any time, on claim being made by the rightful party entitled, or even without such claim, unless he had given bonds to perform the duties. Such abandonment, however, could not excuse him from liabilities already incurred.⁵

collectors of the public revenue. such, are personally liable for the *Sandwich v. Fish*, 2 Gray, 298, 301; *Williamstown v. Willis*, 15 Gray, 427; *Johnston v. Wilson*, 2 N. H. 202, 206; *Horn v. Whittaker*, 6 N. H. 88; *Jones v. Scanland*, 6 Humph. 195, 44 Am. Dec. 300; *Trescott v. Moan*, 50 Me. 347; *Wentworth v. Gove*, 45 N. H. 160. 5—Persons undertaking to act as assessors of a town, without having been legally elected as acts of a collector to whom they have issued a warrant for the collection of taxes assessed by them. *Allen v. Archer*, 49 Me. 346. Same rule applied to fish commissioners. *Bearce v. Fossett*, 34 Me. 575. So a justice is personally liable who issues process without having taken the oath of office. *Courser v. Powers*, 34 Vt. 517.

*CHAPTER XIV.

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IMMUNITY OF JUDICIAL OFFICERS FROM PRIVATE SUITS.

In the last chapter it was shown that where an officer is charged with a duty to an individual which he fails to perform, an action will lie against him on behalf of the person to whom the duty was owing. It was also shown that where a duty is only imposed as a duty to the public, no individual action will lie, though the consequence of a breach may happen to fall exclusively upon one or more individuals. It was admitted at the same time that it is not always easy to determine whether a particular office is charged with duties to individuals, and that the question must usually be decided on a consideration of the nature of the duty, and whether it contemplates only general protection and benefit, or the protection and benefit of such individuals as are liable to be specially affected. When the latter is the case, the duty is distributive, and arises in behalf of any one who is exposed to the injury meant to be guarded against whenever the exposure takes place.

The general subject requires further examination, as it concerns a class of official duties which are public in their nature, though in their discharge specially affecting individuals; but the time, manner and extent of the performance of which are left to the wisdom, integrity and judgment of the officer himself. In these cases it is conceded that, as a general rule, the only liability of the officer is to the criminal law, in case he shall wrongfully and maliciously neglect to perform his duties, or shall perform them improperly. Duties of this nature are usually spoken of as duties in the exercise of discretionary and judicial powers, and it is deemed a conclusive answer to any private action for an injury resulting from neglect or unfaithful performance to say that where a matter is trusted to the discretion or judgment of

an officer, the very nature of the authority is inconsistent with responsibility in damages for the manner of its exercise, [*473] since to hold the officer to such responsibility *would be to confer a discretion and then make its exercise a wrong. Lord Chief Justice NORTH expressed the idea very tersely in the following language: "If a jury will find a special verdict, if a judge will advise and take time to consider, if a bishop will delay a patron and impanel a jury to inquire of the right of patronage, you cannot bring an action for these delays, though you suppose it to be done maliciously and on purpose to put you to charges; though you suppose it to be done *scienter*, knowing the law to be clear; for they take but the liberty the law has provided for their safety, and there can be no demonstration that they have not real doubts, for these are within their own breasts; it would be very mischievous that a man might not have leave to doubt without so great peril."¹

When it is said there can be no demonstration that there were not real doubts, or what were the real motives within the official breast, it is not meant that it is impossible for the law to investigate the fact. In many cases suits are allowed where a bad motive must be the gravamen of the complaint, and the motive is arrived at by showing that while the defendant has done one thing, all honest inducements, so far as they can be presented in evidence, should have inclined him to do something different. An inspection of his motives is thus invited in the light of the exposure which the facts known by or accessible to him makes; and though he asserts one motive, it may satisfactorily appear that he must have indulged another, because these facts, with the motive he pretends to, should have impelled him in a direction the opposite of that he took. And in the case of officials of even the highest station, when the State calls them to account for misconduct, they do not put aside the charge by pleading that their duties were discretionary or judicial, and by denying the competency of the State to look into their breasts and make demonstra-

1—*Barnardiston v. Soame*, 6 36; *Randall v. Brigham*, 7 Wall. State Trials, 1063, 1099. And, see 523.
Taaffe v. Downes, 3 Moore, P. C. C.

tion that their motives were not pure and their purposes not honest; the State rejects such an answer, and does not hesitate to inflict very serious punishment when it is satisfactorily shown that the discretion was abused through malice, or the judgment perverted through favoritism or other improper motive. It is not, therefore, the mere difficulty of an inquiry into the facts that precludes civil liability to the *party who has [*474] been injured by a neglect of judicial duty or an abuse of discretion.

If, however, we select the case of any judicial officer and endeavor to satisfy ourselves what would be the practical working of the opposite doctrine, we shall not be long in doubt that reasons abundant exist why the judge should be exempt from individual responsibility to those interested in the discharge of his duties. We shall also be able to perceive that while the upright judge may have reasons for desiring to be shielded against harassing litigation at the suit of those who may be displeased with his action, the general public has interests still more important which demand for him this immunity.

First, as regards the interest of the judge: Whoever brings his controversy before the courts may be assumed to believe that his case is sound both on the law and on the facts, and that if justice is done him, judgment will pass in his favor. Whoever defends a suit brought against him, may also be supposed to believe that he ought to succeed in his defense. One of the two must fail, and when he fails he can generally attribute it to some ruling of the judge which either conclusively determined the case, or gave such direction to the deliberations of the jury as required the result which they reached. The reasons assigned by the judge for his rulings may or may not be satisfactory to parties, and necessarily in the case of the defeated party, they are received by a mind prepared in advance not to agree to them. If, now, the judge can be held responsible to the defeated party for his action, it must be on the ground either, *First*, that by a wrong judgment, where duty required of him a right judgment, he has inflicted injury; or, *Second*, that he has done wrong by not making use of his honest judgment, but allowing passion or prejudice

to control his action. One or the other of these is the only conceivable ground on which an action against the judge can be supported.

If an action were maintained on the first ground, it would be apparent that no man fit for the position, and having anything either of property or reputation to put at stake, would consent to occupy a judicial position. If at the peril of his fortune, he must justify his judgments to the satisfaction of a jury summoned by a dissatisfied litigant to review them, it would [*475] be presumptuous for any man to place himself in *that

position. Nor would the protection be sensibly greater if his liability were to depend upon a showing of bad motive. And here we cannot do better than to reproduce the language of an important decision. "Controversies involving not merely great pecuniary interests, but the liability and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in the courts, in which there is great conflict in the evidence, and great doubt as to the law which should govern their decision. It is this class of cases that impose upon the judge the severest labor, and often create in his mind a fearful sense of responsibility. Yet it is in precisely this class of cases that the losing party feels most keenly the decision against him and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his conviction of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential

to judicial independence would be entirely swept away. Few persons, sufficiently irritated to institute an action against a judge for his judicial acts, would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.”²

Turning, now, to the public aspect which such a suit would present, the following may be assigned as reasons why the public interest could not suffer such a suit to be brought:

1. The necessary result of the liability would be to occupy the judge’s time and mind with the defense of his own interests, when he should be giving them up *wholly to [*476] his public duties, thereby defeating, to some extent, the very purpose for which his office was created.

2. The effect of putting the judge on his defense as a wrong-doer necessarily is to lower the estimation in which his office is held by the public, and any adjudication against him lessens the weight of his subsequent decisions. This of itself is a serious evil, affecting the whole community; for the confidence and respect of the people for the government will always repose most securely on the judicial authority when it is esteemed, and must always be unstable and unreliable when this is not respected. If the judiciary is unjustly assailed in the public press, the wise judge refuses to put himself in position of defendant by responding, but he leaves the tempest to rage until an awakened public sentiment silences his detractors. But if he is forced upon his defense, as was well said in an early case, it “would tend to the scandal and subversion of all justice, and those who are most sincere would not be free from continual calumniations.”³

3. The civil responsibility of the judge would often be an incentive to dishonest instead of honest judgments, and would invite him to consult public opinion and public prejudices, when he ought to be wholly above and uninfluenced by them. As every suit against him would be to some extent an appeal to popular

2—FIELD, J., in *Bradley v. Fish-* & S. 576. And, see *Le Caux v. er*, 13 Wall. 348. To the same ef- *Eden, Doug.* 594.

fect is *Fray v. Blackburn*, 3 Best 3—*Floyd v. Barker*, 12 Co. 25; quoted in 13 Wall. 349.

feeling, a judge caring specially for his own protection, rather than for the cause of justice, could not well resist a leaning adverse to the parties against whom the popular passion or prejudice for the time being was running, and he would thus become a persecutor in the cases where he ought to be a protector, and might count with confidence on escaping responsibility in the very cases in which he ought to be punished. Of what avail, for example, could the civil liability of the judge have been to the victims of the brutality of Jeffries, if, while he was at the height of his power and influence, and was wreaking his brutal passions upon them amidst the applause of crowded court rooms, these victims had demanded redress against him at the hands of any other court and jury of the realm?

4. Such civil responsibility would constitute a serious obstruction to justice, in that it would render essential a large [*477] increase in the judicial force, not only as it would multiply litigation, but as it would open each case to endless controversy. This of itself would be an incalculable evil. The interest of the public in general rules and in settled order is vastly greater than in any results which only affect individuals; courts are for the general benefit rather than for the individual; and it is more important that their action shall tend to the peace and quiet of society than that, at the expense of order, and after many suits, they shall finally punish an officer with damages for his misconduct. And it is to be borne in mind that if one judge can be tried for his judgment, the one who presides on the trial may also be tried for his, and thus the process may go on until it becomes intolerable.

5. But where the judge is really deserving of condemnation a prosecution at the instance of the State is a much more effectual method of bringing him to account than a private suit. A want of integrity, a failure to apply his judgment to the case before him, a reckless or malicious disposition to delay or defeat justice may exist and be perfectly capable of being shown, and yet not be made so apparent by the facts of any particular case that in a trial confined to those facts he would be condemned. It may require the facts of many cases to establish the fault; it may

be necessary to show the official action for years. Where an officer is impeached, the whole official career is or may be gone into; in that case one delinquency after another is perhaps shown —each tends to characterize the other, and the whole will enable the triers to form a just opinion of the official integrity. But in a private suit the party would be confined to the facts of his own case: it is against inflexible rules that one man should be allowed to base his recovery for his own benefit on a wrong done to another, and could it be permitted, the person first wronged, and whose right to redress would be as complete as any, would lose this advantage by the very fact that he stood first in the line of injured persons.

Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State, and the peace and *happiness of society; that if he shall fail in the faithful [*478] discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer.

The rule thus laid down applies to large classes of offices, embracing some, the powers attached to which are very extensive, and others whose authority is exceedingly limited. It applies to the highest judge in the State or nation,⁴ but it also applies to

4—*Dicas v. Lord Brougham*, 6 jurisdiction. *Terry v. Wright*, 9 C. & P. 249; *Fray v. Blackburn*, Colo. App. 11, 47 Pac. 905; *Harrison v. Redden*, 53 Kan. 265, 36 3 Best & S. 576; *Yates v. Lansing*, 5 Johns. 282; S. C. 9 Johns. 394; Pac. 325; *Murray v. Mills*, 56 *Lining v. Bentham*, 2 Bay, 1; Minn. 75, 57 N. W. 324; *Ayers v. Bradley v. Fisher*, 13 Wall. 335; *Russell*, 50 Hun, 282, 3 N. Y. S. *Lange v. Benedict*, 73 N. Y. 12. 338; *Root v. Rose*, 6 N. D. 575, Courts of general or superior 72 N. W. 1022; *Webb v. Fisher*,

the lowest officer who sits as a court and tries petty cases,⁵ [*479] *and it applies not in respect to their judgments merely,

- 109 Tenn. 701, 72 S. W. 110, 97 508; *Fuller v. Gould*, 20 Vt. 643; Am. St. Rep. 863, 60 L. R. A. 791; *Kibbling v. Clark*, 53 Vt. 379; *Rudd v. Darling*, 64 Vt. 456, 25 Trammell v. Russellville, 34 Ark. Atl. 479. 105, 36 Am. Rep. 1; *Ely v. Thompson*, 3 A. K. Marsh. 70; *Coleman v. Roberts*, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84; *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630; *People v. Suhre*, 97 Ill. App. 231; *State v. Wolever*, 127 Ind. 306, 26 N. E. 762; *Thompson v. Jackson*, 93 Ia. 376, 61 N. W. 1004, 27 L. R. A. 92; *Heath v. Halfhill*, 106 Ia. 133, 76 N. W. 522; *Dixon v. Cooper*, 109 Ky. 29, 58 S. W. 437; *Raymond v. Lowe*, 87 Me. 329, 32 Atl. 964; *Roth v. Shupp*, 94 Md. 55, 50 Atl. 430; *Vennum v. Huston*, 38 Neb. 293, 56 N. W. 970; *Atwood v. Atwater*, 43 Neb. 147, 61 N. W. 574; *Kelsey v. Klabunde*, 54 Neb. 760, 74 N. W. 1066, 1099; *Booth v. Kurrus*, 55 N. J. L. 370, 26 Atl. 1013; *Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138; *Scott v. Fishblate*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696; *Wheeler v. Gavin*, 5 Ohio C. C. 246; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084; *Marks v. Sullivan*, 9 Utah, 12, 33 Pac. 224; *Banister v. Wakeman*, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201. If in the exercise of judicial functions upon a matter within his jurisdiction he acts corruptly or fraudulently, he is not liable civilly. *Irion v. Lewis*, 56 Ala. 190; *Kress v. State*, 65 Ind. 106. But see, *Knell v. Briscoe*, 49 Md. 414; *Hitch v. Lambright*, 66 Ga. 228; *Horne v. Pudil*, 88 Ia. 533, 55 N. W. 485; *Chambers v. Oehler*, 107 Ia. 155,

but to all process awarded by them for carrying their judgments into effect.⁶

Nor is this rule of judicial immunity restricted in its protection to the judges proper, but it extends also to military and naval officers in exercising their authority to order courts-martial for the trial of their inferiors, or in putting their inferiors under arrest preliminary to trial; and no inquiry into their motives in doing so can be suffered in a civil suit.⁷ It extends also to grand and petit jurors in the discharge of their duties as such;⁸ to assessors upon whom is imposed the duty of valuing property

77 N. W. 853. In *Phelps v. Sill*, 1 Day, 315, it is held that an action will not lie against a judge of probate for neglecting to take security from the guardian of an infant, although such an infant had personal estate and the guardian was a bankrupt. Though a judge mistakes, it was said, it is sufficient for him that he acted judicially. For a remarkable case in which a justice was held not responsible, though he seems to have acted very improperly and in defiance of law, see *Raymond v. Bolles*, 11 Cush. 315. The case of *Stone v. Graves*, 8 Mo. 148, was also one of great apparent misbehavior.

clude persons from his court room while a trial is in progress. *State v. Copp*, 15 N. H. 212. In determining upon the authority of one person to appear for another; *Morton v. Crane*, 39 Mich. 520. In taxing an attorney fee. *State v. Jackson*, 68 Ind. 58.

6—*Hammond v. Howell*, 1 Mod. 184; *Dicas v. Lord Brougham*, 6 C. & P. 249. And, see cases cited in last note generally. While for illegally issuing an execution a justice may be liable; *Barrister v. Wakeman*, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201; *Sullivan v. Jones*, 2 Gray 570; he is not for issuing one on his judgment, not appealed from though erroneous, at demand of judgment creditor. *White v. Morse*, 139 Mass. 162.

7—*Sutton v. Johnstone*, 1 T. R. 493; *Grear v. Marshall*, 4 Fost. & F. 485; *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94; S. C. 9 Best & S. 768; *Dawkins v. Lord Rokeby*, 4 Fost. & F. 806, where the subject was largely examined. Coroners, in holding inquests, are judges, and are not liable for excluding persons they think should not be present. *Garnett v. Ferrand*, 6 B. & C. 611.

8—*Hunter v. Mathis*, 40 Ind. 356; *Turpen v. Booth*, 56 Cal. 65, 38 Am. Rep. 48; *Sidener*

There are *dicta* in some cases that a justice is civilly responsible when he acts maliciously or corruptly, but they are not well founded, and the express decisions are against them, as the authorities above collected abundantly show. It is said in *Garfield v. Douglass*, 22 Ill. 100, 74 Am. Dec. 137, that if a justice corruptly, or from improper motives, alters his docket, he will be liable both civilly and criminally; but such an act would not be judicial, but purely unofficial and wrongful.

A justice exercises a judicial discretion in determining to ex-

for the purpose of a levy of taxes;⁹ to commissioners appointed to appraise damages when property is taken under the right of eminent domain;¹⁰ to officers empowered to lay out, alter, and discontinue highways;¹¹ to highway officers in deciding

v. Russell, 34 Ill. App. 446; *Engelke v. Chouteau*, 98 Mo. 629, 12 S. W. 358.

9—*Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530; *Stewart v. Case*, 53 Minn. 62, 54 N. W. 938, 39 Am. St. Rep. 575; *Weaver v. Deven-dorf*, 3 Denio, 117. See *Auditor v. Atchison, &c.*, R. R. Co., 6 Kan. 500, 7 Am. Rep. 575, and a full discussion of the subject, with citation of numerous cases, in *Cooley on Taxation*, pp. 551 to 557.

10—*Van Steenbergh v. Bigelow*, 3 Wend. 42.

11—*Sage v. Laurain*, 19 Mich. 137. The case of *Turnpike Road v. Champney*, 2 N. H. 199, is *contra*. The action in that case was for laying out a highway merely for the purpose of enabling passengers to avoid the plaintiff's toll-gate. RICHARDSON, Ch. J., says: "The powers given to selectmen by the statutes are to be exercised for purposes of public and private convenience and accommodation, and when honestly and properly exercised, the statute will be a sufficient warrant for the doings of selectmen. But if unmindful of the true objects of these statutes, selectmen lay out public or private ways for purposes of wrong and injury to individuals, they are not to be protected by these statutes, but, like other wrong-doers, must be held answerable for the damages that flow from their unlawful acts. There is nothing in the nature of the powers conferred in this instance

that can protect selectmen from an action. They seem to stand in the situation of a moderator of a town meeting, who is unquestionably answerable for maliciously rejecting the vote of one who has a right to vote. If the selectmen should lay out a road around a turnpike-gate merely for the purpose of enabling travelers to evade the payment of toll, it is impossible to doubt that an action might be maintained for the injury. For the law affords no other remedy for the injury. On the other hand, should the public convenience require a road to be laid out [parallel] to a turnpike, it might, without doubt be lawfully done, although it might enable passengers to evade the payment of toll. The public convenience and accommodation are in no case to be sacrificed to the local situation of a turnpike gate.

"In this case, the petition, upon which the defendant acted, stated as a reason why the road should be laid out, that the petitioners were grievously burthened with paying toll at the gate. If for this cause only the defendants proceeded to lay out the road, their proceedings were most manifestly illegal. Such a grievance it was not their province to redress. They had no right to interfere. If the corporation have abused their privileges granted by the charter by erecting a gate at this place, there is, without doubt, a remedy; but it is not to

that a person claiming exemption from a road tax is not *in fact exempt,¹² or that one arrested is in default for [*480] not having worked out the assessment,¹³ to members of a township board in deciding upon the allowance of claims,¹⁴ to arbitrators,¹⁵ and to the collector of customs in exercising his authority to sell perishable property, and in fixing upon the time for notice of sale,¹⁶ and to other similar officers and boards.¹⁷

But it is an interesting and very important question whether, in the case of that class of officers who do not hold courts, but exercise what may be and often is called power *quasi* judicial, like assessors of lands for taxation, the immunity is not after all only partial and limited by good faith and honest purpose. There *are certainly many cases which hold, and [*481] more which assume, that the law will hold such officers liable if they act maliciously to the prejudice of individuals.¹⁸

be given by the selectmen in this manner."

12—*Harrington v. Commissioners, &c.*, 2 *McCord*, 400.

13—*Freeman v. Cornwall*, 10 *Johns.* 470.

14—*Wall v. Trumbull*, 16 *Mich.* 228.

15—*Pappa v. Rose*, L. R. 7 C. P. 32; *Jones v. Brown*, 54 *Ia.* 74, 37 *Am. Rep.* 185.

16—*Gould v. Hammond*, 1 *McAllister*, 235. He is not liable, it is said, except for acting from corrupt motive.

17—To county commissioners acting as a court. *Gaines v. Newbrough*, 12 *Tex. Civ. App.* 466, 34 *S. W.* 1048. To a county superintendent of schools in the matter of licensing teachers. *Elmore v. Overton*, 104 *Ind.* 548, 4 *N. E.* 197; *Branaman v. Hinkle*, 137 *Ind.* 496, 37 *N. E.* 546. To a prosecuting attorney in respect to indictments. *Griffith v. Slinkard*, 136 *Ind.* 117, 44 *N. E.* 1001.

18—See *Hoggatt v. Bigley*, 6

Humph. 236; *Baker v. State*, 27 *Ind.* 485; *Chickering v. Robinson*, 3 *Cush.* 543; *Gregory v. Brooks*, 37 *Conn.* 365; *Wall v. Trumbull*, 16 *Mich.* 228; *Seaman v. Patten*, 2 *Caines*, 312; *Tompkins v. Sands*, 8 *Wend.* 462; *Reed v. Conway*, 20 *Mo.* 22, 24 *Am. Dec.* 46; *Lilenthal v. Campbell*, 22 *La. Ann.* 600; *Williams v. Weaver*, 75 *N. Y.* 30; *McDaniel v. Tebbetts*, 60 *N. H.* 497. In *Harman v. Tappenden*, 1 *East*, 555, it is assumed that an action will lie against officers of corporation if, in disfranchising members, they act maliciously or on purpose to deprive the plaintiff of that particular advantage which resulted to him from his corporate character. Some of these cases assume that a justice of the peace is liable where he acts maliciously; but the authorities will not justify this assumption. See *Lenox v. Grant*, 8 *Mo.* 254; *Stone v. Graves*, 8 *Mo.* 148; *Morrison v. McDonald*, 21 *Me.* 550; *Taylor v. Doremus*, 16 *N. J.* 473;

Thus, it is said that the members of a school board may be held responsible for the dismissal of a teacher, if they act maliciously and without cause;¹⁹ and a county clerk, for willfully and maliciously approving an insufficient appeal bond;²⁰ and a wharf-master, for the removal of a ship from a certain dock, where it can be shown that the order was given maliciously, and with the purpose to cause injury.²¹ It has also been assumed that [*482] the selectmen of a *town may be held liable to one for whom they appoint an overseer as an incompetent person, provided they act from malice and without probable cause.²² Also, that members of a court martial may be liable to parties

Way *v.* Townsend, 4 Allen, 114; Bailey *v.* Wiggins, 5 Harr. 462, 60 Am. Dec. 650; Little *v.* Moore, 4 N. J. 74.

19—Bennett *v.* Fulmer, 49 Pa. St. 157. A school committee is not liable for expelling children from school if they act in good faith. Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256; Stewart *v.* Southard, 17 Ohio, 402; Stephenson *v.* Hall, 14 Barb. 222. See Spear *v.* Cummings, 23 Pick. 224, 34 Am. Dec. 53. See Ferriter *v.* Tyler, 48 Vt. 444, 21 Am. Rep. 133.

20—Billings *v.* Lafferty, 31 Ill. 318. In Reed *v.* Conway, 20 Mo.

22, there is an important negative pregnant in the holding that a surveyor general is not liable to an action for revoking the commission of a deputy surveyor, annulling a surveying contract, and refusing to receive and examine the field notes, where, without malice, and in good faith, he exercises his judgment. Following this case, see Edwards *v.* Ferguson, 73 Mo. 686, where officers with discretionary powers are held not liable except for their malicious acts. Here a board of

school regents refused to pay a balance due a contractor for building a school. See, also, Chamberlain *v.* Clayton, 56 Ia. 331. So a highway officer who acts in good faith is not personally liable for so cutting a ditch as to flow land of an adjoining owner. Spitznogle *v.* Ward, 64 Ind. 30; McOske *v.* Burrell, 55 Ind. 425. A duty imposed upon aldermen to award a contract to the lowest responsible bidder is a judicial duty, for the erroneous or even corrupt performance of which they are not civilly liable. East River Gas Light Co. *v.* Donnelly, 25 Hun, 614.

21—Gregory *v.* Brooks, 37 Conn. 365. See Brown *v.* Lester, 21 Miss. 392. Also, Wasson *v.* Mitchell, 18 Iowa, 153 (case of supervisors); Walker *v.* Halleck, 32 Ind. 239 (members of common council); Culver *v.* Avery, 7 Wend. 380, 22 Am. Dec. 586 (loan officer); Downing *v.* McFadden, 18 Pa. St. 334 (canal commissioner); Gregory *v.* Brown, 4 Bibb, 28, 7 Am. Dec. 731 (justice of the peace).

22—Parmalee *v.* Baldwin, 1 Conn. 313.

maliciously convicted by them of delinquency in the performance of military duty.²³

In respect to these last cases, though they seem out of harmony with the general rule above laid down, and the reasons on which it rests, yet we may, perhaps, safely concede that there are various duties lying along the borders between those of a ministerial and those of a judicial nature, which are usually intrusted to inferior officers, and in the performance of which it is highly important that they be kept as closely as possible within strict rules. If courts lean against recognizing in them full discretionary powers, and hold them strictly within the limits of good faith, it is probably a leaning that, in most cases, will be found to harmonize with public policy.²⁴

Whether officers having charge of elections, and of the preliminary registration and other proceedings, should be shielded by the same immunity that protects judicial officers in general, is a disputed question. In the leading case of *Ashby v. White*,²⁵ *the returning officer who refused to admit a [*483] qualified elector to vote was held liable in damages at his suit.²⁶ This ruling was followed in Massachusetts at an early

23—Shoemaker *v.* Nesbit, 2 Rawle, 201. Macon *v.* Cook, 2 N. & McCord, 379. This seems to be going a great way, but certainly no further than the case of Stewart *v.* Cooley, 23 Minn. 347, 23 Am. Rep. 690. The action in that case was against the judge of a municipal court and others, charging that they conspired to institute a malicious prosecution against the plaintiff, and that one of the defendants made complaint against the plaintiff for perjury, upon which the judge and clerk issued a warrant for his arrest, which was served, and the plaintiff brought into court for examination, whereupon he was discharged for the failure of the complainant to appear. This complaint was held to set forth a good cause of action. The wrongful act on the part of the judge here must have consisted in the issuing of process; and as to that he could have had no discretion if the complaint was sufficient, or if he had, it was a judicial discretion, and to hold him liable by charging some bad motive lying back of it seems to come directly within the condemnation of Bradley *v.* Fisher, 13 Wall. 335, above referred to.

24—See Pike *v.* Megoun, 44 Mo. 491.

25—Ld. Raym. 938; 1 Salk. 19; 8 State Trials, 89. Compare Drew *v.* Coulton, 1 East, 563, note.

26—It is proper to say that this decision has been qualified by later cases, and the election officer is now held not liable for an er-

day, Chief Justice PARKER setting forth the reasons with great clearness and cogency: "The selectmen of a town," he says, "cannot be proceeded against criminally for depriving a citizen of his vote, unless their conduct is the effect of corruption or some wicked and base motive. If, then, a civil action does not lie against them, the party is deprived of his franchise without any relief, and has no way of establishing his right to any future suffrage. Thus a man may be prevented for his life from exercising a constitutional privilege, by the incapacity or inattention of those who are appointed to regulate elections. The decision of the selectmen is necessarily final and conclusive as to the existing election. No means are known by which the rejected vote may be counted by any other tribunal, so as to have its influence upon the election; or, at least, no practice of that kind has ever been adopted in this State. There is, therefore, not only an injury to the individual, but to the whole community, the theory of our government requiring that each elective officer shall be appointed by the majority of votes of all the qualified citizens who choose to exercise their privilege. Now if a party duly qualified is unjustly prevented from voting, and yet can maintain no action for so important an injury, unless he is able to prove an ill design in those who obstruct him, he is entirely shut out from a judicial investigation of his right; and succeeding injuries may be founded on one originally committed by mistake. He may thus be perpetually excluded from the common privilege of citizens, without any lawful means of asserting his rights and restoring himself to the rank of an active citizen. Such a doctrine would be inconsistent with the principles and provisions of our free constitution, and must give way to the necessity of main-
[*484] *taining the people in their rights, secured to them by the form of their government."²⁷

roneous rejection of a vote, provided he acted *bona fide*. See *Cullen v. Morris*, 2 Stark. 577. The same rule applied to a church warden as officer of a parish election. *Tozer v. Child*, 6 El. & Bl. 289; S. C. in Exchequer Chamber,

7 El. & Bl. 377, 381, where the question is made whether Lord HOLT did not insist on malice as essential to the action.

27—*Lincoln v. Hapgood*, 11 Mass. 350, 355. See, also, *Gardner v. Ward*, 2 Mass. 244, note; *Kil-*

It will be seen from the foregoing that the learned judge plants his conclusion on the ground of State necessity and the preservation of free institutions. Our institutions rest upon the ballot, and must be preserved by protecting the liberty of casting it. If any officer denies or obstructs this liberty, he takes away a privilege valuable to the possessor and necessary to the country, and if he does this by mistake, and not of malice, the consequences should nevertheless fall upon him. The same rule has been laid down in Ohio.²⁸

In other States this doctrine is denied, and inspectors of election are put upon the footing of *quasi* judicial officers, and are protected when they act within the limits of good faith, but are made to respond in damages when they maliciously deny the voter's right. Says BARTOL, Ch. J., referring to the Massachusetts and Ohio decisions: "The decisions in those States rest upon the principle that a party who, like the plaintiff, has been deprived of a right, is thereby injured, and must have a remedy. It seems to us that the error in the application of that principle to this case consists in a misapplication of what is the right of a citizen under our election laws. In one sense, if he is a legal voter, he has the right to vote, and is injured if deprived of it; but the law has appointed a means whereby his right to vote is decided, and for that purpose has provided judges to determine that question, and has also provided the most careful guarantees for a proper discharge of their duties by the judges, by the mode of their selection and their oaths of office. In all governments power and trust must be reposed somewhere; all that can be done is to define its limits, and provide means for its proper exercise. When the act in question is that of a judicial officer, all that the law can secure is that they shall not with impunity do wrong *willfully*, fraudulently, or corruptly. If they do so act, they are liable both civilly and *criminally; [*485] but for an error of judgment, they are not liable either

ham *v.* Ward, 2 Mass. 236; Hen- 28—Jeffries *v.* Ankenny, 11 Ohio
shaw *v.* Foster, 9 Pick. 312; Ca- 372; Anderson *v.* Milliken, 9 Ohio
pen *v.* Foster, 12 Pick. 485; Keith St. 568; Monroe *v.* Collins, 17 Ohio
v. Howard, 24 Pick. 292; Blanch- St. 665. See Long *v.* Long, 57 Ia.
ard *v.* Stearns, 5 Met. 298. 497.

civilly or criminally. If the citizen has had a fair and honest exercise of judgment by a judicial officer in his case, it is all the law entitles him to, and although the judgment may be erroneous, and the party injured, it is *damnum absque injuria*, for which no action lies.²⁹ Like reasoning has led to the same conclusion in other States.³⁰ And the principle applies as well to the officers who have charge of the registration of voters preliminary to an election as to the judges or inspectors who receive the ballots.³¹

[*486] . *In some States it has been deemed wise to make the voter himself the conclusive judge of his right to vote.

29—*Bevard v. Hoffman*, 18 Md. Ann. 968; *Patterson v. D'Auterive*, 479, 482, 81 Am. Rep. 618. And, see *Elbin v. Wilson*, 33 Md. 135; *Anderson v. Baker*, 23 Md. 531; *Friend v. Hamill*, 34 Md. 298.

30—*New York*: *Jenkins v. Waldron*, 11 Johns. 114, 6 Am. Dec. 359; *Goetcheus v. Matthewson*, 61 N. Y. 420 (where DWIGHT, Commissioner, examines the subject with fullness and ability). See *People v. Boas*, 29 Hun, 377. *Pennsylvania*: *Weckerly v. Geyer*, 11 S. & R. 35. *Kentucky*: *Caulfield v. Bullock*, 18 B. Mon. 495; *Morgan v. Dudley*, 18 B. Mon. 693, 68 Am. Dec. 735; *Chrisman v. Bruce*, 1 Duv. 63, 85 Am. Dec. 603; *Miller v. Rucker*, 1 Bush, 135. *Indiana*: *Carter v. Harrison*, 5 Blackf. 138. *Michigan*: *Gordon v. Farrar*, 2 Doug. (Mich.) 411. *New Hampshire*: *Wheeler v. Patterson*, 1 N. H. 88, 8 Am. Dec. 41; *Turnpike Co. v. Champney*, 2 N. H. 199. *North Carolina*: *Peavey v. Robbins*, 3 Jones, 339. *Tennessee*: *Rail v. Potts*, 8 Humph. 225. *West Virginia*: *Fausler v. Parsons*, 6 W. Va. 486, 20 Am. Rep. 431. *Delaware*: *State v. McDonald*, 4 Harr. 555; *State v. Porter*, 4 Harr. 556. *Louisiana*: *Dwight v. Rice*, 5 La. Ann. 580; *Bridge v. Oakey*, 2 La.

Ann. 964. *Rhode Island*: *Keenan v. Cook*, 12 R. I. 52. And, see *Sanders v. Getchell*, 76 Me. 158, 49 Am. Rep. 606, as to what is “unreasonable” intrusion under a statute limiting liability of officers to unreasonable, corrupt and willfully oppressive conduct. The above doctrine has been applied to officers whose duty was to qualify and induct into office an elective officer, and who refused to qualify him. *Hannan v. Grizzard*, 99 N. C. 161, 6 S. E. 93.

31—*Fausler v. Parsons*, 6 W. Va. 486, 20 Am. Rep. 431; *Pike v. Megoun*, 44 Mo. 492; *Murphy v. Ramsey*, 114 U. S. 15; *Larned v. Wheeler*, 140 Mass. 390, 54 Am. Rep. 483. If registration officers refuse to register a voter, but afterwards, and before the election reconsider their action, and place his name on the list, so that he may vote if he shall present himself at the polls, which he fails to do, they are not liable. *Bacon v. Benchley*, 2 Cush. 100.

Judges of election are not liable if, in good faith, they reject the vote of one who is an elector in fact, but whose actions at the

If his right is questioned, an oath which embraces the several requisites of qualification is tendered to him, and if he will take this, and thus give evidence that he answers all the conditions, he must be registered for voting—if registration is required—and his ballot must be received when offered. This legislation assumes that the course marked out by it is safer and less liable to abuses than leaving the decision to any tribunal. The oath is taken with the penalties of perjury in view, and these penalties are thought to be a better protection to the privilege of suffrage than any conclusion of judges or inspectors, whose means of information must often be defective, and who may not only act under honest mistakes, but also, when called upon to act in the excitement of an election which calls up and intensifies the party passions, be influenced by partisan or other improper feelings or prejudices. Whenever the law thus makes a man the final judge of his own right, the election officers have only a ministerial duty to perform; they must receive the vote if the oath is taken, and they are responsible as in other cases of ministerial duties if they refuse.³²

Jurisdiction Essential. Every judicial officer, whether the grade be high or low, must take care, before acting, to inform himself whether the circumstances justify his exercise of the judicial function. A judge is not such at all times and for all purposes: when he acts he must be clothed with jurisdiction; and acting without this, he is but the individual falsely assuming an authority he does not possess. The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when time of presenting his ballot, led whom he fails to assess a tax, them to believe he was not. *Humphrey v. Kingman*, 5 Met. 162. See *Gates v. Neal*, 23 Pick. 308.

For the evidence receivable to show improper motives in the election officers in rejecting votes, see *Elbin v. Wilson*, 33 Md. 135; *Friend v. Hamill*, 34 Md. 298.

Where one's right to vote depends upon payment of a tax, an assessor is not liable to one upon

32—See *Spragins v. Houghton*, 3 Ill. 377; *State v. Robb*, 17 Ind. 536; *Gillespie v. Palmer*, 20 Wis. 544; *People v. Pease*, 30 Barb. 588; *Chrisman v. Bruce*, 1 Duv. 63, 85 Am. Dec. 603; *People v. Gordon*, 5 Cal. 235.

he assumes to decide cases of a class which the law withholds from his cognizance, or cases between persons who are not, either actually or constructively, before him for the purpose.

[*487] Neither is he exercising the judicial function *when, being empowered to enter one judgment or make one order, he enters or makes one wholly different in nature. When he does this he steps over the boundary of his judicial authority, and is as much out of the protection of the law in respect to the particular act as if he held no office at all. This is a general rule.³³

Jurisdiction in a judge may be defined as the authority of law to act officially in the matter then in hand. One set of facts under the law confers it in the case of the assessor of taxes, and another set of facts confers it in the case of the commissioner of highways or the sewer commissioner. Most of the officers who exercise an inferior authority have no jurisdiction at all until certain preliminary action has been taken which is particularly pointed out by statute; and neither in their case nor in the case of the inferior courts will any intendment of law be made in favor of jurisdiction when their action is called in question, but they must show by their written records that the circumstances existed which authorized them to act.³⁴ In favor of the action of the superior courts, however, to which vast interests and general powers are confided, it will be intended that they have acted with full jurisdiction, and that they have assumed to do nothing that the law does not sanction.³⁵

33—Case of the Marshalsea, 10 Co. 68; *Groenveld v. Burwell*, 1 Ld. Raym. 454; *Yates v. Lansing*, 5 Johns. 282; *Phelps v. Sill*, 1 Day, 315; *Palmer v. Carroll*, 24 N. H. 314; *Rowe v. Addison*, 34 N. H. 306; *Craig v. Burnett*, 32 Ala. 728; *Clarke v. May*, 2 Gray, 410; *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438; *State v. Nerland*, 7 S. C. (n. s.) 241; *Johnson v. Bouton*, 35 Neb. 898, 53 N. W. 995.

34—The rule for jurisdiction is

that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so, while nothing shall be intended to be within the jurisdiction of an inferior court but that which is specially so alleged. 1 Saund. 74. And, see *The Brewers' Case*, 1 Roll. Rep. 134; *Parsons v. Loyd*, 3 Wils. 341; *Estopinal v. Peyroux*, 37 La. Ann. 477.

35—“The chief distinction be-

*When it is said that the jurisdiction of an inferior [*488] court must appear, what is meant is, that it must appear by the record itself; it cannot be supplied by intendment, or rest in the mere knowledge of witnesses to be brought out when the authority is questioned. Therefore, a warrant of commitment which does not in its recitals show authority in the magistrate to

tween judgments pronounced by courts of record and those pronounced by courts not of record, arises from the presumption of law that the former courts act within their jurisdiction, while, so far as jurisdiction is concerned, no presumption is indulged in favor of the latter. Whoever relies upon the judgment of a court of special jurisdiction must establish every fact necessary to confer jurisdiction upon the court. The proceedings of all courts not of record must be shown to be within the powers granted to them by law, or such proceedings will be entirely disregarded. The acts of these two classes of courts have been properly likened to the acts of general agents and the acts of special agents. The former are to be regarded as valid in all cases to the extent that all persons relying upon them need show nothing beyond the general grant of authority; while the latter, to be binding, must first be shown to fall within the limits of a special or restricted grant. *Clark v. Holmes*, 1 Doug. (Mich.) 390; *Sears v. Terry*, 26 Conn. 273; *Shufeldt v. Buckley*, 45 Ill. 223; *Stanton v. Styles*, 5 Exch. 578; *Gray v. McNeal*, 12 Ga. 424; *Harrington v. People*, 6 Barb. 607; *Taylor v. Bruscup*, 27 Md. 219; *O. & M. R. R. Co. v. Shultz*, 31 Ind. 150; *Thompson v. Multnomah Co.*, 2 Or. 34. There is a further distinction in regard to the proceedings of these two classes of courts, arising from the fact that courts of special jurisdiction have no record, and therefore no unimpeachable memorial of their transactions. Any statement in relation to jurisdiction found among the papers, minutes, or other written matter kept by these courts, seems to be but *prima facie* evidence; in opposition to which it may be shown by any satisfactory means of proof that the authority of the court did not extend over the matter in controversy, nor over the parties to the suit." *Freeman on Judgments*, § 517, citing many cases.

It has been held, however, that this rule does not go so far as to permit the contradiction, in actions against a justice, of the returns of officers of the service of process by them by means of which suits were instituted; *Lightsey v. Harris*, 20 Ala. 409; nor the recital of a justice in his docket that the parties appeared and went to trial before him. *Facey v. Fuller*, 13 Mich. 527. See *Gray v. Cookson*, 16 East, 13. Not even on a charge that the record was made up falsely and corruptly can the record of the justice be impeached in a suit against him. *Kelly v. Dresser*, 11 Allen, 31.

issue it cannot be upheld.³⁶ Neither can a warrant issued by a magistrate for a seizure of goods, in which the same infirmity is manifest.³⁷ Nor a justice's commitment of a witness for contempt, issued after the case in which he was called had been disposed of.³⁸ But where the facts alleged before a magis-

trate are sufficient to give him jurisdiction, and he pro-
[*489] *ceeds upon them to judgment and execution, his right
to exemption from liability cannot be affected by the
truth or falsity of those facts, or the sufficiency or insufficiency
of the evidence adduced for the purpose of establishing them.³⁹

In the case of some officers the jurisdiction does not and cannot depend upon record. Thus, the jurisdiction of an assessor to impose a personal tax may depend upon the fact of residence, of

36—*Wickes v. Clutterbuck*, 2 Bing. 483. See *Hill v. Pride*, 4 Call. 107; nor if commitment is for failure of officer to obey an order if there is no judgment on which to base it. *Lanpher v. Dewell*, 56 Ia. 153.

38 Neb. 293, 56 N. W. 970; *Booth v. Kurrus*, 55 N. J. L. 370, 26 Atl. 1013; *Wheeler v. Gavin*, 5 Ohio C. C. 246; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084; *Marks v. Sullivan*, 9 Utah, 12, 33 Pac. 224; *Terry v. Wright*, 9 Colo. App. 11, 47 Pac. 905. The same principle was applied in the case of a court-martial, in *Shoemaker v. Nesbit*, 2 Rawle, 201, assuming that the members acted *bona fide*. On the general subject, see notes to *Creps v. Durden*, 1 Smith Lead. Cas. 971. See, also, *Olliet v. Bessey*, 2 W. Jones, 214; *Houlden v. Smith*, 14 Q. B. 841. Not liable for issuing an attachment upon an affidavit sufficient on its face, but false as to a jurisdictional fact. *Connelly v. Woods*, 31 Kan. 359. Nor a search warrant under an ordinance afterwards held invalid. *Henke v. McCord*, 55 Ia. 378. See *McCall v. Cohen*, 16 S. C. 445, 42 Am. Rep. 641. But having jurisdiction to examine and commit, he is liable if he assumes to try a criminal. *Patzack v. Von Gerichten*, 10 Mo. App. 424.

37—*Newman v. Earl of Hardwicke*, 8 A. & E. 123; *McClure v. Hill*, 36 Ark. 268. So his mistaken belief as to his jurisdiction in case of criminal process will not protect. *Truesdell v. Combs*, 33 Ohio St. 186.

38—*Clark v. May*, 2 Gray, 410. In Louisiana it has been decided that a justice empowered to issue a warrant on proofs being made, though he issues one without proofs, is not liable; this being only an error in judgment. *Maguire v. Hughes*, 13 La. Ann. 281. But *quere* of this. In *Ackerley v. Parkinson*, 3 M. & S. 411, it is held that if a judicial officer has jurisdiction of the subject-matter, he is not liable for proceeding upon a citation, though the citation is void.

39—*Cave v. Mountain*, 1 M. & G. 257; *Dixon v. Cooper*, 109 Ky. 29,

which no record exists; and, therefore, the fact must always rest in the knowledge of witnesses. But where an officer is to proceed upon evidence in writing, and the statute points out what this evidence shall be, it intends that it shall be found of record in the proper office, and not that important public matters shall be left to uncertain parol testimony.⁴⁰

It is universally conceded that when inferior courts or judicial officers act without jurisdiction the law can give them no protection whatever.⁴¹ The rule has been held to be otherwise, however, in the case of judges of the superior courts where the error has consisted in exceeding their authority. The particular case was one in which the judge, sitting in one court, ordered the name of an attorney to be stricken from the rolls for a contempt of authority committed in another court, of which the judge was also a member. It was held by the Federal Supreme Court that he was not responsible in a civil action for this error.⁴²

40—*Cardigan v. Paige*, 6 N. H. 182, 191; *Moser v. White*, 29 Mich. 59, 60; *People v. Highway Comrs.*, 14 Mich. 528.

41—*Mitchell v. Galen*, 1 Alaska, 339; *De Courcey v. Cox*, 94 Cal. 665, 30 Pac. 95; *State v. Wolever*, 127 Ind. 306, 26 N. E. 762; *Horne v. Pudil*, 88 Ia. 533, 55 N. W. 485; *Glazar v. Hubbard*, 102 Ky. 68, 42 S. W. 1114, 80 Am. St. Rep. 340, 39 L. R. A. 210; *Head v. Levy*, 52 Neb. 456, 72 N. W. 583.

42—*Bradley v. Fisher*, 13 Wall. 335. A plaintiff was convicted of an offense before a United States Circuit Court. The judge sentenced the plaintiff to suffer fine and be imprisoned. After the payment of the fine he set aside the sentence and re-sentenced the plaintiff to imprisonment. The United States Supreme Court adjudged the re-sentence to have been without authority, and discharged the plaintiff. Thereupon, plaintiff brought an action of false

imprisonment against the judge. The court held that the judge had jurisdiction of the person and the subject matter. To adjudge that a second sentence could be pronounced, says FOLGER, C. J., "Is a judicial act done as a judge, as a court, though the adjudication was erroneous and the act based upon it was without authority and void. Where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case; although upon the correctness of his determination in these particulars the validity of his judgment must depend. For such an act, a person acting as judge therein is not liable to civil or criminal action. The power to decide protects though the decision be erroneous." The court further

[*490] Had it *been a justice of the peace who had committed a like error, an action would have been supported, however honest might have been his motives, and however plain it might have appeared that he was intending to keep within his

[*491] powers. *Why the law should protect the one judge and not the other, and why if it protects one only, it should be the very one who, from his higher position and pre-

holds, that while the Circuit Court in a sense is a court of limited and special jurisdiction, it is not an inferior court, and that the rule as to judges of superior courts here applied, and that for those reasons the defendant in this case was protected by his judicial character from the action brought against him by the plaintiff. *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80.

A like question has received full consideration from the Court of Appeals of New Jersey, and BEASLEY, C. J., states the conclusion of the court as follows: "The true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers, is, that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put at *least colorably* under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the

magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems to be a reasonable one; it protects the judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that was practically willful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

"The application of the above stated rule to this case must, obviously, result in a judgment affirming the decision of the circuit judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were, that the plaintiff, in combination with two other persons, 'with force and arms,' entered upon certain lands, and 'with force and arms did unlawfully carry away about four hundred bundles of cornstalks, of the value,' &c., and were engaged in carrying other cornstalks from said lands. By a statute of this State, (Rev. p. 244, § 99), it is declared to be an indictable offense, 'if any person shall willfully, unlawfully and

sumed superior learning and ability ought to be most free from error, are questions of which the following may be suggested as the solution:

The inferior judicial officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so. Moreover, in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court which, under the law, appears doubtful.⁴³ On the other hand, when a grant of general jurisdiction is made, a presumption accompanies it that it is to be exercised generally until an exception appears which is clearly beyond its intent: its very nature is such as to confer upon the officer entrusted with it more liberty of action in deciding upon his powers than could arise from a grant expressly confined within narrow limits, and the law would be inconsistent with it-

maliciously' set fire to or burn, carry off or destroy any barrack, cock, crib, rick or stack of hay, corn, wheat, rye, barley, oats, or grain of any kind, * * * or any trees, herbage, growing grass, hay or other vegetables, etc. Now, although the misconduct described in the complaint is not the misconduct described in this act, nevertheless, the question of their identity was colorably before the magistrate, and it was his duty to decide it; and under the rule above formulated, he is not answerable to the person injured for

his erroneous application of the law to the case that was before him." *Grove v. Van Duyn*, 44 N. J. L. 654, 43 Am. Rep. 412. See, further, *Ross v. Griffin*, 53 Mich. 5; *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Bocock v. Cochran*, 32 Hun, 521.

43—It is no protection that the inferior court in good faith decides that the law confers jurisdiction. *Wingate v. Waite*, 6 M. & W. 739; *Houlden v. Smith*, 14 Q. B. 841; *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438.

[*492] self if it *were not to protect him in the exercise of this judgment. Moreover, for him to decline to exercise an authority because of the existence of a question, when his own judgment favored it, would be to that extent to decline the performance of duty, and measurably to defeat the purpose of the law creating his office; for it cannot be supposed that this contemplated that the judge should act officially as though all presumptions opposed his authority when the fact was directly the contrary.

The supreme court of Georgia quotes the foregoing paragraph and disapproves of the reasoning and of the distinction it is intended to support. "We are unable to appreciate," says the court, "the force of the reasons embodied in the above quotation, which contains all the arguments we have been able to find in favor of the distinction." The court holds that no good reason exists in law why presiding officers of inferior courts should not be measured by the same rules with respect to liability for their judicial acts, as judges of courts of general jurisdiction, and that, consequently, all judicial officers stand upon the same footing and must be governed by the same rules.⁴⁴ The supreme court of Iowa repudiates the distinction and says: "The current of legal thought is that the distinction is unreasonable, unjust, illogical, and ought not to obtain."⁴⁵ In the case referred to the defendant, a justice of the peace, issued a summons and entered judgment against the plaintiff, who resided in another township. Under the statute, the justice had no jurisdiction of a person residing out of his township and the judgment was void. But the defendant issued an execution on the judgment, under which the plaintiff's property was levied on and sold. It was held that the

44—*Calhoun v. Little*, 106 Ga. S. C. 445; *Scott v. Fishblate*, 117 336, 32 S. E. 86, 71 Am. St. Rep. N. C. 265, 23 S. E. 436, 30 L. R. A. 254, 43 L. R. A. 630, citing *Thompson v. Jackson*, 93 Ia. 376, 61 N. W. 1004, 27 L. R. A. 92; *Henke v. McCord*, 55 Ia. 378, 7 N. W. 623; *Bell v. McKinney*, 63 Miss. 187; *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633; *McCall v. Cohen*, 16

45—*Thompson v. Jackson*, 93 Ia. 376, 61 N. W. 1004, 27 L. R. A. 92.

defendant was not liable for having erroneously decided that he had jurisdiction.⁴⁶

In an Indiana case it appeared that in a prosecution before a mayor, acting as a justice of the peace, an application was made by the defendant therein for a change of venue. The mayor denied the application and proceeded with the trial and the defendant was fined and committed to prison. In a suit on the mayor's bond for damages it was held that though the application for a change of venue was regular and sufficient and rendered the subsequent proceedings without jurisdiction and void, yet that the mayor was not liable. The court says: "The test by which the question of liability or non-liability is to be determined, seems to lie in the answer to this question: Was the act complained of an exercise of judicial authority, or was it non-judicial? As applied to acts which are judicial in their nature, the answer to this query depends upon the further question: Had the court jurisdiction in the particular case?

"Where a court of limited jurisdiction has, in a given case, jurisdiction of the subject-matter and of the person interested, the same immunity is accorded to the judge, or magistrate, that is in any case accorded to the judge of a court of general jurisdiction. And here we would remark that by jurisdiction of the subject-matter is not meant simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs.

"It must be conceded that if the necessary steps were all taken to entitle appellant to a change of venue, the action of the mayor in thereafter, over his objection, assuming to retain jurisdiction, and the resulting trial and condemnation were *coram non judice* and void.

"Yet this would not necessarily render the mayor liable to an action. True, in that case, he has exceeded his jurisdiction, but not, we think, in the sense in which that word is used in the cases. At least not in the sense in which the use of that word is justified by principle."

46—There was the same holding in *Heath v. Halfhill*, 106 Ia. 133, 76 N. W. 522.

"We are inclined to think that the use of the words 'excess' and 'exceeded,' in that connection unfortunate, as not expressing with accuracy the idea intended to be conveyed. A judge, even of a court of inferior and limited jurisdiction, only *exceeds* his jurisdiction, so that he is liable to an action, when he acts *without* jurisdiction—when he assumes a jurisdiction with which the law has never clothed him; or when, having had jurisdiction, he has lost it in some way, as by a discontinuance of the cause, and afterwards without notice, assuming to act as in the case of *Dyer v. Smith*, 12 Conn. 384; or when, having jurisdiction, he should grant a change of venue, and thereafter assume to act without consent of parties. Having jurisdiction, he does not lose it by the mere fact that an application for a change of venue is made. The application for a change of venue in itself calls for judicial action. Ruling on such a motion is a judicial act. Having jurisdiction of the subject-matter and of the person of the defendant when the application is made, his decision thereon is privileged to the same extent as would be the decision of a court of general jurisdiction on such a motion.

"This means, of course, that whether he decides it right or wrong, he is protected without reference to the motive that may impel him to the decision. If he decides the motion wrong, and is protected therein, it will not do to say that the immunity ends with the decision of that single question, but it extends to such additional rulings and such additional action as necessarily or legitimately might follow if the decision was correct."⁴⁷

Judge Interested. The magistrate or officer cannot protect himself behind his judicial or discretionary action, if it shall

47—*State v. Wolever*, 127 Ind. 306, 318, 319, 26 N. E. 762. To the same effect: *Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138; *Banister v. Wake-man*, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201. Where a justice of the peace granted a fourth continuance in violation of a statute, in consequence of which he lost jurisdiction of the case, but after wards issued a subpoena for a witness in the case and afterwards an attachment for the same witness, under which the latter was arrested, it was held the justice was liable for false imprisonment. *Holz v. Rediske*, 116 Wis. 353, 92 N. W. 1105. A justice is not liable in damages to the plaintiff in a case because, in consequence of ill health and a severe storm, he

turn out that he was interested, and has assumed to sit or act in his own case, or in that of one of his near relatives, in whose case he would be disqualified to sit as a juror. His action under such circumstances is a mere nullity.⁴⁸ So, in general, if he is complainant or moving party in a prosecution or proceeding, he cannot act in deciding it.⁴⁹ But there are some apparent exceptions to this general rule. The following are cases: A justice of the peace may, of his own motion, call upon a party to answer to a contempt of his authority committed in his presence, and may proceed to hear and dispose of the case, though he occupies the apparently inconsistent positions of accuser and judge; if a felony or a breach of the peace is committed in his presence, he may at once deal with the case, without complaint being entered; and where township or other municipal boards are empowered to pass upon all municipal claims, the interest of the members does not preclude their passing upon their own among the rest. But any authority conferred upon such boards will be strictly construed, and power to adjudge upon their own claims will not be held included, unless it is very clearly conferred. "In legal reasoning, and in the construction of constitutions and statutes, we are often compelled to content ourselves with conclusions *somewhat less certain than those involved in [*493] mathematical axioms; because neither conventions nor

fails to appear at the time and place set for trial and the suit is thereby discontinued. McGuckin v. Wilkin, 75 App. Div. 167, 77 N. Y. S. 385.

48—Hall *v.* Thayer, 105 Mass. 219, citing Davis *v.* Allen, 11 Pick. 466, 22 Am. Dec. 386; Wolcott *v.* Ely, 2 Allen, 338; McGough *v.* Wellington, 6 Allen, 505; Fox *v.* Hazelton, 10 Pick. 275; Strong *v.* Strong, 9 Cush. 560, 574. And, see Dimes *v.* Proprietors, &c., 3 H. L. Cas., 787; Stockwell *v.* White Lake, 22 Mich. 341. See Scanlan *v.* Turner, 1 Bailey, 421; Bedell *v.* Bailey, 58 N. H. 62. In Matter of Ryers, 72 N. Y. 1, 28

Am. Rep. 88, the rule is laid down as to what interest in a judge will prevent the validity of the action taken, apart from the question of his liability. Where a statute made a judge disqualified, except by mutual consent, when he was related to either party by consanguinity or affinity within the 4th degree, it was held that the degree of relationship was to be computed according to the civil law. Chase *v.* Weston, 75 Ia. 159, 39 N. W. 246; Stone *v.* Marion County, 78 Ia. 14, 42 N. W. 570. 49—Rex *v.* Great Yarmouth, 6 B. & C. 646; Rex *v.* Hoseason, 14 East, 605, 608.

legislatures always use language with mathematical accuracy, and neither the human mind nor human affairs will always submit to merely mathematical rule. For various reasons, and upon various grounds, exceptions or qualifications are sometimes implied, though not expressed. An act or constitution which should give to justices of the peace, or to a certain court, the right to try all cases involving certain amounts, or of a general character, would give neither the justice nor the judge the right to try his own cause, or to give final judgment in his own favor, though the case in every other respect, should fall within the class he was expressly authorized to try. An exception of such cases would be implied, and the exception would be just as valid and just as readily recognized by all courts as if it had been expressed.⁵⁰

Legislative action cannot be held invalid because of the interest of legislators in the subject-matter under which they have acted. This rule applies to legislative bodies of all grades. Administrative officers, also, such as assessors of taxes, sometimes act from the necessity of the case, where their own interests are involved; but where the law admits of any other course, it would seem plain that this was inadmissible. Thus, one is not at liberty to sit in forming a quorum of a board to decide upon some matter in which he is concerned, if the law provides for a quorum without him.⁵¹

It is proper to say here that the judicial function can never be delegated by officers of any grade. Whoever, therefore, shall assume to act by delegation can perform only nugatory acts.⁵²

Contempts of Authority. The jurisdiction to punish [*494] for contempt of authority is a very delicate one, and requires to be exercised with great care and caution. The

50—CHRISTIANCY, J., in *Kennedy v. Gies*, 25 Mich. 83. The constitutional provisions under controversy empowered the county auditors to adjust and allow finally all claims against the county. Held, that this did not preclude the salaries of the auditors themselves being fixed by law, though they were payable by the county.

51—*Regina v. Justices, &c.*, 6 Q. B. 753; *Stockwell v. White Lake*, 22 Mich. 341.

52—*Andrews v. Marris*, 1 Q. B. 3; *Whitelegg v. Richards*, 2 B. & C. 45; *Dews v. Riley*, 11 C. B. 434; *Van Slyke v. Insurance Co.*, 39 Wis. 390, 20 Am. Rep. 50; *State v. Jefferson*, 66 N. C. 309; *Cohen v. Hoff*, 3 Brev. 500. A court cannot

reason has already been hinted at: The judge occupies the position of accuser also, and when he punishes, is dealing with conduct which is contemptuous of his own authority, and perhaps insulting to himself.

A contempt of authority exists when one is guilty of conduct which directly tends to prevent or impede the performance of public duty by a competent tribunal then in session or about to convene for the purpose. The power to inflict summary punishment for such contempts is inherent in each house of the legislative department,⁵³ but it is a power which must be exercised by the house itself, and cannot be delegated to committees.⁵⁴ Imprisonment may be imposed as a punishment, but when it is, it must terminate with the session at which it is imposed, and the party is then entitled to his discharge.⁵⁵ The warrant of the presiding officer reciting the fact of conviction is sufficient authority for the commitment, even though it fails to show in what the contempt consisted.⁵⁶ This is upon the ground that the same presumptions support the action of the supreme legislative authority which uphold that of the superior courts. Inferior bodies, with limited legislative powers, such as municipal councils, boards of supervisors, etc., cannot punish for contempts. In this country even the legislature cannot confer the power upon them.⁵⁷

delegate to one of its members
the power to punish for contempt.

Van Sandau v. Turner, 6 Q. B. 773.

53—Shaftsbury's Case, 1 Mod. 144; Murray's Case, 1 Wils. 299; Flower's Case, 8 T. R. 314, Crosby's Case, 3 Wils. 188; Burdette *v.* Abbot, 14 East, 1; Gosset *v.* Howard, 10 Q. B. 411; Anderson *v.* Dunn, 6 Wheat. 204; State *v.* Mathews, 37 N. H. 450; Burnham *v.* Morrissey, 14 Gray, 226, 74 Am. Dec. 676. There is no power to punish a witness for refusing to testify before a committee if the investigation is not one the body has power to institute. Kilbourn *v.* Thompson, 103 U. S. 168. See

People v. Keeler, 99 N. Y. 463, 52 Am. Rep. 49.

54—*Brown v. Davidson*, 59 Ia. 461.

55—Jefferson's Manual, § 18; Richard's Case, 1 Lev. 165; 1 Sid. 245; L. Raym. 120.

56—*Anderson v. Dunn*, 6 Wheat. 204. See *Burdett v. Abbot*, 14 East, 1; *Gosset v. Howard*, 10 Q. B. 411.

57—Whitcomb's Case, 120 Mass. 118, 21 Am. Rep. 502, in which the subject is carefully examined by Mr. Justice GRAY. *Re Hammel*, 9 R. I. 248, was a case of punishment for contempt by a town council, but this point was not raised.

The power to punish for contempts is granted as a necessary incident in establishing a tribunal as a court.⁵⁸ It is [*495] therefore *possessed by the courts of justices of the peace.⁵⁹ But court commissioners have no such powers.⁶⁰ The power cannot be conferred upon a board of tax commissioners.⁶¹

The necessity that jurisdiction should exist in the punishment for contempts is the same as in all other cases; but where the

58—United States *v.* New Bedford Bridge Co., 1 Wood & M. 401; United States *v.* Hudson, 7 Cranch, 32; Robinson *ex parte*, 19 Wall. 505; *Respublica v. Oswald*, 1 Dall. 319, 1 Am. Dec. 246; *States v. White*, 1 T. U. P. Charl. 136; *Yates v. Lansing*, 9 Johns. 395, 6 Am. Dec. 290; *Sanders v. Metcalf*, 1 Tenn. Ch. R. 419, 428; *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Cossart v. State*, 14 Ark. 538; *Clark v. People*, Breese, 266, 12 Am. Dec. 177; *Oswald's Case*, 1 Dall. 319; *Neel v. State*, 9 Ark. 263, 50 Am. Dec. 209; *State v. Morrill*, 16 Ark. 384; *Gorham v. Luckett*, 6 B. Mon. 638; *State v. Woodfin*, 5 Ired. 199, 42 Am. Dec. 161; *Ex parte Adams*, 25 Miss. 883, 59 Am. Dec. 234; *Morrison v. McDonald*, 21 Me. 550; *State v. Tipton*, 1 Blackf. 166; *People v. Turner*, 1 Cal. 152, 52 Am. Dec. 295; *McDermott v. Judges, &c.*, L. R. 2 Pr. C. Cas. 341; *Picket v. Wallace*, 57 Cal. 555; *Hughes v. People*, 5 Col. 436; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961; *Cooper v. People*, 13 Colo. 337, 22 Pac. 790, 6 L. R. A. 430; *Cooper v. People*, 13 Colo. 373, 22 Pac. 790; *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *State v. Judge*, 45 La. Ann. 1250, 14 So. 310, 40 Am. St. Rep. 282; *Nebraska Chil-*

dren's Home Soc. *v. State*, 57 Neb. 765, 78 N. W. 267; *Scott v. Fishblate*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696; *In re Robinson*, 117 N. C. 533, 23 S. E. 453, 53 Am. St. Rep. 596. Although the contempt is committed in another State. *Chafee v. Quidnick Co.*, 13 R. I. 442. Imprisonment as punishment for failure to pay over money as ordered is not imprisonment for debt. *Smith v. McLendon*, 59 Ga. 523.

59—*Rex v. Revel*, 1 Stra. 420; *Regina v. Rogers*, 7 Mod. 28; *Lining v. Bentham*, 2 Bay, 1, 8; *Onderdonk v. Ranlett*, 3 Hill, 323; *Re Cooper*, 32 Vt. 253; *Coleman v. Roberts*, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84. Denied after full discussion. *Rhinehart v. Lance*, 43 N. J. L. 311, 39 Am. Rep. 592. A surrogate's court has the power only as given by statute. *Watson v. Nelson*, 69 N. Y. 536.

60—*In re Remington*, 7 Wis. 643; *Haight v. Lucia*, 36 Wis. 255. A notary taking depositions has no such power in Indiana, but has in Missouri. *Burtt v. Pyle*, 89 Ind. 398; *Ex parte Krieger*, 7 Mo. App. 367.

61—*Langenburg v. Decker*, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108.

punishment is imposed by a court of general jurisdiction, the rule applies that it must be presumed to have acted within the limits of its authority, and that its judgment is warranted by the law and by the facts.⁶² It is otherwise in the case of a court of special or limited jurisdiction, for in that case the record of the court must show that the party is convicted of conduct which in law constituted a contempt of court,⁶³ and the process issued in execution of the judgment of the court will be void if it fails to show by its recitals that misconduct was charged which *prima facie* constituted a contempt.⁶⁴ But if the misconduct charged was such as might be a contempt of court, the court itself must be the conclusive judge, whether in fact it was one or not,⁶⁵ and the judge will not be liable for an erroneous commitment where he had jurisdiction.⁶⁶

*To specify in detail the conduct that might constitute [*496] contempt of court would be to enumerate the ways in which misbehavior might obstruct the courts of justice. Assaults in the presence of the court, disorders of any description which interrupt its proceedings, abuse of the court, refusal of one called as a witness to testify, neglect of official duty, or other misbehavior by an officer of the court, neglect to obey the orders or process of the court, etc., may all be punished as contempts.⁶⁷

62—*Yates v. People*, 6 Johns. 337; *Yates v. Lansing*, 9 Johns. 395, 6 Am. Dec. 290; *Fernandez ex parte*, 10 C. B. (N. S.) 3.

63—*Lining v. Bentham*, 2 Bay, 1; *People v. Turner*, 1 Cal. 152, 52 Am. Dec. 295; *Batchelder v. Moore*, 42 Cal. 412; *Turner v. Commonwealth*, 2 Met. (Ky.) 619; *People v. Conner*, 15 Abb. Pr. (N. S.) 430; *Ex parte Krieger*, 7 Mo. App. 367.

64—*Thatcher ex parte*, 7 Ill. 167.

65—*In re Cooper*, 32 Vt. 253. See *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *Ex parte Smith*, 53 Cal. 204; *Tyler v. Hammersley*, 44 Conn. 393, 24 Am. Rep. 471.

66—*Morrison v. McDonald*, 21 Me. 550; *Scott v. Fishblate*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696. See *Watson v. Bodell*, 14 M. & W. 57, 69; *Cook v. Bangs*, 21 Fed. Rep. 640.

67—*Snyder v. State*, 151 Ind. 553, 52 N. E. 152; *In re Robinson*, 117 N. C. 533, 23 S. E. 453, 53 Am. St. Rep. 596; *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58. It is a contempt if strikers interfere with the receiver of a railroad appointed by a court. *In re Higgins*, 27 Fed. Rep. 443; *In re Doolittle*, 23 Fed. Rep. 544; *U. S. v. Kane*, 23 Fed. Rep. 748. So is it to attempt to create a belief that jurors in a pending case could be bribed.

So might be any acts of violence and disorder calculated and designed to prevent the court convening. It has also been held in many cases that the publication of an article in a newspaper commenting on proceedings in court then pending and undetermined, or upon the court in its relation thereto, made at a time and under circumstances calculated to affect the course of justice in such proceedings, and obviously intended for that purpose, may be punished as a contempt, even though the court was not in session when the publication was made.⁶⁸ Such a publication, when made, however, is a continuous wrong, as much as would be something of a physical nature, planned in advance, and so arranged as that its natural and necessary results should be to throw the court into disorder and confusion when its sitting should commence.

A warrant issued to carry into execution a conviction for contempt, by an inferior court, should show that opportunity was given the party to be heard in his defense. The right to a hearing is absolute, and cannot be denied in a court of any [*497] grade.⁶⁹ *And the punishment must be one warranted

Little v. State, 90 Ind. 338, 46 Am. Rep. 224. Or to attempt to bribe jurors. *Langdon v. Wayne Circuit Judge*, 76 Mich. 358, 43 N. W. 310. Or to attempt to persuade a witness not to testify. *Savin, Petitioner*, 131 U. S. 267, 9 S. C. Rep. 699, 33 L. Ed. 150. So it is a contempt for a reporter to conceal himself in the jury room in order to overhear the proceedings of the jury. *People v. Barrett*, 56 Hun. 351, 9 N. Y. S. 321.

68—*Matter of Sturoc*, 48 N. H. 428, 97 Am. Dec. 626; *Respublica v. Passmore*, 3 Yeates, 438, 2 Am. Dec. 388; *Respublica v. Oswald*, 1 Dall. 319; *Daw v. Eley*, L. R. 7 Eq. Cas. 49; *Re Cheltenham, &c., Co.*, L. R. 8 Eq. Cas. 580; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Cooper v. People*, 13 Colo. 337, 22 Pac. 790, 6 L.

R. A. 430; *Cooper v. People*, 13 Colo. 373, 22 Pac. 790; *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *Field v. Thornell*, 106 Ia. 7, 75 N. W. 685, 68 Am. St. Rep. 281; *State v. Judge*, 45 La. Ann. 1250, 14 So. 310, 40 Am. St. Rep. 282; *Percival v. State*, 45 Neb. 741, 64 N. W. 221, 50 Am. St. Rep. 568; *State v. Bee Publishing Co.*, 60 Neb. 282, 83 N. W. 204, 83 Am. St. Rep. 531, 50 L. R. A. 195; *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638. In *ex parte Hickey*, 12 Miss. 751, this authority was denied, and in *Storey v. People*, 79 Ill. 45, it is decided that under the present constitution of Illinois a person charged with such misconduct can only be punished on indictment, and is entitled to jury trial.

69—*Ex parte Bradley*, 7 Wall. 364; *Lowe v. State*, 9 Ohio St. 337;

by law. Where a justice commits one to prison for refusal to answer a question in a suit before him, the committal is for the purpose of compelling an answer; and if it appears that the suit has been disposed of when the order for commitment was made, the order is void.⁷⁰ Attorneys, solicitors, etc., for misconduct as such, may be punished by having their names stricken from the rolls;⁷¹ but they do not forfeit their right to their office by misconduct in respect to the court as suitors or citizens merely, and therefore cannot be punished by being deprived of it on conviction for other contempts.⁷²

The punishment imposed for contempt of court must be certain. An order of commitment, until discharged by due course of law, would be void for uncertainty.⁷³

The cases in the nature of contempts, where the purpose of the proceedings is to enforce some civil remedy, such as the payment of costs, or of alimony, will come under the same rules in respect to jurisdiction as the cases of criminal contempts above spoken of.

Ex parte Pollard, L. R. 2 Pr. C. Cas. 106. See *Batchelder v. Moore*, 42 Cal. 412; *Turner v. Commonwealth*, 2 Met. (Ky.) 619; *Ex parte Kilgore*, 3 Tex. App. 247. In this last case the point is considered fully. See also *State v. Judges*, 32 La. Ann. 1256; *Russell v. French*, 67 Ia. 102. If a contempt is not covered by statute and is not committed in the court's presence, the offense must be proved, the court cannot act on its own knowledge. *Huntington v. McMahon*, 48 Conn. 174; *Welch v. Barber*, 52 Conn. 147. 70—*Clarke v. May*, 2 Gray, 410. 71—*Ex parte Moore*, 63 N. C. 397, and cases cited; *Ex parte Bradley*, 7 Wall. 364. 72—*Re Wallace*, L. R. 1 Pr. C. Cas. 283. 73—*Rex v. James*, 5 B. & Ald. 894; *Re Hammel*, 9 R. I. 248. See *Crawford's Case*, 13 Q. B. 613.

WRONGS IN RESPECT TO PERSONAL PROPERTY.

Classification of Property as Real and Personal. The classification of property as real and personal is extremely artificial, and is governed more by circumstances than by the nature or inherent qualities of things. The common law idea of real estate comes from a time and a condition of things when nearly all that was valued highly, and upon which families were built up and sustained, was to be found in the freehold estate, and in those things in the nature of heir looms which, in legal contemplation, attached themselves to it and passed with it to the heir. The estate held by feudal tenure of the feudal superior, with the castle and mansion house upon it, the deer in the park, the family pictures, the family jewels, the charters of nobility or of precedence, if any, perhaps the ancestral carriage; anything, in short, which distinctively pertained to the family as such, and gained importance and imparted importance as it was preserved with and held inseparable from that which gave the family its chief prominence, that is to say, the landed estate; these were the matters of consequence, and these were, in fact as well as in legal designation, the real property until modern times. There might be temporary interests in land, held perhaps at the will of the owner of the freehold, or even for terms of years; there were beasts raised for the market, and wares in which traders dealt; but such property was not property of that dignified importance and character upon which families were based; it had not connected with it the same idea of permanence; it was for temporary support or for trade, and not to be kept and perpetuated in families; it was property, but it pertained rather to the person who for the time owned and controlled it, and who might dispose of it to-morrow or himself pass away, than to the family which.

in legal contemplation, was perpetual. It was, therefore, not improperly designated personal property in contradistinction to the real property which was before mentioned.

*In thus classifying certain property as real property [*499] the prominent idea doubtless is that of permanence in interest and ownership. But the representative of this permanency was the land, and the other things which constituted real property connected themselves with the land, and were real only because of the association. The deer in the park were real property only as they were a part of the great estate; the family pictures were chiefly important as they were kept as heir-looms; even the castle and mansion house would lose its value and become a mere temporary shelter if it could be supposed to be set down upon the land of another and subject to be ordered off at the will of the owner of the freehold. Thus a small piece of land, insignificant in value in itself, might give incalculable value to the structure erected upon it, since it would give local habitation and a permanent abiding place to the family which the building alone, unconnected with an ownership in the land, could not afford. Therefore, when traders and others erected buildings on land in which they had no freehold, the owner of the freehold was looked upon as having property of the substantial and real class, and the owner of the building as having that of the less substantial nature. The land was consequently real property, though it might be of little money value, and the building was personal property, a mere chattel, though its money value might be much greater than the value of that upon which it stood. The distinction still exists; the building constitutes a part of the freehold in the one case; in the other it is a removable fixture, and is personality.

Fixtures. The actual or presumed intent on the part of the party attaching a chattel to the realty, that it shall constitute a part of the realty, or, on the other hand, that it shall remain a chattel, is usually the most important circumstance to be considered in determining the fact;¹ and if no one were concerned

1—Mr. Ewell well says that, and of reason, keeping in mind the "The weight of modern authority exceptions as to constructive an-

with the question but the party by whom the annexation [*500] was *made, it might well be suffered to be controlling in all cases. But as the question of ownership often depends on the question whether a fixture is removable or not, and

nexion admitted by all the authorities to exist, seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests:

"1. Real or constructive annexation of the article in question to the realty.

"2. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected.

"3. The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made.

"Of these three tests, the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and others seem to derive their chief value as evidence of such intention." Ewell on Fixtures, p. 21, 23. See *McConnell v. Blood*, 123 Mass. 47; *State Savings Bank v. Kercheval*, 65 Mo. 682, 686, 27 Am. Rep. 310; *Wheeler v. Bedell*, 40 Mich. 693; *Jenkins v. McCurdy*, 48 Wis. 628, 33 Am. Rep. 841; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899, and cases cited;

Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N. W. 280; *Lansing Iron, etc., Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667; *Cranston v. Beck*, 70 N. J. L. 145, 56 Atl. 121; *Causey v. Empire Plaid Mills*, 119 N. C. 180, 25 S. E. 863; *Alberson v. Elk Creek Min. Co.*, 39 Ore. 552, 65 Pac. 978; *Jones v. Bull*, 85 Tex. 136, 19 S. W. 1031. "Whatever is once annexed to the freehold which is designed by the owner thereof to be used and enjoyed in connection therewith becomes a part of the realty and passes with a conveyance thereof. * * * We are aware that it has been held in some cases that in order to give chattels the character of fixtures they must be so affixed to the realty that they cannot be removed without physical injury thereto; but we think that the better opinion, as well as the better reason, is the other way, and in favor of regarding everything as a fixture which has been attached to the realty with a view to enhance the value thereof and for the purpose of being permanently used in connection therewith. Nor is it necessary that the intention of the owner in affixing such articles should be expressed in words, for it may be and ordinarily should be inferred from the nature of the articles affixed, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and the purpose or use for which

men make purchases and accept linens upon property, supposing it to be of that nature, either real or personal, that appearances would indicate, it would be not only impolitic, but in many cases unjust, to suffer a secret intent to control where appearances would indicate the existence of an intent of a different nature.² The law, therefore, usually acts upon the presumed rather than upon any actual intent, and the general rules which govern the question of the removability of fixtures are few and simple.

If a building is erected by the owner of the freehold by way of improvement thereof, and apparently for permanent use and enjoyment with it, or if machinery is put up and attached to a building apparently for like permanent use, in the place where it is put, or if a pump is put in the well, or fence constructed to divide off fields, or any erection whatsoever made which apparently is calculated to increase the permanent value of the estate for use and enjoyment, a reasonable presumption arises that the owner intended to make them a part of the realty, and the law accepts this intent as conclusive, and considers them real estate from the time they are constructed or affixed. The owner's deed, mortgage, or lease of the land will convey them as a part of it, and when he dies they pass with the land to his devisee or heir-at-law. Nor is the particular manner of annexation to the freehold specially important;³ though structures evidently put up *for a mere temporary purpose, and affixed to [*501] the realty in a manner indicating no intent that they should be permanent, will, of course, remain personality. A port-

it is made." *Canning v. Owen*, 22 R. I. 624, 628, 629, 48 Atl. 1033, 84 Am. St. Rep. 858.

2—*Horne v. Smith*, 105 N. C. 322, 3 S. E. 373, 18 Am. St. Rep. 903.

3—*Lansing Iron, etc., Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667; *Bald v. Hagar*, 9 C. P. (Canada) 382. Whether the rolling stock of railroads is to be considered a part of the realty, is a point on which the authorities are greatly at variance. See *Minne-*

sota v. St. Paul, &c., R. R. Co., 2 Wall. 609; *Williamson v. N. J. Sou. R. R. Co.*, 29 N. J. Eq. 311; *Ewell on Fixtures*, 34, and cases cited. As to need of actual annexation; *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789; *Spruhener v. Stout*, 52 Wis. 517; *Ege v. Kille*, 84 Penn. St. 333; *Early v. Burtis*, 40 N. J. Eq. 501. As to removal of mining fixtures; *Conrad v. Sag. Ming. Co.*, 54 Mich. 249; *Wake v. Hull*, L. R. 8 App. Cas. 195.

able furnace put into a house in the usual way by the owner is held to be a fixture.⁴ The same has been held with respect to radiators,⁵ and light fixtures,⁶ but the contrary has also been held in both cases.⁷ Where store fixtures were put in by the owner for the use of a tenant and attached to the walls, they were held to be part of the realty and to pass to the mortgagee, and a subsequent oral sale of the same to the tenant was held to pass no title.⁸ In regard to machinery put into a shop or factory by the owner as between him and a vender or subsequent mortgagee, the rule is said to be: "That where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purposes for which the building is used will be considered as a part thereof, although the connection between them is such that it may be severed, without physical or lasting injury to either."⁹

4—*Duffus v. Howard Furnace Co.*, 15 Misc. 169, 37 N. Y. S. 19; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603.

5—*Cafehout v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582. *Contra*, *National Bank v. North*, 160 Pa. St. 303, 28 Atl. 694.

6—*Canning v. Owen*, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858. In *Hall v. Law Guarantee, etc., Soc.*, 22 Wash. 305, 60 Pac. 643, 79 Am. St. Rep. 935, gas and electric light fixtures and globes, a hot water tank, window shades, door and window screens and a windmill were held not to be fixtures as between mortgagor and mortgagee.

7—Mantels and mirrors screwed to the wall held not fixtures. *Cranston v. Beck*, 70 N. J. L. 145, 56 Atl. 121; *Philadelphia Mort. & T. Co. v. Miller*, 20 Wash. 607, 56 Pac. 382, 72 Am. St. Rep. 138, 44 L. R. A. 559.

8—*Johnston v. Philadelphia M. & T. Co.*, 129 Ala. 515, 30 So. 15, 87 Am. St. Rep. 75.

9—*Haskin Wood, etc., Co. v. Cleveland Ship Building Co.*, 94 Va. 439, 447, 26 S. E. 878. And see *Shepard v. Blossom*, 66 Minn. 421, 69 N. W. 221, 61 Am. St. Rep. 431; *Cavis v. Beckford*, 62 N. H. 229, 13 Am. St. Rep. 554; *Langdon v. Buchanan*, 62 N. H. 657; *Horne v. Smith*, 105 N. C. 322, 3 S. E. 373, 18 Am. St. Rep. 903; *Jones v. Bull*, 85 Tex. 136, 19 S. W. 1031; *Gunderson v. Swarthout*, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860; *Homestead Land Co. v. Becker*, 96 Wis. 206, 71 N. W. 117; *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. 1069. Machinery held in place by its own weight and only connected with the building by a belt was held not to be a fixture as between the owner and a prior mortgagee. *Kendall v. Hathaway*, 67 Vt. 122, 30 Atl. 859.

Certain box machinery attached by means of bolts, screws and nails were held not to be a fixture as between a mortgagee of the realty and a chattel mortgagee of the machinery.¹⁰ Heavy machines for a rolling mill, weighing three tons each and designed to be placed on a foundation already prepared, were held to be a part of the realty from the time of delivery on the premises.¹¹ So of an engine and boiler.¹² Machinery disconnected and taken apart, to be repaired and then replaced, does not lose its character as a part of the realty.¹³

On the other hand, a similar erection or attachment by one not the owner of the freehold might well be presumed to be made with the intent of removing it as a chattel. This presumption would be reasonable in most cases, because, if he intended it as a permanent annexation, he would lose title to it immediately, since if he made it a part of the realty, the ownership must pass to the owner of the realty. Therefore, the person making the annexation under such circumstances is allowed to retain his ownership in it as a chattel, wherever no principle of justice or public policy is contravened by doing so.

Annexations made by a tenant for the more convenient and profitable enjoyment of his estate for the term, or even by way of ornament, if not inconsistent with the purpose for which the estate is leased to him, remain his, and of course remain personal property. This is the general rule.¹⁴ So when a building is

10—*Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639. The court says: “We do not think that mere adaptability of machinery to use in the business which happens to be conducted upon the realty is of itself enough to give the character of realty to the machinery. To constitute machinery and apparatus fixtures, it is not alone sufficient that they be placed in the shop or factory with the intent that they should remain there for permanent use, but the intent must be to make them a permanent accession to the freehold.” 385.

11—*McFadden v. Crawford*, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894.

12—*Green v. Phillips*, 26 Gratt. 752.

13—*Grant v. Wilson*, 17 N. C. Rep. 144.

14—*Elwes v. Maw*, 3 East, 38; S. C. 2 Smith Lead. Cas. 228; *Lancaster v. Eve*, 5 C. B. (N. S.) 717; *Van Ness v. Pacard*, 2 Pet. 137; *Holmes v. Tremper*, 20 Johns. 29, 11 Am. Dec. 238; *Meigs' Appeal*, 62 Penn. St. 28, 1 Am. Rep. 372; *O'Donnell v. Hitchcock*, 118 Mass. 401; *Thomas v. Crout*, 5 Bush, 37;

erected under a mere license given by the owner of the freehold, and which is subject to be recalled at any time, a like presumption arises that the licensee intended to preserve his property in the structure, and it will remain personal property accordingly.¹⁵

[*502] *But there are some cases in which, though the erection is made by one not the owner of the freehold, an intent to retain a property in the fixtures as a chattel could not be presumed, and others in which the policy of the law could not suffer effect to be given to it if it actually existed. Thus, if one, though not the owner, is in possession under an executory contract of purchase, it is a reasonable presumption that he expects to complete the purchase, and that whatever he attaches to the realty in such a manner that if it were so attached by the owner of the freehold it would become a part of it, he intends shall be a part of it.¹⁶ So, if one, without license, express or implied,

Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; *Kimball v. Grand Lodge*, 131 Mass. 59; *Cooper v. Johnson*, 143 Mass. 108; *Cubbins v. Ayres*, 4 Lea, 329; *Robertson v. Corsett*, 39 Mich. 777; *Stout v. Stoppel*, 30 Minn. 56; *Deane v. Hutchinson*, 40 N. J. Eq. 83; *Broaddus v. Smith*, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; *Overman v. Sasser*, 107 N. C. 432, 12 S. E. 64, 10 L. R. A. 722; *Wright v. Macdonald*, 88 Tex. 140, 30 S. W. 907; *Leigh v. Taylor* (1902), A. C. 157. Tenant's trade fixtures do not pass on sale of land under mortgage given before the term began. *Sanders v. Davis*, L. R. 15 Q. B. D. 218. As to the effect of the tenants buying the reversion subject to a mortgage see *Jones v. Detroit Chair Co.*, 38 Mich. 92, 31 Am. Rep. 314; *Globe Marble, &c., Co. v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259.

15—*Cowin v. Cowan*, 12 Ohio St. 629; *Wagner v. Cleveland, &c., R. R. Co.*, 22 Ohio St. 563, 10 Am.

Rep. 770; *Ricker v. Kelly* 1 Me. 117, 10 Am. Dec. 38; *Hinckley v. Baxter*, 13 Allen, 139; *Noble v. Sylvester*, 42 Vt. 146; *Wilgus v. Gettings*, 21 Iowa, 177; *Weathersby v. Sleeper*, 42 Miss. 732; *Fenlon v. Rackliff*, 50 Me. 362; *Nor. Cent. R. Co. v. Canton Co.*, 30 Md. 347. See *Pope v. Skinkle*, 47 N. J. L. 39; *Griffin v. Ransdell*, 71 Ind. 440; *Fischer v. Johnson*, 106 Ia. 181, 76 N. W. 658; *Brown v. Turner*, 113 Mo. 27, 20 S. W. 660; *Laird v. Railroad Co.* 62 N. H. 254, 13 Am. St. Rep. 564; *Hughes v. Edisto Cypress Shingle Co.*, 51 S. C. 1, 28 S. E. 2; *Page v. Urick*, 31 Wash. 601, 72 Pac. 454, 96 Am. St. Rep. 924; *Seibel v. Bath*, 5 Wyo. 409, 40 Pac. 756.

16—See *Crane v. Dwyer*, 9 Mich. 350, 80 Am. Dec. 87; *Lapham v. Norton*, 71 Me. 83; *Taylor v. Collins*, 51 Wis. 123; *Westgate v. Wixon*, 128 Mass. 304; *Kingsley v. McFarland*, 82 Me. 231, 19 Atl. 442, 3 L. R. A. 230; *McCrillis v. Cole*, 25 R. I. 156, 55 Atl. 196. But see

on the part of the owner of the freehold, shall enter and make permanent erections thereon, the law will not reward his conduct or encourage others in that of like character, by allowing him to remove what he has thus unlawfully attached.¹⁷ So, if any one having a right to attach a removable fixture to the freehold owned by another shall so attach it that it cannot be removed without serious injury to the realty, the law will not suffer him to reserve a right of removal to the prejudice of the owner of the inheritance.¹⁸

On the other hand, for similar reasons, if one, without the consent of the owner, shall take the building of another and *remove it upon and attach it to his own realty, or [*503] shall take another's machinery and put it up in a per-

Com'r's Rush Co. v. Stubbs, 25 Kan. 322. Where a railroad company dug a well on what it supposed to be its right of way and put up a boiler house, pump and boiler, but by mistake the location was on the plaintiff's land, it was held that they did not become a part of the realty and that the company could remove them. Atchison, etc., R. R. Co. v. Morgan, 42 Kan. 23, 21 Pac. 809, 16 Am. St. Rep. 471, 4 L. R. A. 284.

17—Mr. Ewell collects the cases of this nature in his treatise on the Law of Fixtures, Ch. 2. Doscher v. Blackstone, 7 Ore. 143; Prescott, etc., R. R. Co. v. Rees, 3 Arizona, 317, 28 Pac. 1134; Dutton v. Ensley, 21 Ind. App. 46, 51 N. E. 380; Snell v. Meacham, 80 Ia. 53, 45 N. W. 398. Even if the entry is in good faith. Honzik v. Delaglise, 65 Wis. 494, 56 Am. Rep. 634; Kimball v. Adams, 52 Wis. 554. See, also, Morrison v. Berry, 42 Mich. 389, 36 Am. Rep. 446. So where a depot was built on condemned land and the proceedings were afterward set

aside. Hunt v. Miss., &c., Ry. Co., 76 Mo. 115. But see Railroad Co. v. Deal, 90 N. C. 110. If a railroad is constructed without right on land, the iron and material do not pass to the land owner. Justice v. Nesquehoning Valley R. R. Co., 87 Pa. St. 28; Jones v. New Orleans, etc., Co. 70 Ala. 227; Searl v. School District, 133 U. S. 553, 10 S. C. Rep. 374; Preston v. Sabine, etc., Ry. Co., 70 Tex. 375, 7 S. W. 825; 2 Lewis Em. Dom. § 507, and cases cited. This rule, in McKiernan v. Hesse, 51 Cal. 594, was applied to erections made without permission, on the lands of the United States. Compare Pennybecker v. McDougal, 48 Cal. 160.

18—The injury, however, which will preclude removal, when the structure is erected or attached by a tenant or licensee, must be something more than merely nominal. See Avery v. Cheslyn, 3 Ad. & El. 75; Whiting v. Brastow, 4 Pick, 310; Seeger v. Pettit, 77 Pa. St. 437.

manent way in his own mill, he cannot by such unauthorized act, make the personal property of another his own real estate, but the qualities of real and personal property will still be preserved, and the separate ownership will remain.¹⁹

It should be added to the foregoing that the parties concerned may, by agreement between themselves, in due form, give to fixtures the legal character of realty or personality, at their option, and the law will respect and enforce their understandings wherever the rights of third persons will not be prejudiced, or any general policy of the law violated.²⁰ Thus, a house constituting a part of the realty may be mortgaged separate from the land, or sold separate from it, and the mortgage or sale will be perfectly valid, if made in such form as to be sufficient under the Statute of Frauds as a transfer of an interest in lands.²¹ But [*504] here the *rights of third persons might possibly intervene; for if the owner of the land were to sell it to one ignorant of what had been done respecting the fixture, and without implied notice of it, the purchaser would take the land with the house as a part of it, because he would have a right to sup-

19—Cochran *v.* Flint, 57 N. H. 514, 544. LADD, J.: “The rule is, and this is elementary, that the movable must be affixed by the owner of it, and affixed in the course of his general use and occupation of the immovable; and I venture the remark that not a case can be found where it is held that the owner would be divested of his title if the movable thing is affixed without his consent, either express or implied. D'Eyncourt *v.* Gregory, L. R. 3 Eq. 382, 394.” Central, &c., R. R. Co. *v.* Fritz, 20 Kan. 430; Walker *v.* Grand Rapids, etc., R. R. Co., 70 Wis. 92, 35 N. W. 332.

20—Chalifoux *v.* Potter, 113 Ala. 215, 21 So. 322; Broaddus *v.* Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; Case Mfg. Co. *v.* Garven, 45 Ohio St. 289, 13 N. E.

493; Landigan *v.* Mayer, 32 Ore. 245, 51 Pac. 649, 67 Am. St. Rep. 521; German Savings & L. Soc. *v.* Weber, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267; Keefe *v.* Fur-long, 96 Wis. 219, 70 N. W. 1110.

21—See Sampson *v.* Graham, 96 Fa. St. 405; Docking *v.* Frazell, 34 Kan. 29, 17 Pac. 160; Aldrich *v.* Husband, 131 Mass. 480; Dudley *v.* Foote, 63 N. H. 57, 56 Am. Rep. 489; Lacustrine, &c., Co. *v.* Lake, &c., Co., 82 N. Y. 476. The following are recent cases where the question of fixtures has arisen between vendor and vendee: Smyth *v.* Sturgess, 108 N. Y. 495, 15 N. E. 544; Snow *v.* Perkins, 60 N. H. 493, 49 Am. Rep. 333; Jenkins *v.* McCurdy, 48 Wis. 628, 33 Am. Rep. 841; Leonard *v.* Stickney, 131 Mass. 541; Lacustrine, &c., Co. *v.* Lake, &c., Co. 82 N. Y. 476;

pose it constituted a part.²² The owner of machinery may consent that it be put up in the mill of another under a contract of conditional sale, and with the understanding that his title thereir as personalty shall be retained; and this understanding will also be enforced as against the owner of the land, or any other person who has not been deceived by appearances into a purchase of the land or taking a mortgage upon it, on the supposition that his deed or mortgage covered the machinery as well as the land and building.²³ "Where a person sells machinery under a condition

Fullington *v.* Goodwin, 57 Vt. 641; between mortgagor or one claiming in his right and mortgagee of the land; Morris' App. 88 Pa. St. 368; Harmony Bldg. Ass. *v.* Berger, 99 Pa. St. 320; Stafford *v.* Adair, 57 Vt. 63; Wofford *v.* Baxter, 33 Minn. 12, 53 Am. Rep. 1; Farmers, &c., Co. *v.* Minn., &c., Co. 35 Minn. 543; Corcoran *v.* Webster, 50 Wis. 125; McKeage *v.* Hanover Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471; Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; Scheifle *v.* Schmitz, 42 N. J. Eq. 700, 11 Atl. Rep. 257; Tillman *v.* DeLacy, 80 Ala. 103; Foote *v.* Gooch, 96 N. C. 265, 1 S. E. 525, 60 Am. Rep. 411; Clore *v.* Lambert, 78 Ky. 224; Sheffield, &c., Soc. *v.* Harrison, L. R. 15 Q. B. D. 358; *Ex parte* Punnett, L. R. 16 Ch. D. 226; German Savings & L. Soc. *v.* Weber, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267; Fuller-Warren Co. *v.* Harter, 110 Wis. 80, 85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603. In Massachusetts, if the article is only adapted for use where it is, it is a fixture. Smith Paper Co. *v.* Servin, 130 Mass. 511; not if removable and adapted to use anywhere. Maguire *v.* Park, 140 Mass. 21; Carpenter *v.* Walker, 140 Mass. 416. Cases between

chattel mortgagee of the property and mortgagee of the land Keeler *v.* Keeler, 31 N. J. Eq. 181; Campbell *v.* Roddy, 44 N. J. Eq 249, 14 Atl. 279; Wheeler *v.* Bedell, 40 Mich. 693; Henkle *v.* Dillon, 15 Ore. 610, 17 Pac. 148; Miller *v.* Wilson, 71 Ia. 610, 33 N. W. 128; Adams *v.* Beadle, 47 Ia. 439. See Duffus *v.* Bangs, 42 Hun, 52.

22—Burk *v.* Hollis, 98 Mass. 55; Poor *v.* Oakman, 104 Mass. 309; Gibbs *v.* Estey, 15 Gray, 587; Richardson *v.* Copeland, 6 Gray 536. Drawers in a house: Connor *v.* Squires, 50 Vt. 680; Fences: Rowland *v.* Anderson, 33 Kan 264; Machinery in a mill: Knowlton *v.* Johnson, 37 Mich. 47; Hamilton *v.* Huntley, 78 Ind. 521, 41 Am. Rep. 593; so as to purchase on mortgage foreclosure though the thing was personalty as between parties to the mortgage Lyle *v.* Palmer, 42 Mich. 314; Stillman *v.* Flenniken, 58 Ia. 450.

23—Crippen *v.* Morrison, 12 Mich. 23, and cases cited; Shell *v.* Haywood, 16 Pa. St. 523; Piper *v.* Martin, 8 Penn. St. 206; Ford *v.* Cobb, 20 N. Y. 344; Mott *v.* Palmer, 1 N. Y. 564; Cross *v.* Marston, 17 Vt. 533, 44 Am. Dec. 353; Russell *v.* Richards, 10 Me. 429, 25 Am. Dec. 254; Hilborne *v.*

that it shall remain the property of the vendor until the price is paid, but it is of such a character that when it is put in place in a mill it would pass under a mortgage of the real estate, and the vendor had reason to suppose it would be, and it was so placed before it was paid for; held that the equity of a subsequent mortgagee, without notice of the vendor's claim and in reliance upon the vendee's title being absolute, is paramount to that of the conditional vendor."²⁴ Landlord and tenant may also, [*505] by the lease or other *agreement, control the whole subject of fixtures as they may see fit.

When a licensee has a right to remove fixtures, he will lose them unless he removes them within a reasonable time, to be determined by the circumstances, after his license has been re-

Brown, 12 Me. 162; *Smith v. Benson*, 1 Hill 176; *Pierce v. Emery*, 32 N. H. 485; *Haven v. Emery*, 33 N. H. 66; *Wood v. Hewett*, 8 Q. B. 913; *Walker v. Grand Rapids, &c., Co.* 70 Wis. 92, 35 N. W. 332; *Ingersoll v. Barnes*, 47 Mich. 104; *Walker v. Schindel*, 58 Md. 360; *Priestley v. Johnson*, 67 Mo. 632; *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14; *Palmateer v. Robinson*, 60 N. J. L. 433, 38 Atl. 957; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493; *Henkle v. Dillon*, 15 Ore. 610, 17 Pac. 148; *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744. In Ohio it is held that between the conditional vendor of flouring machinery placed in a mill and a subsequent mortgagee of the realty without notice the machinery is personal. Otherwise as to motive machinery covered by unrecorded chattel mortgage. *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493. Where plaintiff leased machinery to one in possession under contract of purchase without notice of stipulation in the contract that on for-

feiture fixtures should pass to land owner, he is not bound by contract, and between him and the land owner the machinery is a chattel. *Hendy v. Denkerhoff*, 57 Cal. 3. In Massachusetts the strict rule is applied, that whatever the understanding between the mortgagor and one who attaches to the realty fixtures which, if attached by the mortgagor himself, would become a part of it, they will, when so attached, become realty, so as to be covered by the lien of an existing mortgage. *Hunt v. Bay, &c., Co.*, 97 Mass. 279; *Clary v. Owen*, 15 Gray, 522; *Bartholomew v. Hamilton*, 105 Mass. 239; *Southbridge Bank v. Stevens, &c., Co.*, 130 Mass. 547. See also *Bass, &c., Works, v. Gallentine*, 99 Ind. 525; *Roddy v. Brick*, 42 N. J. Eq. 218.

24—*McCrillie v. Cole*, 25 R. I. 156, 55 Atl. 196. See *Davenport v. Shants*, 43 Vt. 546; *Landigan v. Mayer*, 32 Ore. 245, 51 Pac. 649, 67 Am. St. Rep. 521; *Wade v. Donan Brewing Co.*, 10 Wash. 284, 38 Pac. 1009; *Reynolds v. Ashby &*

voked.²⁵ A tenant must take away his removable fixtures at or before the expiration of his term, or at least within such reasonable time thereafter as he may, by consent or otherwise, lawfully continue in possession.²⁶ But if the tenancy is for an uncertain period, as where it is for life or at will, fixtures may be removed within a reasonable time after the tenancy is ended. If the tenant commits an act of forfeiture, this is a forfeiture of his interest in the land only;²⁷ but when enforced against him, and possession obtained, by ejectment or other proceeding, his right to such fixtures as are not already removed, is gone.²⁸ It has been held, in some cases, that one who accepts a renewal of a lease without stipulating to reserve his rights in existing fixtures, abandons his right to them as he would on surrendering possession without removing them,²⁹ but this seems unreasonable, and has been questioned.³⁰

All removable fixtures, being personalty, are subject to all the

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| Son, (1903) 1 K. B. 87; Reynolds v. Ashby & Son, (1904) A. C. 466. | 27—See <i>Davis v. Eyton</i> , 7 Bing. 154. |
| 25— <i>Fischer v. Johnson</i> , 106 Ia. 181, 76 N. W. 658; <i>Antoni v. Belknap</i> , 102 Mass. 193; <i>Ombony v. Jones</i> , 19 N. Y. 234, 238. See <i>Overton v. Williston</i> , 31 Penn. St. 155; <i>Sullivan v. Carberry</i> , 67 Me. 531. | 28— <i>Weeton v. Woodcock</i> , 7 M. & W. 14; <i>Minshall v. Lloyd</i> , 2 M. & W. 450; <i>Pugh v. Arton</i> , L. R. 8 Eq. Cas. 626; <i>Whipley v. Dewey</i> , 8 Cal. 36; <i>Kutter v. Smith</i> , 2 Wall. 491. See <i>Keogh v. Daniell</i> , 12 Wis. 163. |
| 26— <i>Penton v. Robart</i> , 2 East, 88; <i>Weeton v. Woodcock</i> , 7 M. & W. 14; <i>Lyde v. Russell</i> , 1 B. & Ad. 394; <i>Ombony v. Jones</i> , 19 N. Y. 234; <i>Conner v. Coffin</i> , 22 N. H. 538, 541; <i>Stokoe v. Upton</i> , 40 Mich. 581; <i>Griffin v. Ransdell</i> , 71 Ind. 440; <i>Smith v. Park</i> , 31 Minn. 70; <i>Youngblood v. Eubank</i> , 68 Geo. 630; <i>Darrah v. Baird</i> , 101 Penn. St. 265; <i>Chalifoux v. Potter</i> , 113 Ala. 215, 21 So. 322; <i>Thorn v. Sutherland</i> , 123 N. Y. 236, 25 N. E. 362. So if a removable building is put up after foreclosure by mortgagor. <i>Guernsey v. Wilson</i> , 134 Mass. 482. | 29— <i>Merritt v. Judd</i> , 14 Cal. 59; <i>Marks v. Ryan</i> , 63 Cal. 107; <i>Loughran v. Ross</i> , 45 N. Y. 792; <i>Wright v. Macdonald</i> , 88 Tex. 140, 30 S. W. 907. So where the second lease contains different terms. <i>Watriss v. Natn. Bank</i> , 124 Mass. 571, 26 Am. Rep. 694; <i>McIver v. Estabrook</i> , 134 Mass. 550. See <i>Hedderich v. Smith</i> , 103 Ind. 203, 53 Am. Rep. 509. So if a lease for years succeeds a letting from year to year. <i>Carlin v. Ritter</i> , 68 Md. 478, 13 Atl. 370, 16 Atl. 301. |
| | 30— <i>Kerr v. Kingsbury</i> , 39 Mich. 150. |

rules of law which govern that species of property, even [*506] though *they still continue attached to the freehold.

Still, if the owner is injured in respect to his rights therein, while this annexation continues and while he is still in possession of the land, the wrong should be considered an injury in respect to his possession of the realty, and trover for the fixtures will not lie.³¹ But all fixtures become personalty when severed, whether the act of severance is rightful or wrongful.³²

[*507] ***Betterments.** The laws known as betterment or occupying claimant laws, establish a peculiar species of property in those entitled to the benefit of their provisions. The

31—*Minshall v. Lloyd*, 2 M. & W. 450; *Mackintosh v. Trotter*, 3 M. & W. 184. Where ice already formed is sold by the land owner, the buyer may have trover against a third person who takes it away. The ice, in such case, is to be regarded as personalty. *Higgins v. Kusterer*, 41 Mich. 318, 32 Am. Rep. 160; see *Richards v. Gauffret*, 145 Mass. 486, 14 N. E. 535.

32—In the rules respecting fixtures we note the gradual departure from notions which had their origin in a system which had little in common with modern enterprise and thrift. As has already been said, land formerly was of chief importance; commerce was subordinate to martial prowess. The Jew, who best represented the movable property of the country, prudently hid his jewels and his gold in his unpretending and mean habitation, or secreted them upon his person sewed into the old clothes which appeared to express misery and poverty. His wealth did not make him respected, but he was despised for the qualities which produced it, and when the master of the sword found his debt to the Jew usurer falling due, it might be a question whether he should be paid in coin or in blows; whether he should be robbed and driven from the land, or spared as a necessary but hated convenience. The idea grew up very slowly that the non-land-owner, who would make his industry available by the improvement of lands, should be encouraged to do so by saving to him an ownership in the buildings he attached to the soil. The old idea recognized but faintly a distinct ownership in the shop which the tenant put upon the land, and if it was at all of a substantial nature, the landlord would be likely to claim it as having become a part of the soil by being affixed to it. A hundred years ago it was scarcely settled that an agricultural tenant might remove his fixtures at the end of his term, and the idea was still prevalent that to entitle any tenant to retain as personalty the structure he put up for use in connection with the realty, he should abstain from putting it on foundations that seemed to be permanent. With the vast increase in personal property which

purpose of these laws is to do equity as between the party who has erected buildings of a permanent character, or made other improvements, upon lands which at the time he supposed were his own, but which are recovered by another on claim of paramount title.³³ At the common law the owner, in recovering the land, would become entitled to the improvements also. The laws mentioned have changed this by requiring the owner, after establishing his title, to pay for the improvements as a condition of being put in possession, and by confirming the occupant in possession, if payment is declined. While the right of election remains, the right of the occupant has some of the qualities of a lien and some of the conditional title; but his remedies for wrongs would obviously be those of an occupant of the realty.

Sidewalks, etc. Sidewalks constructed by the owner of urban property in front of his lot, or curbstones, etc., planted there by him, are his property, whether the title to the soil in the street is in him or not.³⁴ While a sidewalk remains it is a part of the realty;³⁵ but when any such structure is taken up, the materials become personality, and trespass *de bonis* or trover will lie if the city authorities, or individuals, unlawfully appropriate them.³⁶

has taken place within a century, the artificial distinctions between realty and personality are being gradually put aside or modified, and those only are strictly adhered to which have solid grounds for their support. Cities grow upon leased grounds, and substantial structures for houses and shops are, as between landlord and tenant, the personal estate of the latter. The house becomes a part of the land if affixed to the land by the owner, because then the inference of intent to make it so is irresistible, but it does not become a part of it when affixed by the tenant, because the difference in ownership of house and land will prevent the merger which is necessary to their be-

coming one in contemplation of the law. The tenant's supposed intent to keep separate as personal chattels the boards, the bricks, etc., which he builds into the house, is respected and is conclusive.

33—The allowance for betterment is based upon the increased value which they give the land, not upon their cost. Cleland *v.* Clark, 123 Mich. 179, 81 N. W. 1086, 81 Am. St. Rep. 161.

34—Irving *v.* Ford, 65 Mich. 241, 32 N. W. 601; Parish *v.* Baird, 160 N. Y. 302, 54 N. E. 724.

35—Rogers *v.* Randall, 29 Mich. 41.

36—Muzzey *v.* Davis, 54 Me. 361. See Rogers *v.* Randall, 29 Mich. 41.

Right to Crops. Growing crops are presumptively the property of the owner of the soil; but this is only a presumption, and often proves to be unfounded. A more general rule is that growing crops are the property of the person who rightfully has planted and grown them.^{36a} Therefore, crops grown by a tenant are his property. He may sell or mortgage them as such while they are growing, and he may harvest and appropriate them when ripened.³⁷ The exception to this general statement [*508] is this: that if the tenant shall sow or plant *crops which, in the ordinary course of nature, will not ripen during his term, he will lose them. If the rule were otherwise, he would be enabled, by his own act and without the consent of the lessor, to prolong beyond the duration of his term his possession of the land planted.³⁸ But where the duration of the lease is uncertain, as where it is a lease at will, or for the life of some person designated, or its duration depends upon some contingency, and it is terminated otherwise than by the voluntary act of the tenant himself, the tenant or his personal representative is entitled to the growing crops as emblements,³⁹ and may

36a—Grass is personality for the purpose of sale and a purchaser has constructive possession and may maintain trespass against one cutting and taking it without right. *Avitt v. Farrell*, 68 Mo. App. 665. Crops matured and severed are personal property. *Wakefield v. Dyer*, 14 Okl. 92, 76 Pac. 151.

37—*Doremus v. Howard*, 23 N. J. 390; *Brown v. Turner*, 60 Mo. 21; *Clark v. Harvey*, 54 Pa. St. 142; *Fobes v. Shattuck*, 22 Barb. 568. If tenant surrenders possession during term, the crops pass to the landlord. *Shahan v. Herzberg*, 73 Ala. 59.

38—*Bain v. Clark*, 10 Johns. 424; *Harris v. Carson*, 7 Leigh. 632, 30 Am. Dec. 510; *Kingsbury v. Collins*, 4 Bing. 202. So if tenant is bound to know that his

landlord's title will be lost under execution sale before ripening. *Wheeler v. Kirkendall*, 67 Ia. 612. But see *Hecht v. Dettman*, 56 Ia. 679, 41 Am. Rep. 131. It makes no difference that lease was for a year with privilege of three if tenant abandons within first year. *Dircks v. Brant*, 56 Md. 500. In Pennsylvania the outgoing tenant owns the way-going crop. *Shaw v. Bowman*, 91 Pa. St. 414.

39—*Bevans v. Briscoe*, 4 Har. & J. 139; *Davis v. Thompson*, 13 Me. 209; *Davis v. Brocklebank*, 9 N. H. 73; *Orland's Case*, 5 Co. 116. See *Towne v. Bowers*, 81 Mo. 491; *Dobbins v. Lusch*, 53 Ia. 304; *King v. Foscue*, 91 N. C. 116; *Hendrixson v. Cardwell*, 9 Bax. 389; *Felch v. Harriman*, 64 N. H. 472, 13 Atl. 418.

enter upon the land to cultivate them and to remove them when ready for harvest. The landlord, if he refuses to recognize this right and excludes him, is liable on the special case; and if he harvests the crop and appropriates it to his own use, he may be sued either in trespass or trover for the value.⁴⁰ So when one who sows crops on the land of another under a license has rights after the license is revoked corresponding to those of a tenant at will whose estate has been terminated by the landlord.⁴¹ Where crops are raised "on shares," the owner of the land and the person raising them are tenants in common of the crop until it has been harvested and divided.⁴² Trees, plants and *crops sowed or planted on land by a stranger to the [*509] title, and without authority, belong to the owner of the soil.⁴³

40—*Stewart v. Doughty*, 9 Johns. 108; *Forsythe v. Price*, 8 Watts, 282; *Robinson v. Kruse*, 29 Ark. 575; *Harris v. Frink*, 49 N. Y. 24.

41—*Smith v. Jenks*, 1 Denio, 580; *Jencks v. Smith*, 1 N. Y. 90. *Harris v. Frink*, 49 N. Y. 24.

42—*Daniels v. Daniels*, 7 Mass. 136; *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52; *Foote v. Colvin*, 3 Johns. 216, 3 Am. Dec. 478; *Bradish v. Schenck*, 8 Johns. 151; *Carter v. Jarvis*, 9 Johns. 143; *Putnam v. Wise*, 1 Hill, 234, 37 Am. Dec. 309; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 310; *Moulton v. Robinson*, 27 N. H. 550; *Daniels v. Brown*, 34 N. H. 454, 69 Am. Dec. 505; *Hatch v. Hart*, 40 N. H. 93; *Carr v. Dodge*, 40 N. H. 403; *Hurd v. Darling*, 14 Vt. 214; *Beets v. Ratliff*, 50 Miss. 561; *Doty v. Heth*, 52 Miss. 530; *Briggs v. Thompson*, 9 Pa. St. 338; *Alwood v. Ruckman*, 21 Ill. 200; *Marlowe v. Rogers*, 102 Ala. 510, 14 So. 790; *Belser v. Youngblood*, 103 Ala. 545, 15 So. 863. But the relation of landlord and tenant may exist, although the rent is to be paid by a portion of the crop, in which case the parties are not tenants in common of the crop raised. *Dixon v. Nicolls*, 39 Ill. 372, 89 Am. Dec. 312. See, further, on what relation is created by such arrangement. *Walworth v. Jenness*, 58 Vt. 670; *Chicago, &c., Co. v. Linard*, 94 Ind. 319; *Frout v. Hardin*, 56 Ind. 165, 26 Am. Rep. 18; *Texas, &c., Ry. Co. v. Bayliss*, 62 Tex. 570; *Yates v. Kinney*, 19 Neb. 275; *Atkins v. Womeldorf*, 53 Ia. 150. In Massachusetts it is held that it cannot be said as a matter of law that the land owner has a mortgageable interest in such crop. Each case depends on the intent of the parties as shown in the contract. *Orcutt v. Moore*, 134 Mass. 48, 45 Am. Rep. 278.

43—*Ewell on Fixtures*, 64; *Simpkins v. Rogers*, 15 Ill. 397; *Mitchell v. Billingsley*, 17 Ala.

Wild Animals. There is no property in wild animals until they have been subjected to the control of man. If one secures and tames them, they are his property; if he does not tame them, they are still his so long as they are kept confined and under his control.⁴⁴ In the case of wild bees, these rules are somewhat qualified. Bees have a local habitation, more often in a tree than elsewhere, and while there they may be said to be within control, because the tree may at any time be felled. But the right to cut it is in the owner of the soil, and, therefore, such property as the wild bees are susceptible of is in him also. A hunter's custom may recognize a right to the tree in the first finder, but the law of the land knows nothing of this, and he will be a trespasser if, without permission, he enters upon the land to cut it.⁴⁵ Even a license given by the owner of the soil to enter and cut the tree may be revoked at any time before it has

been acted on.⁴⁶ But if the bees have once been domesticated [*510] and have then escaped, the loser retains his property therein, and may reclaim them if he pursues after them with reasonable promptness.⁴⁷

391; *Reid v. Kirk*, 12 Rich. 54; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371. Even if the trespasser remains and harvests them. *Freeman v. McLenan*, 26 Kan. 151; *contra*, *Adams v. Leip*, 71 Mo. 597. If one holds a farm by fraudulent conveyance, title to crops raised while conveyance is unimpeached is in him, unless raised for his grantor. *Hartman v. Weiland*, 36 Minn. 223.

175, 2 Am. Dec. 264; *Gillet v. Mason*, 7 Johns. 16; *Buster v. Newkirk*, 20 Johns. 75; *Ferguson v. Miller*, 1 Cow. 243, 13 Am. Dec. 519; *Idol v. Jones*, 1 Dev. 162; *Cock v. Weatherby*, 5 S. & M. 333.

46—*Ferguson v. Miller*, 1 Cow. 243, 13 Am. Dec. 519. See *Adams v. Benton*, 43 Vt. 30.

47—*Goff v. Kilts*, 15 Wend. 550. The right, however, might be of little value if they were found on the land of another who should refuse to permit the pursuer to enter and reclaim them. Possibly it might be held—as we think it certainly ought to be—that the owner of the bees might enter and retake them if he could do so without doing an injury to the land; but the law would give no implied license to cut a tree for the purpose.

44—*Amory v. Flynn*, 10 Johns. 102, 6 Am. Dec. 316; *Rex v. Brooks*, 4 C. & P. 131; *Regina v. Shickle*, L. R. 1 C. C. 158; S. C. 11 Cox, C. C. 189; *Commonwealth v. Chace*, 9 Pick. 15, 19 Am. Dec. 348; *Manning v. Mitcherson*, 69 Ga. 447. See *State v. Krider*, 78 N. C. 481.

45—*Merrill v. Goodwin*, 1 Root, 209; *Pierson v. Post*, 3 Caines,

As regards beasts of the chase, the English rule is that if the hunter starts and captures a beast on the land of another, the property in him is in the owner of the land.⁴⁸ Under the civil law the property passed to the captor,⁴⁹ and such is believed to be the recognized rule in America even when the capture has been effected by means of a trespass on another's land.⁵⁰

How Wrongs May be Done. The methods in which one may be wronged in respect to his ownership of personal estate are the following:

1. By the direct application of force, injuring or destroying it, or disturbing the owner in his possession.
2. By indirect injuries, whether through negligence or of intent.
3. By failure to respond to any obligation of bailment in respect to it.
4. By converting the property to the use of the wrong-doer.
5. By neglect to restore possession to the owner when it has been acquired without his consent, or when a possession once rightful has become wrongful by failure to comply with a lawful demand to surrender it to the owner.

Trespass to Personality. The first of these wrongs is technically known as a trespass. A trespass to property consists in the unlawful disturbance by force of another's possession.⁵¹ Therefore, that is not a trespass which con-

48—*Riggs v. Earl of Lonsdale*, 1 H. & N. 923; *Blades v. Higgs*, 12 C. B. (N. S.) 501; 13 C. B. (N. S.) 844; *S. C. in Error*, 11 H. L. Cas. 621.

49—*Justinian*, Inst. Lib. 2, t. 1, § 12.

50—Fish are the property of those who take them, and a whale belongs to the captors. *Taber v. Jenny*, 1 Sprague, 315. That there is no property in fish swimming in tide water, see *Matthews v. Treat*, 75 Me. 594, nor in a fresh water pond unless so enclosed as to be entirely within con-

trol of the owner of surrounding land. *State v. Roberts*, 59 N. H. 484. See also *Lincoln v. Davis*, 53 Mich. 375, 57 Am. Rep. 116. One who owns the fee of soil covered by navigable fresh water, has the exclusive right to shoot wild fowl flying over the water. *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845.

51—To maintain trespass to goods the plaintiff must have possession or the right of possession. *Cook v. Thornton*, 109 Ala. 523, 20 So. 14.

sists merely in some wrong done to property by one to whom, for any purpose, the possession has been transferred by the owner, and who at the time of the wrong was lawfully holding it.⁵² But a possession obtained by fraud and for the very purpose of the wrong, is not a lawful possession, and an injury by force, while it continues, must be deemed a trespass on the possession of the owner.⁵³

The possession disturbed by a trespass may be either, 1, that of a general owner of the property; or, 2, that of one having a special property therein as mortgagee, bailee, or officer;⁵⁴ or, 3, that of a mere possessor, by which is meant one who has a peaceable possession, but who shows in himself no other right. This mere possession is sufficient as against one who disturbs it without right in himself, and who, therefore, occupies the position of an intermeddler in that in which he has no interest. Thus, though an heir as such is not entitled to the possession of the personality of his ancestor, yet if he have actual possession, he may sue in respect thereof any intruder.⁵⁵ So an agister of

52—*Furlong v. Bartlett*, 21 Pick. 401; *Bradley v. Davis*, 14 Me. 44, 30 Am. Dec. 729; *Henderson v. Marx*, 57 Ala. 169. If a land owner allows logs of another to be put on his land upon agreement that they shall be removed by a certain time, and such logs are, after reasonable notice, not so removed, he may remove them himself without being a trespasser as to the log owner. *Knapp v. Hortung*, 103 Penn. St. 400. But if one puts chattels on another's land without his consent, the latter is liable in trespass if he ships them to a distant place instead of removing them to some reasonable spot. *Rich v. Johnson*, 61 Ind. 246.

53—*Butler v. Collins*, 12 Cal. 457.

54—*Brownell v. Manchester*, 1 Pick. 232; *Casher v. Peterson*, 4

N. J. 317; *Browning v. Skillman*, 24 N. J. 351; *Taylor v. Manderson*, 1 Ashm. 130; *Whitney v. Ladd*, 10 Vt. 165; *Sewell v. Harrington*, 11 Vt. 141, 34 Am. Dec. 675; *St. Louis, etc., Ry. Co. v. Norton*, 71 Ark. 314, 73 Pac. 1095.

55—*Hyde v. Stone*, 7 Wend, 354; *Beecher v. Crouse*, 19 Wend. 306. See *Webb v. Fox*, 7 T. R. 391; *Carter v. Bennett*, 4 Fla. 283, cases of trover. See also *Miller v. Clay*, 57 Ala. 162; *Wustland v. Potterfield*, 9 W. Va. 438. Trespass will not lie against one whose property, in the hands of a bailee, has been taken with the latter's consent. *Marshall v. Davis*, 1 Wend. 109, 19 Am. Dec. 463. But trover will lie if the property is not restored on demand, or is disposed of. See *Terry v. Bamberger*, 44 Conn. 558.

cattle, though having no lien, may maintain trespass against stranger for taking them away;⁵⁶ and so may one who is simpl. intrusted with goods for safe keeping without compensation.⁵⁷ Says SAVAGE, Ch. J.: "It would be mon- [*512 strously inconvenient if a wrong-doer could come and take things out of the possession of him who had the possessio under the rightful owner.⁵⁸ Though a mere servant has not suc a special property as will enable him to maintain trover, yet bailee or trustee, or any other person who is responsible to hi principal, may maintain the action, and the lawful possession o the goods is *prima facie* evidence of property."⁵⁹ But possessio may be either actual or constructive. The right to the possessio of chattels draws to it, in contemplation of law, the possession i self, so that one party may sometimes be entitled to sue on hi actual possession, while another may sue on his constructive pos session. Thus, though a bailee or a mortgagor of chattels who i left in possession thereof may bring trespass against one who dis turbs his possession, still if the mortgagee or bailor is of right er titled to demand and take possession at any time, this right draw to it the possession, and the wrong-doer is a trespasser upon hi also.⁶⁰ So, if one cut wood on the land of another, he has, as t all third persons, the possession of the wood cut, and may brin suits as possessor against intermeddlers; but if he has cut with out right, the wood belongs to the owner of the land, and i deemed to be in his possession.⁶¹ So the finder of a chattel ha rightful possession of what he finds, except as against the owner but the latter has constructive possession, and if the finder inter tionally or carelessly abuses or injures it, he becomes himself

56—*Bass v. Pierce*, 16 Barb. 595.

60—*White v. Brantley*, 37 Al

57—*Faulkner v. Brown*, 13 Wend. 63; *Cowing v. Snow*, 11 Mass. 415.

58—Citing *Sutton v. Buck*, 2 Taunt. 309, per CHAMBRE, Justice.

59—*Faulkner v. Brown*, 13 Wend. 63, 64, citing cases. That a servant cannot bring trespass on the possession he holds for his master is held in *Tuthill v. Wheeler*, 6 Barb. 362.

420; *Overby v. McGee*, 15 Ar 459, 63 Am. Dec. 49; *Staples Smith*, 48 Me. 470; *Strong*

Adams, 30 Vt. 221, 73 Am. De 305; *White v. Webb*, 15 Conn. 30

61—*Ward v. Andrews*, 2 Chi 636; *Bulkley v. Dolbeare*, 7 Con. 232. One who so cut and stacke hay cannot recover from a rai road company through whos negligence it is burnt. Murph

trespasser, and cannot, in a suit by the owner, justify even the original taking.⁶²

A trespass may be intentional or unintentional. A [*513] mere *accident—which, as has already been said, is an event happening without fault⁶³—can never be a trespass; and, therefore, if one, in hurriedly removing goods from a burning building, should injure another without being chargeable with negligence, he would not be liable for the injury; while, if carelessly or recklessly, he were to throw the goods into the street, where many persons were congregated or were passing, he would justly be held a trespasser upon any one injured. That, however, which is done purposely, though by mistake, is not to be deemed accidental. Therefore, if one goes upon the land of another to take away his own sheep, and by mistake takes some which do not belong to him, his mistake cannot excuse the trespass.⁶⁴ So if one is sent to take property, and does so

v. Sioux City, &c., Co., 55 Ia. 473, 39 Am. Rep. 175.

62—Oxley *v.* Watts, 1 T. R. 12. A horse was taken up as an es-tray and afterwards worked. Held to constitute the party taking him up a trespasser *ab initio*. See Clark *v.* Moloney, 3 Harr. 68; Brandon *v.* Huntsville Bank, 1 Stew. (Ala.) 320, 18 Am. Dec. 48; McLaughlin *v.* Waite, 9 Cow. 670.

63—Ante, p. *91-2.

64—Dexter *v.* Cole, 6 Wis. 319, 70 Am. Dec. 465. COLE, J.: “We have no doubt but the action of trespass would lie in this case. In driving off the sheep the defendant in error, without doubt, unlawfully interfered with the property of Dexter, and it has been frequently decided that to maintain trespass *de bonis asportatis* it was not necessary to prove actual forcible possession of property; but that evidence of any unlawful interfer-

ence with, or exercise of acts of ownership over property, to the exclusion of the owner, would sustain the action. Gibbs *v.* Chase, 10 Mass. 125; Miller *v.* Baker, 1 Met. 27; Phillips *v.* Hall, 8 Wend. 610, 24 Am. Dec. 108; Morgan *v.* Varick, 8 Wend. 587; Wintringham *v.* Lafoy, 7 Cow. 735; Reynolds *v.* Shuler, 5 Cow. 323; 1 Chit. Pl. 11 Am. Ed. 170, and cases cited in the notes. Neither is it necessary to prove that the act was done with a wrongful intent, it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally or by mistake. 2 Greenl. Ev. § 622; Guille *v.* Swan, 19 Johns. 381, 10 Am. Dec. 234. There is nothing inconsistent with these authorities in the case of Parker *v.* Walrod, 13 Wend. 296.” See a similar case in Hobart *v.* Hagget, 12 Me. 67.

in good faith, believing it to belong to his employer, this is trespass in him if the belief proves unfounded.⁶⁵ But an employment of force to which the plaintiff assents is no trespass upon his rights unless the assent was in itself illegal, as we have seen it is in some cases of personal injury.⁶⁶

The force that constitutes trespass may be applied either, 1, by the party himself who is responsible for it; or, 2, by some other person for whose conduct, as servant or otherwise, he is accountable; or, 3, by his domestic animals. The principle on *which the party is held responsible in the sec- [*514] ond and third cases is explained elsewhere.

The force may be express or implied. Thus false or illegal imprisonment is a trespass to the person imprisoned, though it is sometimes effected by threats or by otherwise exciting the person's fears. So setting a fire which directly communicates with the property of another and destroys it, has been held to be a trespass in respect to such property.⁶⁷ But this seems questionable.

The degree of force is immaterial to the right of action. If one's horse is hitched where he had a right to hitch him, it is a trespass if another, without permission, unhitches and removes him to another post, however near,⁶⁸ but one may justify unhitching a horse from his own fence or shade tree, and removing him, provided it is to a place of safety.⁶⁹

As regards the directness of the injury which will distinguish a case in trespass from one in which the remedy must be sought on the special case, there seems to be no better test than this: That if the unlawful force caused the injury before it was spent, this injury must be deemed direct; but if, after the unlawful

65—*Higginson v. York*, 5 Mass. 341. See *Basely v. Clarkson*, 3 Lev. 37.

66—See *ante*, p. *187-8. Also, for the general principle, *Cadwell v. Farrell*, 28 Ill. 438.

67—*Jordan v. Wyatt*, 4 Grat. 151, 47 Am. Dec. 720. A leasehold being a chattel interest in realty a sale of it with the fix-

tures on it does not make the sheriff liable in trespass to a prior vendee of the fixtures, inasmuch as the fixtures are not severed or actually seized as personality. *Kyle v. Giebner*, 114 Pa. St. 381.

68—*Burch v. Carter*, 32 N. J. 554.

69—*Gilman v. Emery*, 54 Me. 460.

force was spent, the injury occurred, as a collateral or secondary consequence, it is to be considered indirect.

Thus, where one was injured by the throwing of a lighted squib into a crowd, which only reached him after several persons, in self protection, had repelled it from themselves, this was a trespass, because the plaintiff was injured as a direct consequence of the unlawful act, and before its force was spent.⁷⁰ So it is a trespass if one injure another in the careless handling of fire-arms.⁷¹ So, "if a man throws a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong; but if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case, because

it is only prejudicial in consequence, for which [*515] *originally I could have no action at all."⁷² So it is a

trespass if one turn a stream upon his neighbor's land by carrying a ditch over the line; but if he only set up a spout on other lands, which may carry water there when it rains, or a dam which may turn it there, the injury, when it comes, will arise on the special case.⁷³ So if one carelessly drives against another, this is a trespass;⁷⁴ but if his servant is guilty of the like want of care, the action should be case.⁷⁵ So, though one of several

70—*Scott v. Shepherd*, 3 Wils. strikes plaintiff's wife. *Drew v. Peer*, 93 Pa. St. 234. See *Allegheny, &c., R. R. Co. v. McLain*, 91 Pa. St. 442. An action of trespass does not lie against a railroad company for the destruction or injury of animals run over by its cars or engines, unless the wrongful act was done by its direction, or with its assent.

71—*Underwood v. Hewson*, Stra. 596; *Weaver v. Ward*, Hob. 134; *Taylor v. Rainbow*, 2 H. & N. 423.

72—*PARKER*, Ch. J., in *Reynolds v. Clarke*, Stra. 634, 636.

73—*Reynolds v. Clarke*, Stra. 634.

74—*Leame v. Bray*, 3 East, 593. See, to same effect, *Sheldrick v. Abery*, 1 Esp. 55; *Day v. Edwards*, 5 T. R. 648; *Savignac v. Roome*, 6 T. R. 125.

75—*Haggett v. Montgomery*, 5 Esp. (2 N. R.) 446. Compare *Williams v. Holland*, 6 C. & P. 23, and *Ogle v. Barnes*, 8 T. R. 187, explained in *Leame v. Bray*, 3 East, 593, 595. So if the servant

stage proprietors, who is himself driving the coach, might be sued in trespass for carelessly driving against the plaintiff and injuring him; yet if other proprietors are sued with him who were not personally connected with the force, the action must be case.⁷⁶

A disturbance of an incorporeal hereditament, such, for example, as a right of way, is not a trespass, because the right, being intangible, is not the subject of force. Neither is a forcible injury to property, in which the plaintiff has only a reversionary interest, a trespass, since he can have in such property no constructive possession.⁷⁷

Anything is the subject of trespass in which the law recognizes *any property, complete or partial. Therefore, [*516] to kill one's dog or cat, or even a wild beast kept in confinement, is a trespass, unless it can be justified.⁷⁸

The remedies for a trespass are either, 1, an action for the recovery of damages, which will lie in all cases, 2, recaption of the goods, when the trespasser has taken them into his possession, and they can be retaken without breach of the peace; and, 3, replevin or recapture of the goods by legal process.⁷⁹ A trespass may also generally be treated as a conversion.

76—*Moreton v. Hardern*, 4 B. & C. 223; S. C. 6 D. & Ry. 275. Perhaps, however, where negligence is the gist of the action, case may at all times be brought, even though the injury may be direct.

77—*Hall v. Pickard*, 3 Camp. 187. The case was one in which horses had been let by the plaintiff for a certain time, and one of them was run against and killed before the time had expired. And see *Lunt v. Brown*, 13 Me. 236; *Shepherd v. Taylor*, 105 Ala. 507, 17 So. 88; *McCarty v. Roswald*, 105 Ala. 511, 17 So. 120. But a landlord may maintain trespass against the vendee of crop of a sub-lessee for injury to landlord's shrubbery and to cornstalks which

under original lease were to be the landlord's, although the entry was with consent of tenant. *Babley v. Vyse*, 48 Ia. 481.

78—*Parker v. Mise*, 27 Ala. 480, 62 Am. Dec. 776; *Dodson v. Mock*, 4 Dev. & Bat. 146, 32 Am. Dec. 677; *Wheatley v. Harris*, 4 Sneed, 468, 70 Am. Dec. 258; *Dunlap v. Snyder*, 17 Barb. 561; *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Perry v. Phipps*, 10 Ired. 259, 51 Am. Dec. 387; *Lentz v. Stroh*, 6 S. & R. 34.

79—A citizen, whose horse was taken and carried off by the army, and was finally found in private hands, may lawfully retake it, and if the party in possession claims it, he is called upon to

Indirect Injuries. These are generally injuries of negligence, and are committed by a failure to observe that care in respect to the rights of others which is their due. But they may be injuries intended, and differing from trespasses only in this: that they are secondary, and not a direct result of the unlawful act. Thus, if one shoot a gun into a crowd and injure some one of the persons there congregated, the act is a trespass; but if he purposely, and with evil intent, leave a loaded pistol where children will be likely to handle it, he will be equally liable when an injury occurs, but the action must be on the special case, because the injury is indirect, and does not happen until some secondary agency has intervened.⁸⁰

TROVER.

The injury which is redressed in an action of trover is technically called conversion, and the declaration counts upon the

show how the owner lost his title. Hawkins *v.* Nelson, 40 Ala. 553, 91 Am. Dec. 492. In trespass the defendant may show in mitigation of damages that the property has been restored to the plaintiff or that it has been applied for his benefit. Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622; Hamilton *v.* Phillips, 120 Ala. 177, 24 So. 587, 74 Am. St. Rep. 29; Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514. In the last case the court says: "It is a thoroughly well settled doctrine of trespass, that under the general issue a defendant may put in evidence, in mitigation of damages, the fact that the property which he has wrongfully taken from the plaintiff, or has been returned to the plaintiff, or has been applied for the benefit or advantage of the plaintiff with his consent, express or implied, or through legal proceedings instituted by third persons; and that to the extent such applica-

tion has been made, the recovery, which ordinarily would be the value of the property, is mitigated and reduced. This rule finds its most frequent illustration in cases where the property has been attached or levied upon in the hands of the trespassers, by creditors of the plaintiff in trespass, or subjected to the satisfaction of some mortgage or other lien held by third persons as against said plaintiff upon it. . . . If, notwithstanding the trespass, the full value of the property, or of his interest in it, as the case may be, has directly or indirectly inured to his benefit, it cannot be said that he has been materially damaged, and his recovery would be nominal." p. 204. Where the trespass is wanton and malicious punitive damages may be given. Avakian *v.* Noble, 121 Cal. 216, 53 Pac. 559.

80—Dixon *v.* Bell, 5 M. & S. 198. See Welch *v.* Durand, 36

real or supposed fact that the plaintiff casually lost his goods, and the defendant found and appropriated them. "In form the action is a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and *has been brought in many cases where, in truth, the defendant has got the possession lawfully. Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten."⁸¹ If the plaintiff prefers to recover back the specific property, he brings replevin instead of trover, provided the goods are still in the defendant's possession, and he might formerly have brought the now nearly obsolete action of detinue.⁸²

There are two principal differences between the actions of trespass and trover for personality appropriated by defendant; the first of which is, that in trespass there is always either an original wrongful taking, or a taking made wrongful *ab initio* by subsequent misconduct,⁸³ while in trover, the original taking is supposed or assumed to be lawful, and often the only wrongs consists in a refusal to surrender a possession which was originally rightful, but the right to which has terminated. The second is, that trespass lies for any wrongful force, but the wrongful force is no conversion where it is employed in recognition of the owner's right, and with no purpose to deprive him of his right, temporarily or permanently. Thus, if one take up the beast of another, in order to prevent his straying away, and afterwards turn him out again, he may be liable in trespass for so doing, but his act

Conn. 182, 4 Am. Rep. 55; *Tancred v. Allgood*, 4 H. & N. 438.

81—Lord MANSFIELD, Ch. J. in *Cooper v. Chitty*, Burr. 3. See the nature of the action explained in *Burroughes v. Bayne*, 5 H. & N. 296, 309.

82—There are statutes in some States which permit the plaintiff

in an action of replevin to proceed in it as in trover, and recover the value of the property in case the officer fails to find it to return to him on the writ.

83—*Van Brunt v. Schenck*, 11 Johns. 377; *Parker v. Walrod*, 13 Wend. 296; S. C. in error, 16 Wend. 514, 30 Am. Dec. 124.

is no conversion, because the owner's dominion is not disputed, and the intent to make a wrongful appropriation is absent.⁸⁴

Who may bring Trover. It is commonly said that "to sustain trover, the plaintiff must show a legal title; he must have property, general or special, or actual possession or the right [*518] to immediate possession at the time of the conver*ision;"⁸⁵

and in some cases the defendant has been allowed to defeat a recovery by merely showing property in a third person, without at all connecting himself with the right of such person. Thus, in *Rotan v. Fletcher*, the suit was trover for a cow taken from the possession of the plaintiff, and which he had bought of the wife of one Heminway, the owner, who had absconded. There was some evidence of an attachment of the cow for a debt of Heminway, but the court, without relying upon this, held the action not maintainable. "The action was trover, and it was competent for the defendant to prove property in a third person. The pretended sale from Mrs. Heminway did not transfer the property to the plaintiff below. She had no authority to sell the cow; and besides, it was offered to be proved that even this sale was fraudulent."⁸⁶ So in *Tuthill v. Wheeler*, it was decided that one in possession of a canal boat for the season, under a contract

84—Wilson *v.* McLaughlin, 107 Mass. 587. But see Tobin *v.* Deal, 60 Wis. 87. No conversion if a lot owner removes from one part of it to another goods there by his permission if no ownership claimed or dominion assumed. Shea *v.* Milford, 145 Mass. 525, 14 N. E. 769.

85—Drury *v.* Mutual, &c., Ins. Co. 38 Md. 242, 249, per MILLER, J.; Stephenson *v.* Little, 10 Mich. 433, 439, per MANNING, J.; Owens *v.* Weedman, 82 Ill. 409, 417, per DICKEY, J.; Johnson *v.* Wilson, 137 Ala. 468, 34 So. 392, 97 Am. St. Rep. 52; Atlantic Coast Line R. R. Co. *v.* Baker, 118 Ga. 809, 45 S. E. 673; Frink *v.* Pratt, 130 Ill. 327, 22 N. E. 819; Blain *v.* Fos-

ter, 33 Ill. App. 297; Poppers *v.* Peterson, 33 Ill. App. 384; Langhenry *v.* Chicago Trust & S. Bank, 70 Ill. App. 200; Kennett *v.* Peters, 54 Kan. 119, 37 Pac. 999, 45 Am. St. Rep. 274; Citizens' Bank *v.* Tiger Tail, etc., Co., 152 Mo. 145, 53 S. W. 902. "To maintain trover, the plaintiff must have property in himself, and a right to possession at the time of the conversion, and must recover on the strength of his own title." Moore *v.* Walker, 124 Ala. 199, 202, 26 So. 984. Of course the husband cannot bring trover for the conversion of the wife's property. Taylor *v.* Jones, 52 Ala. 78.

86—Rotan *v.* Fletcher, 15 Johns 206. See Sheldon *v.* Soper, 14

with the owner to navigate it, and to be accountable for any injury to it, could not bring trover against one who had taken it from his possession, because he had at the time in the boat neither a special nor a general ownership.⁸⁷ The reason is thus given by the Supreme Court of Maine: "The defendant in an action of trover, may prove that the title to the property claimed was, when the suit was commenced, in a third person, and thus defeat the action. If he could not, he might subsequently be compelled to pay for the same property again to such third person, he being a stranger to the first suit."⁸⁸ But as the liability is also incurred where trespass is brought on a mere possession, it is manifest that it cannot constitute any sufficient reason for holding that a party may sue in one form of action but not in the other. In the foregoing cases the general doctrine is so stated as to render it misleading. It has often been decided

*that possession alone is sufficient to enable one to maintain the action of trover, and in a leading case, always since recognized as authority, the finder of a jewel was held entitled to bring trover against one who, having taken the jewel for examination, refused to restore it.⁸⁹ It may, indeed, be said of this case that here was something more than a bare possession, for a finder of goods has a special property therein which is good against all the world but the real owner; but other cases go further, and hold, in the language of LORD CAMPBELL, that "the law is, that a person possessed of goods as his property has a good title as against every stranger, and that one who takes

Johns. 352; *Grady v. Newby*, 6 Blackf. 442; *Glenn v. Garrison*, 17 N. J. 1, 4.

87—*Tuthill v. Wheeler*, 6 Barb. 362.

88—*Clapp v. Glidden*, 39 Me. 448, 451. It has been held in the same State, however, that the existence of a lien on goods in favor of a common carrier was no defense to a wrong-doer sued by the owner for a conversion of the goods. *Ames v. Palmer*, 42 Me.

197, 66 Am. Rep. 271. See also *Ribble v. Lawrence*, 51 Mich. 569; *Seymour v. Peters*, 67 Mich. 415, 35 N. W. 62; *Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510.

89—*Armory v. Delamirie*, Stra. 505; *McLaughlin v. Waite*, 9 Cow. 670; *Brandon v. Planters, &c., Bank*, 1 Stew. 320; *Clark v. Maloney*, 3 Harr. 68. See *McAvoy v. Medina*, 11 Allen, 548, 87 Am. Dec. 733.

them from him, having no title in himself, is a wrong-doer, and cannot defend himself by showing that there was a title in some third person, for against a wrong-doer possession is title. The law is so stated by the very learned annotator in note to *Wilbraham v. Snow*,⁹⁰ and I think it most reasonable law, and essential for the interests of society, that peaceable possession should not be disturbed by wrong-doers. * * * It is not disputed that the *jus tertii* cannot be set up as a defense to an action of trespass for disturbing the possession. In this respect I see no difference between trespass and trover; for, in truth, the presumption of law is that the person who has the possession has the property. Can that presumption be rebutted by evidence that the property was in a third person, when offered as a defense by one who admits that he himself had no title and was a wrong-doer when he converted the goods? I am of opinion that this cannot be done.⁹¹

So, in New York, it has been held that trover will lie "on a bare possession" against a stranger,⁹² and that a defendant in trover cannot set up property in a third person without showing some claim, title or interest in himself derived from such per-

son.⁹³ In Vermont the same doctrine is asserted, [*520] *though it is conceded that if one have a bare possession only, which he voluntarily surrenders to another, he cannot afterward rely upon it as evidence of ownership.⁹⁴ In New Hampshire it is said, in one case, "The plaintiff had possession, and that is sufficient in trover against a wrong-doer. It is enough until the defendant shows a better title."⁹⁵ In a later case it is

90—2 Wms. Saunders, 47 f.

54, approved in *Harker v. Dement*,

91—Jefferies *v. Great Western R. Co.*, 5 El. & Bl. 802. The defendant having failed to make out any right in himself sought to show that by an act of bankruptcy the title had passed to assignees. *Held*, inadmissible.

9, Gill, 9, 12, 52 Am. Dec. 670. Sheriff cannot defend by showing title in third person without connecting himself with it. *Wheeler v. Lawson*, 103 N. Y. 40.

92—Daniels *v. Ball*, 11 Wend. 57, note. *Lyon v. Sellew*, 34 Hun, 124.

94—*Knapp v. Winchester*, 11 Vt. 351.

93—Duncan *v. Spear*, 11 Wend.

95—*Bartlett v. Hoyt*, 29 N. H. 317, citing *Sutton v. Buck*, 2 Taunt. 302.

held that property in a third person is no defense unless the defendant connects himself with it.⁹⁶ Other cases are to the same effect.⁹⁷

When, therefore, it is said that the plaintiff in trover must have had, at the time of the conversion, the right to the property, and also a right of possession, nothing more can be intended than this: that the right of which he complains he has been deprived must have been either a right actually in possession, or a right immediately to take possession; it is not enough that it be merely a right in action or a right to take possession at some future day.⁹⁸ If then the plaintiff shows that property in his *possession has been taken and converted, he shows [*521] *prima facie* his right to maintain the suit; and it is only

96—*Harris v. Smith*, 71 N. H. 330, 52 Atl. 854.

97—*Carter v. Bennett*, 4 Fla. 283, 355; *Burke v. Savage*, 13 Allen 408; *Hubbard v. Lyman*, 8 Allen 520; *Magee v. Scott*, 9 Cush. 148, 55 Am. Dec. 49; *Cook v. Patterson*, 35 Ala. 102; *Vining v. Baker*, 53 Me. 544; *Coffin v. Anderson*, 4 Blackf. 395; *Greenbaum v. Taylor*, 102 Cal. 624, 36 Pac. 957; *Anderson v. Agnew*, 38 Fla. 30, 20 So. 766; *Mitchell v. Thomas*, 114 Ala. 459, 21 So. 991. A mortgagee must connect himself with the third person's title as against one claiming in the right of the mortgagor. *Marks v. Robinson*, 82 Ala. 69. But an officer may show that the person in actual possession of goods seized had no possession in his own right, otherwise he might be subjected to double litigation. *Stearns v. Vincent*, 50 Mich. 209, 45 Am. Rep. 37. So one may rely on a third person's title without connecting himself with it where his own claim is in good faith under color of right. *Ribble v. Lawrence*, 51 Mich. 569. See *Sey-*

mour v. Peters, 67 Mich. 415, 38 N. W. 62. In *Boyce v. Williams* 84 N. C. 275, title in a third person is held a complete defense although defendant does not connect himself with it.

98—See *Wilson v. Wilson*, 37 Md. 1; *Langhenry v. Chicago Trust & S. Bank*, 70 Ill. App. 200; *Dudley v. Abner*, 52 Ala. 572. There must be possession, or right to it immediately. *Stevenson v. Fitzgerald*, 47 Mich. 166; *Edwards v. Frank*, 40 Mich. 616. If the right arises under a contract void as against public policy, no action lies. *Clements v. Yturria*, 81 N. Y. 285. Cutting by one's agent under claim of right of timber in possession sufficient to bring trover for its conversion. *Putnam v. Lewis*, 133 Mass. 264. If the legal title and right to possession is in a trustee, the beneficiary cannot bring the action. *Myers v. Hale*, 17 Mo. App. 204. The transferee of a bill of lading may bring the action against the carrier for unauthorized delivery. *Forbes v. Boston, &c., R. R. Co.* 133 Mass. 154. So may the as

when he is compelled to show his title, in order to make out his right to immediate possession, that it can be important for him to go further.⁹⁹

In illustration of cases in which a showing of title is not sufficient, those may be instanced in which the owner has parted with the right of possession for a time under some contract of lease or bailment. In such a case, if the term has not expired or the bailment been terminated at the time conversion takes place, the owner cannot sue in trover,¹ because not having had the right to possession his only injury is in his reversionary interest, and in suing for that he must count on the special case and not on a conversion.² So, if one purchases property to be paid for on delivery, and pays in part only, he cannot bring trover against a subsequent vendee from his vendor, since his part payment did not invest him with the right of possession.³

In a certain sense, however, one always shows a right of property when he shows that he has gained an apparently rightful possession. Such a possession is evidence of property, and whoever, by force or fraud, intercepts it without being able to show any right in himself, is liable to this action. Indeed, the possession gained is not only evidence of right as against such a person, but it is conclusive evidence, unless he is able in some man-

signee of a pledgor against the pledgee refusing to deliver upon tender. *Southworth Co. v. Lamb*, 82 Mo. 242. But after consigning goods a consignor must show in an action against another than the carrier, something more than his prior possession and consigning. *Benjamin v. Levy*, 39 Minn. 11, 38 N. W. 700. A mere allegation of ownership is not sufficient to maintain trover. *Citizens' Bank v. Tiger Tail, etc., Co.*, 152 Mo. 145, 53 S. W. 902.

99—See *Foster v. Chamberlain*, 41 Ala. 158, and cases cited.

1—*Gordon v. Harper*, 7 T. R. 9; *Wheeler v. Train*, 3 Pick. 255, 258; *Fairbank v. Phelps*, 22 Pick. 535;

Caldwell v. Cowan, 9 Yerg. 262; *Clark v. Draper*, 19 N. H. 419; *Forth v. Pursley*, 82 Ill. 152; *Wanship v. Neale*, 10 Gray, 382. See *Montgomery v. Brush*, 121 Ill. 513, 13 N. E. 230.

2—*McGowan v. Chapen*, 2 Murph. 61; *Hilliard v. Dortch*, 3 Hawks, 246; *Ayer v. Bartlett*, 9 Pick. 156; *Marshall v. Davis*, 1 Wend. 109, 19 Am. Dec. 463; *Arthur v. Gayle*, 38 Ala. 259.

3—*Owens v. Weedman*, 82 Ill. 409, citing *Bloxam v. Sanders*, 4 B. & C. 941; *Wilmhurst v. Bowker*, 5 Bing. (N. C.) 541. If vendor delivers chattel to vendee, retaining title till a certain date, when it is to be paid for, he can-

ner to so connect himself with the right of the real owner as to be entitled to defend in such owner's interest. Thus, if one has a bare possession, and this is taken from him by one having no *right, the latter may defend against an action of [*522] trover by showing that he had been notified by the owner to retain the property for him.⁴ And where the plaintiff's possession was not rightful as against the owner, a surrender of the possession to the owner would be a complete defense to a suit in trover.⁵ There must also be many cases in which a mere showing of the wrongful character of the plaintiff's possession would defeat his action, as where a thief sues the officer for the stolen property taken from him in making the arrest, or a trespasser brings suit against one who stops him while carrying off the goods he has wrongfully taken. These are cases in which it can not be said that in law a possession has been gained; and one who disturbs this wrongful manual possession may defend in the right of the owner, whether expressly authorized to do so or not.⁶

On the principle that where one has the right of property this draws to it the right of possession, if one's goods are held with cut right by another, and a third person converts them to his own use, the owner may maintain trover for such conversion. So the vendor in a void sale to a married woman may bring trover against a sheriff who levies on the goods as the property of

not maintain trover meantime ministration granted thereon, but against a third person who seizes it as vendee's. *Newhall v. Kingsbury*, 131 Mass. 445. Nor can one who consigns goods to another to be paid for as sold^d by him. *Hardy v. Munroe*, 127 Mass. 64. Nor can consignees who have not agreed to accept goods. *Gibbons v. Farwell*, 58 Mich. 233.

4—A warehouseman, being bailee of the goods from the plaintiff, may show in defense to an action of trover that the goods are a part of the estate of a deceased person and were bailed to him before ad-

ministration granted thereon, but that since the taking out of letters the administrator had notified him not to deliver them to the plaintiff. *Thorne v. Tilbury* 3 H. & N. 534.

5—*Ogle v. Atkinson*, 5 Taunt 759; *King v. Richards*, 6 Whart 418.

6—See *Laclouch v. Towle*, Esp. 114; *Cheesman v. Exall*, Exch. 341.

7—*Clark v. Rideout*, 39 N. H 238; *Egglesston v. Mundy*, 4 Mich 295; *Carter v. Kingman*, 10 Mass. 518.

the woman's husband.⁸ So a mortgagee of chattels who, under his mortgage, is entitled to immediate possession, may sue in trover for a conversion while they remained in the hands [*523] of the mortgagor;⁹ but a servant cannot *bring trover for the conversion of his master's goods, since his pos-

8—*Smith v. Plomer*, 15 East, 607. The distinction between these cases and those in which it has been held that a lessor cannot bring suit in trover for the conversion of the goods leased, is that in these the conversion took away the plaintiff's present right, but in the case of goods leased it is the termor, not the lessor, whose present right is taken, and who, consequently, is wronged by the conversion. The termor may bring suit in trover and recover the whole value of the property, being himself liable over to the lessor when his term is ended. *Gordon v. Harper*, 7 T. R. 9.

9—*McConeghy v. McCaw*, 31 Ala. 447; *Robinson v. Kruse*, 29 Ark. 575; *Coles v. Clark*, 3 Cush. 399; *Chamberlain v. Clemence*, 8 Gray, 389; *Bellune v. Wallace*, 2 Rich. 80; *Spriggs v. Camp*, 2 Speers, 181; *Badger v. Batavia Manuf. Co.*, 70 Ill. 302; *Melody v. Chandler*, 12 Me. 282; *Jones v. Webster*, 48 Ala. 109; *Broughton v. Atchison*, 52 Ala. 62; *Grove v. Wise*, 39 Mich. 161; *Warder-Bushnell & Glessner Co. v. Harris*, 81 Ia. 153, 46 N. W. 859; *Brown v. Campbell Co.*, 44 Kan. 237, 22 Pac. 1020, 21 Am. St. Rep. 274; *Howard v. Burns*, 44 Kan. 543, 24 Pac. 981; *Howard v. First Nat. Bank*, 44 Kan. 549, 24 Pac. 983, 10 L. R. A. 537; *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452. See *Buddington v. Mastbrook*, 17 Mo. App. 577; *Rhea v. Deaver*, 85 N. C. 337; *Howe v.* Wadsworth, 59 N. H. 397. Otherwise where he has not right to immediate possession. *Elmore v. Simon*, 67 Ala. 526; *Heflin v. Slay*, 78 Ala. 180; *Johnson v. Wilson*, 137 Ala. 468, 34 So. 392, 97 Am. St. Rep. 52; *Dawes v. Rosenbaum*, 179 Ill. 112, 53 N. E. 585; *Bank of Little Rock v. Fisher*, 55 Mo. App. 51. But see *Hudman Brothers v. Du Bose*, 85 Ala. 446, 5 So. 162, 2 L. R. A. 475; *Woods v. Rose*, 135 Ala. 297, 33 So. 41; *Chittenden v. Pratt*, 89 Cal. 178, 26 Pac. 626; *Nichols v. Barnes*, 3 Dak. 148, 14 N. W. 110; *Lafayette County Bank v. Metcalf*, 40 Mo. App. 494. Where a chattel mortgage provided that in case of a sale of the mortgaged property without the consent of the mortgagee, the latter should be entitled to immediate possession, such a sale was held to be a conversion and the purchaser was held liable in trover to the mortgagee. *Conwell v. Jeger*, 21 Ind. App. 110, 51 N. E. 733. A mortgagee in possession may, of course, maintain trover. *Lander v. Propper*, 6 Dak. 64, 50 N. W. 400; *Jones v. Kellogg*, 51 Kan. 263, 33 Pac. 997, 37 Am. St. Rep. 278. Where the mortgagee is not entitled to possession the mortgagor may sue in case for the injury to his reversionary interest. *Googins v. Gilmore*, 47 Me. 9; *Forbes v. Parker*, 16 Pick. 462; *Manning v. Monaghan*, 23 N. Y. 539.

session is the possession of his master.¹⁰ A factor, on the other hand, or a bailee, or any other person with a right of his own, however special or trivial, has a property sufficient for the purposes of this action, and as against a mere wrong-doer may recover the whole value of the property, being accountable over to the general owner.¹¹ A pledgee may recover for the conversion of the property pledged,¹² and an officer for property in his custody under process of court.¹³ One having a mere right to a lien but no right to possession cannot maintain trover.¹⁴ The owner of property in the hands of an agent may sue for its conversion.¹⁵ An owner may abandon his property and so divest himself of his title thereto and, having done so, he cannot thereafter sue for its conversion.¹⁶ The finder of lost property may have trover therefor as against any person but the true owner,¹⁷

10—Lehigh Co. v. Field, 8 W. & S. 232; Farmers' Bank v. Mc Kee, 2 Penn. St. 318.

11—Beyer v. Bush, 50 Ala. 19. See Hollenback v. Todd, 19 Ill. App. 452; Gillette v. Goodspeed, 69 Conn. 363, 37 Atl. 973; Allen v. Barrett, 100 Ia. 16, 69 N. W. 272; Lord v. Buchanan, 69 Vt. 320, 37 Atl. 1048, 60 Am. St. Rep. 933; Chamberlain v. West, 37 Minn. 54, 33 N. W. 114; Taber v. Lawrence, 134 Mass. 94. Case, not trover, is the proper form of action to be brought against one who takes possession of a crop grown by a tenant on which the landlord has a statutory lien. Hussey v. Peebles, 53 Ala. 432; Corbitt v. Reynolds, 68 Ala. 378; Bush v. Garner, 73 Ala. 162; Anderson v. Bowles, 44 Ark. 108. A warehouseman may recover in one action for the conversion of goods deposited by different bailors. Bode v. Lee, 102 Cal. 583, 36 Pac. 936.

12—Cramer v. Marsh, 5 Colo. App. 302, 38 Pac. 612; Citizens' Banking Co. v. Peacock, 103 Ga.

171, 29 S. E. 752; Beebe v. Latimer, 59 Neb. 305, 80 N. W. 904.

13—Vanosdall v. Hamilton, 118 Mich. 533, 77 N. W. 9; Penland v. Leatherwood, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38. And see Goodrow v. Buckley, 70 Mich. 513, 38 N. W. 454.

14—Jordan v. Lendsay, 132 Ala. 567, 31 So. 484; Frink v. Pratt, 130 Ill. 327, 22 N. E. 819. But see Thornton v. Dwight Mfg. Co.; 137 Ala. 211, 34 So. 187; Merchants & Planters Bank v. Meyer, 56 Ark. 499, 20 S. W. 406; Goodrow v. Buckley, 70 Mich. 513, 38 N. W. 454.

15—Montgomery v. Brush, 121 Ill. 513, 13 N. E. 230; Boehr v. Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444.

16—Kansas City, etc., R. R. Co. v. Wagand, 134 Ala. 388, 32 S. W. 744. Joint owners should all be joined as plaintiffs, and, if any refuse, they should be made parties under the statute. Bolton v. Cuthbert, 132 Ala. 403, 31 So. 358, 90 Am. St. Rep. 914.

17—See *ante*, p. 849, n. 89.

but when property is put by the owner in a particular place and is inadvertently left there and forgotten, the occupant of the premises is entitled to its possession and not the finder.¹⁸

What May be Converted. Anything which is the subject of property, and is of a personal nature, is the subject of conversion, even though it have no value except to the owner.¹⁹ The maker of a note who has paid it, may maintain trover against the payee, who, instead of surrendering it, wrongfully disposes of it, whereby the maker is compelled to make payment a second time.²⁰ Even a refusal to surrender a paid note to the payee is a conversion; he being entitled to its possession as evidence of payment; but the damages in such case would only be nominal.²¹ So

trover will lie by the maker of a note which has never
[*524] been delivered, against the payee, who *wrongfully ob-
tains possession, and refuses to give it up on demand,²² or where the defendant wrongfully negotiates the plaintiff's note

See *Hoagland v. Forest Park*, respects the owner have gotten etc., Amusement Co., 170 Mo. 335, out of his possession." p. 24.
70 S. W. 878, 94 Am. St. Rep. 740. 19—*State v. Omaha Nat. Bank*,
18—*Loucks v. Galloghy*, 1 Misc. 59 Neb. 483, 81 N. W. 319.
22, 23 N. Y. S. 126. Here the 20—*Buck v. Kent*, 3 Vt. 99;
plaintiff found a roll of bills on Pierce *v. Gilson*, 9 Vt. 216; Mur-
a desk in a bank and left them ray *v. Burling*, 10 Johns. 172;
with defendant, a teller in the Otisfield *v. Mayberry*, 63 Me. 197.
bank, to keep for the owner. Compare *Platt v. Potts*, 11 Ired.
No one having claimed them for two 266, 52 Am. Dec. 412; *Besherer v.*
years, the plaintiff demanded Swisher, 3 N. J. 748.
them and, being refused, brought 21—*Pierce v. Gilson*, 9 Vt. 216;
trover. It was held that the bills Spencer *v. Dearth*, 43 Vt. 98;
were not lost and judgment was Stone *v. Clough*, 41 N. H. 290. In given for the defendant. The New York and Alabama it has court says: "It has been held that in order to constitute legal been held that trover will not lie losing, the thing must have been under such circumstances. *Todd v. Crookshanks*, 3 Johns. 432; actually *lost* by the owner; and *Lowremore v. Berry*, 19 Ala. 130, not merely *mislaid*; that is, he 54 Am. Dec. 188.
must not voluntarily and pur- 22—*Groggerley v. Cuthbert*, 5
posely have laid it away in a cer- B. & P. 170; *Evens v Kymer*, 1
tain place, for a time, with the B. & Ad. 528; *Neal v. Hanson*,
intention of retaking it, and 60 Me. 84. For a chattel note,
then have forgotten where *Hicks v. Lyle*, 46 Mich. 488. For
he placed it; but it must have in- certificate of stock, *Daggett v.*
voluntarily and accidentally as *Davis*, 53 Mich. 35, 51 Am. Rep.

whereby he is compelled to pay it.²³ Trover will lie also for the conversion of a draft,²⁴ or certificate of stock,²⁵ or for specific money, which it was defendant's duty to turn over to the plaintiff,²⁶ but not for money which was given to the defendant to be used for a particular purpose and which the defendant converts to his own use,²⁷ or which is found due upon an accounting.²⁸ The guardian of the plaintiff settled a claim on an insurance policy in the defendant company for less than the amount due and surrendered the policy to the company, which claimed that the policy was paid in full. The guardian had no power to make such a settlement without an order of court. It was held that trover would lie for the policy.²⁹ In another case a board of trade obtained possession of the plaintiff's certifi-

91. For shares of stock, Payne v. Elliott, 54 Cal. 339, 35 Am. Rep. 80; Budd v. Mult. &c., Co., 12 Ore. 271, 53 Am. Rep. 355. For special deposit of bonds, First Nat. Bank v. Dunbar, 19 Ill. App. 558.

23—Detwiler v. Bainbridge Grocery Co., 119 Ga. 981, 47 S. E. 553; Thomson v. Gortner, 73 Md. 474, 21 Atl. 371; Brown v. St. Charles, 66 Mich. 71, 32 N. W. 926. Trover lies for the conversion of promissory notes. Carter v. Lehman, 90 Ala. 126, 7 So. 735; Dean v. Nichols, etc. Co., 95 Ia. 89, 63 N. W. 582; Walley v. Deseret Nat. Bank, 14 Utah, 305, 47 Pac. 107.

24—Lawatsch v. Cooney, 86 Hun, 546, 33 N. Y. S. 775.

25—Smith v. Thompson, 94 Mich. 381, 54 N. W. 168; Hine v. Commercial Bank, 119 Mich. 448, 78 N. W. 471; Berry v. Calder, 48 Hun, 449, 1 N. Y. S. 586; Condouris v. Imperial Turkish, etc. Co., 3 Misc. 66, 22 N. Y. S. 695; Kahaley v. Haley, 15 Wash. 678, 47 Pac. 23; Newman v. Mercan-
¹¹ T. T. Co., 189 Mo. 422, 98 S. 26—Benson v. Eli, 16 Colo. App. 494, 66 Pac. 450; Farmers' Alliance, etc. Co. v. McElhannon, 98 Ga. 394, 25 S. E. 558; McElhannon v. Farmers' Alliance, etc. Co., 95 Ga. 670, 22 S. E. 686; Cooke v. Bryant, 103 Ga. 727, 30 S. E. 435; Grand Pacific Hotel Co. v. Rowland, 88 Ill. App. 519; Bearss v. Preston, 66 Mich. 11, 32 N. W. 912; Shrimpton v. Culver, 109 Mich. 577, 67 N. W. 507; State v. Omaha Nat. Bank, 59 Neb. 483, 81 N. W. 319; Salem Trac-
tion Co. v. Anson, 41 Ore. 562, 67, Pac. 1015, 69 Pac. 675; Larson v. Dawson, 24 R. I. 317, 53 Atl. 93, 96 Am. St. Rep. 716; Tucker v. Nebeker, 2 App. D. C. 326. But see Farrelly v. Hubbard, 84 Hun, 391, 32 N. Y. S. 440.

27—Shrimpton v. Culver, 109 Mich. 577, 67 N. W. 507; Larson v. Dawson, 24 R. I. 317, 53 Atl. 93, 96 Am. St. Rep. 716.

28—Cooke v. Bryant, 103 Ga. 727, 30 S. E. 435.

29—Hayes v. Mass. Mut. Life Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 I. B. A. 202

cate of membership therein, cancelled it and denied his right thereto. It was held to be a conversion of the certificate and that the measure of damages was the value of the right evidenced by the certificate.³⁰ And where the defendant was authorized to collect a judgment in favor of the plaintiff and he wrongfully discharged it for a nominal sum, he was held liable in trover for a conversion of the judgment.³¹ But it will not lie against a magistrate for papers used in evidence by the plaintiff, before him, and placed on file.³²

One may bring trover for a building or other fixture owned by him on the land of another, which the owner of the land refuses to permit him to take away, and converts to his own use.³³ So where timber, crops or mineral are wrongfully severed from the land, anyone buying, selling or otherwise appropriating the same will be liable in trover.³⁴ But it is held that trover will not lie for oil mined by one in adverse possession and delivered to the defendant.³⁵ If a tenant wrongfully cuts and converts wood to his own use, the landlord may sue for conversion.³⁶

30—*Olds v. Chicago Open Board of Trade*, 33 Ill. App. 445. taches to the land a chattel of the vendor which he finds there.

31—*Rivinus v. Langford*, 75 Fed. 959, 21 C. C. A. 581. *Thweat v. Stamps*, 67 Ala. 96. And see *Dewitz v. Shoeneman*, 82 Ill. App. 378.

32—*Greene v. Mead*, 18 N. H. 505. Trover for parish records has been sustained. *Baker v. Fales*, 16 Mass. 487; *Stebbins v. Jennings*, 10 Pick. 172; *Sawyer v. Baldwin*, 11 Pick. 492. 34—*Central Coal & Coke Co. v. John Henry Shoe Co.*, 69 Ark. 302, 63 S. W. 49; *Omaha, etc. Refining Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; *Wright v. Skinner*, 34 Fla. 453, 16 So. 335; *Powers v. Tilley*, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; *Hunt v. Boston*, 183 Mass. 303, 67 N. E. 244.

33—*Osgood v. Howard*, 6 Me. 452, 20 Am. Dec. 322; *Russell v. Richards*, 11 Me. 371; *Hilborn v. Brown*, 12 Me. 162; *Smith v. Benson*, 1 Hill, 176; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Crippen v. Morrison*, 13 Mich. 23. Compare *Overton v. Williston*, 31 Pa. St. 155; *Prestcott v. Wells*, 3 Nev. 82; *Korbe v. Barbour*, 130 Mass. 255. So if one detaches a fixture and sets it up on his own land. *Woods v. McCall*, 67 Ga. 506. But not if the vendee of land wrongfully at-

35—*Griffin v. S. W. Pa. Pipe Lines*, 172 Pa. St. 580, 33 Atl. 578; *National Transit Co. v. Weston*, 121 Pa. St. 485, 15 Atl. 569.

36—*Brooks v. Rogers*, 101 Ala. 111, 13 So. 386.

What Constitutes Conversion. Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion. "The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right, amounts, in law, to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use."³⁷ "Conversion, which will sustain trover, must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment or dominion over it; an appropriation of it by the defendant to his own use, or to the use of a third person, in disregard or defiance of the owner's rights; or a withholding of possession under

37—WARNER, J., in *Liptrot v. v. Brooks*, 52 Mo. App. 364; Tut-Holmes, 1 Kelly, 381, 391. See *tle v. Hardenberg* 15 Mont. 219, *Hare v. Pearson*, 4 Ired. 76; *Gilm-38 Pac. 1070; State v. Omaha* Nat. Bank, 59 Neb. 483, 81 N. W. 319; *Brown v. Ela*, 67 N. H. 110, 30 Atl. 412; *Bigelow Co. v. Colcock*, 1 Nott & McC. 592, 9 Heintze, 53 N. J. L. 69, 21 Atl. Am. Dec. 729; *West Jersey R. R. Co. v. Trenton, &c., Co.*, 32 N. J. 109; *Waller v. Bowling*, 108 N. C. 517; *Weber v. Davis*, 44 Me. 147, 289, 12 S. E. 990, 12 L. R. A. 261; 69 Am. Dec. 87; *Roe v. Campbell*, *Putnam's Sons v. MacLeod*, 23 R. 40 Hun, 49; *Gordon v. Stockdale*, 4 I. 373, 50 Atl. 646; *Cernahan v. 89 Ind. 240; Dodge v. Myer*, 61 Chrisler, 107 Wis. 645, 83 N. W. Cal. 405; *Burnham v. Marshall*, 778; *McDonald v. Bayha*, 93 56 Vt. 365; *Johnson v. Farr*, 60 Minn. 139, 100 N. W. 679; *Inter- N. H. 426; Haddix v. Einzman*, 191 Mo. 248; *Lucas v. Sheridan*, 14 Ill. App. 443; *Hudman Brothers v. Du Bose*, 85 Ala. 446, 5 So. 124 Wis. 567, 102 N. W. 1077. See 162, 2 L. R. A. 475; *Mitchell v. Thomas*, 114 Ala. 459, 21 So. 991; as illustrating, *Baker v. Beers*, 38 S. W. 902; *Sprague Collecting 64 N. H. 102, 6 Atl. 35; Donahue Agency v. Spiegel*, 107 Ill. App. v. *Shippee*, 15 R. I. 453, 8 Atl. 541. 508; *Scollard v. Brooks*, 170 The indorsement and delivery Mass. 445, 49 N. E. 741; *House of an elevator receipt may be a conversion of the wheat de- scribed in it. Hamlin v. Car- ruthers*, 19 Mo. App. 567.

a claim of title inconsistent with the title of the owner.”³⁸

While, therefore, it is a conversion *where one takes the [*525] plaintiff’s property and sells or otherwise disposes of it,³⁹ it is equally a conversion if he takes it for a temporary purpose only, if in disregard of the plaintiff’s right. Therefore, if one hire a horse to go to one place, and drive him to another, this is a conversion, though he return him to the owner.⁴⁰ “The word conversion, by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them.”⁴¹ “Any asportation of a chattel for the

38—*Boling v. Kirby*, 90 Ala. not. *Evans v. Mason*, 64 N. H. 215, 7 So. 914, 24 Am. St. Rep. 789.

39—*Thompson v. Currier*, 24 N. H. 237; *Pickering v. Coleman*, 12 N. H. 148; *Shaw v. Peckett*, 25 Vt. 423; *Blood v. Sayre*, 17 Vt. 609; *Merchants’ and Planters’ Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406; *Wright v. Skinner*, 34 Fla. 453, 16 So. 335; *Howe v. Munson*, 65 Ill. App. 674; *Brown v. Campbell Co.*, 44 Kan. 237, 22 Pac. 1020, 21 Am. St. Rep. 274; *Powers v. Tilley*, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238. So is a second sale by a vendor in possession after the first sale. *Philbrook v. Eaton*, 134 Mass. 398.

40—*Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick. 136, 22 Am. Dec. 414; *Horsely v. Branch*, 1 Humph. 199; *Crocker v. Gullifer*, 44 Me. 491, 69 Am. Dec. 118; *Fisher v. Kyle*, 27 Mich. 454; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Cartlidge v. Sloan*, 124 Ala. 596, 26 So. 918; *Welch v. Mohr*, 93 Cal. 371, 28 Pac. 1060; *Malone v. Robinson*, 77 Ga. 719. A short delay on the way is

not. *Evans v. Mason*, 64 N. H. 98, 5 Atl. 766. Nor is delay caused by missing the road. *Spooner v. Manchester*, 133 Mass. 270, 43 Am. Rep. 514. Where one hired a team and driver and substituted another driver it was held a conversion. *Kellar v. Garth*, 45 Mo. App. 332. The doctrine of the text is repudiated in *Doolittle v. Shaw*, 92 Ia. 348, 60 N. W. 621, 54 Am. St. Rep. 562, 26 L. R. A. 366, wherein the court says: “To constitute a conversion in a case like that at bar, there must be some exercise of dominion over the thing hired, in repudiation of, or inconsistent with, the owner’s rights. We hold that the mere act of deviating from the line of travel which the hiring covered, or going beyond the point for which the horse was hired, are acts which, in and of themselves, do not necessarily imply an assertion of title or right of dominion over the property, inconsistent with, or in defiance of, the bailor’s interest therein.” pp. 354-5.

41—*MARTIN*, B., in *Burroughes v. Bayne*, 5 H. & N. 296, 302. For one to put another’s cow in his own pasture without authority is

use of a defendant or a third person amounts to a conversion, for this simple reason: that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times, and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion.⁴² The act must, indeed, be intended, and not merely accidental or negligent,⁴³ but it is not necessary that the result which actually follows should have been contemplated. Thus, an agent has been held liable in trover who, being intrusted with a note to get it discounted, and expressly directed not to let it go without the money, allowed another to take it to obtain the discount, who did *so, but appropriated the proceeds.⁴⁴ Here [*526]

proof of a conversion. *Ireland v. Horseman*, 65 Mo. 511. So if having turned another's cattle from his own land one finding them still in the highway knowingly drives them in the other direction from their owner's premises and they are lost. *Tobin v. Deal*, 60 Wis. 87, 50 Am. Rep. 345. So it is conversion for one to take goods from a seizing officer on a defective writ of replevin. *Adams v. McGlinchy*, 62 Me. 533.

42—*ALDERSON*, B., in *Fouldes v. Willoughby*, 8 M. & W. 540.

43—*Simmons v. Lillystone*, 8 Exch. 431. See *Bowlin v. Nye*, 10 Cush. 416; *Rembaugh v. Phipps*, 75 Mo. 422. If one, supposing B to own it, borrows A's plow from B, who has no right to lend it, and returns it to B, he is not liable to A for its conversion. *Frome v. Dennis*, 45 N. J. L. 515. A mere delay to deliver property by a carrier is no conversion. *Briggs v. New York, &c., R. R. Co.*, 28 Barb. 515. "Conversion upon which recovery in trover may be had must be a posi-

tive tortious act. Nonfeasance, or neglect of legal duty, mere failure to perform an act made obligatory by contract, or by which property is lost to the owner, will not support the action." *Bolling v. Kirby*, 90 Ala. 215, 222, 7 So. 914, 24 Am. St. Rep. 789.

44—*Laverty v. Snethen*, 68 N. Y. 522. The court cite and rely upon *Syeds v. Hay*, 4 T. R. 260; *Spencer v. Blackman*, 9 Wend. 167; *McMorris v. Simpson*, 21 Wend. 610, and distinguish the case from those in which the agent did nothing he was not authorized to do, but disobeyed instructions in doing it. *Dufresne v. Hutchinson*, 3 Taunt. 117; *Sarjeant v. Blunt*, 16 Johns. 74; *Palmer v. Jarman*, 2 M. & W. 282; *Cairnes v. Bleecker*, 12 Johns. 300. And, see *Dean v. Turner*, 31 Md. 52. It is a conversion to apply to another use notes executed for a specified purpose. *Haynes v. Patterson*, 95 N. Y. 1; *Badger v. Hatch*, 71 Me. 562. So for administrator wrongfully to pledge a note of the estate. *State v. Bern-*

was a distinct wrongful act in the agent, and not a mere negligent failure in the performance of a duty confided to him. So one having property entrusted to him to sell, is liable in trover if he exchanges it for other property, this being beyond his authority.⁴⁵ So if one entrusted with goods for a particular purpose, puts them in the hands of a third person contrary to orders.⁴⁶ So is the vendee in a conditional sale, if he disposes of the article before he has acquired any property by making payment.⁴⁷ So, if one obtains property by fraudulently pretending to have a lien upon it when he has not, the owner, though he delivered possession when the fraudulent claim was made, may bring trover for the value, the taking from him being wrongful.⁴⁸ Or if one obtains property under a void contract of sale, which is not paid for and refuses to restore it on demand.⁴⁹ Where the defendant obtained the plaintiff's property under a contract made while the plaintiff was intoxicated and incapacitated and the defendant knew it, it was held that the plaintiff could maintain trover without rescinding the contract, or restoring what he had received under it, or making a demand.⁵⁰ If an officer levies upon property which is exempt

ing, 74 Mo. 87. Where defendants received from plaintiff a note for collection, sent it to a correspondent in another State, which collected it and became insolvent before remitting, whereby proceeds lost, it was held not a conversion by defendants. *Gilbert v. Walker*, 64 Conn. 390, 30 Atl. 132.

45—*Hass v. Damon*, 9 Iowa 589. The agent to loan on good real estate converts money if he retains it and procures the transfer to his principal of a security which he knows to be worthless. *King v. Mackellar*, 109 N. Y. 215, 16 N. E. 201. Where an agent had authority to sell for cash only, a sale on credit was held not a conversion. *Loveless v.*

Fowler, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407.

46—*Boldewahn v. Schmidt*, 89 Wis. 444, 62 N. W. 177.

47—*Sargent v. Gile*, 8 N. H. 325; *Grace v. McKissack*, 49 Ala. 163. So is the purchaser from him. *Eaton v. Munroe*, 52 Me. 63.

48—*Dudley v. Abner*, 52 Ala. 572.

49—*Strauss v. Schwab*, 104 Ala. 669, 16 So. 692.

50—*Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846. Where a purchase has been effected by means of false representation the vendor may maintain trover without demand. *Thurston v. Blanchard*, 22 Pick. 18; *Green v. Russell*, 5 Hill 183; *Thompson v. Roe*,

from execution, and proceeds to a sale of the same, the owner may treat this as a conversion.⁵¹ So if he levy on the property of the plaintiff under a writ against another party,⁵² or on property in the possession of a mortgagee under a writ against the mortgagor.⁵³ But a levy upon and sale of mortgaged chattels subject to the mortgage when the mortgage is not due and the mortgagee is not entitled to possession, is held not a conversion by the officer, when nothing is done by him to put the property beyond the reach of the mortgagee.⁵⁴ But a bailee will not be liable in trover for a loss of the property through larceny or negligence, though he might be, perhaps, on his implied contract of bailment.⁵⁵ And where a bank was entrusted with bonds for safe* keeping, which, when called for, were [*527] found to be gone, and the evidence tended equally to show that they had been lost, stolen, or misdelivered, it was held trover would not lie, since it could only be for a misdelivery that the bank, under the circumstances, could be liable, and the

16 Conn. 71; *Noble v. Adams*, 7 Taunt. 59; *Bristol v. Wilsmore*, 2 D. & R. 755; *Dean v. Ross*, 178 Mass., 397, 60 N. E. 119. In the latter case the defendant obtained the plaintiff's property by falsely representing that the plaintiff's deceased husband had directed through a medium that she give it to the defendant. Trover for the property was sustained.

51—*Sanborn v. Hamilton*, 18 Vt. 590. So if he seize A's goods on a writ against B although they are not removed. *Johnson v. Farr*, 60 N. H. 426. See *Scudder v. Anderson*, 54 Mich. 122; so when A has warned him that his wheat is mingled with B's in a bin. *Behler v. Drury*, 51 Mich. 111. A conversion is complete at the sale when a proper levy has been made on growing crops. *Howard v. Rugland*, 35 Minn. 388.

See *Molm v. Barton*, 27 Minn. 530. If an officer of his own motive retains after a trial a drum of the prisoner to prevent future disturbance it is a conversion. *Thatcher v. Weeks*, 79 Me. 547, 11 Atl. 599.

52—*Milner & Kettig Co. v. De Loach Mill Mfg. Co.*, 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63; *Yockey v. Smith*, 181 Ill. 564, 54 N. E. 1048, 72 Am. St. Rep. 286. So is a levy on partnership property on a writ against one partner. *Russell v. Cole*, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432.

53—*Lander v. Proper*, 6 Dak. 64, 50 N. W. 400; *Jones v. Kellogg*, 51 Kan. 263, 33 Pac. 997, 37 Am. St. Rep. 278.

54—*Locke v. Streck*, 54 Neb. 472, 74 N. W. 970.

55—*Hawkins v. Hoffman*, 6 Hill 586, 41 Am. Dec. 767; *Packard v. Getman*, 4 Wend. 613. A mere

misdelivery was not established.⁵⁶ In any case, the act of a bailee that shall amount to a conversion must be inconsistent with the bailment, and known by him to be so.⁵⁷ Therefore a commission merchant who continues to make sales after his authority has terminated, but without notice to him of the fact, is not guilty of conversion, but is liable only for an accounting.⁵⁸

When the mortgagor of chattels is left in possession, he has not only such a special property as will enable him to maintain trover against a wrong-doer, but he has also, in his right of redemption, a property which is or may be valuable, and which he may lawfully sell in recognition of the right of the mortgagee. Such a sale is therefore no conversion of the mortgagee's interest.⁵⁹ But a sale in denial of the mortgagee's right would be a

negligent injury is no conversion. *Nelson v. Whetmore*, 1 Rich. 318. Nor does the larceny of the goods from an officer render him liable in trover. *Dorman v. Kane*, 5 Allen 38.

56—*Dearbourn v. Union Nat. Bank*, 58 Me. 273. If a bank treats a special deposit as general assets it is a conversion. *First Nat. Bk. v. Dunbar*, 19 Ill. App. 558; so if it collects and surrenders drafts with forged indorsements. *People v. Bank*, 75 N. Y. 547. If one lets another have securities to help him start in business and creates the relation of debtor and creditor, trover will not lie to recover the securities. *Borland v. Stokes*, 120 Pa. St. 278, 14 Atl. 61.

57—A delivery to the husband by a bailee of the wife of the wife's property is a conversion. *Markoe v. Tiffany*, 26 App. Div. 95, 49 N. Y. S. 751.

58—*Jones v. Hodgkins*, 61 Me. 480. See, for the same principle, *Fifield v. Maine Cent. R. R. Co.*, 62 Me. 77. If a commission mer-

chant sells B's goods supposing them to be A's, and pays over the proceeds to the latter, he is liable for conversion. *Cerkel v. Waterman*, 63 Cal. 34. Deposit as collateral by a partner for his individual debt of bonds loaned to the firm for a temporary purpose is a conversion. *Birdsall v. Davenport*, 43 Hun, 552. See *Nichols v. Gage*, 10 Ore. 82; *Union, &c., Bank v. Farrington*, 13 Lea, 333. So is an unauthorized sale by a broker. *Caswell v. Putnam*, 41 Hun, 521; or a refusal to sell when ordered. *Coleman v. Pearce*, 26 Minn. 123. See further as to conversion by bailees. *Goell v. Smith*, 128 Mass. 238; *Thacher v. Moors*, 134 Mass. 156; *Rosenweig v. Frazer*, 82 Ind. 342; *Loveless v. Fowler*, 79 Ga. 134, 4 S. E. 103; *Dodge v. Myer*, 61 Cal. 405; *Allgear v. Walsh*, 24 Mo. App. 134; *Seton v. Lafone*, L. R. 18 Q. B. D. 139, 19 Id. 68; *Donlin v. McQuade*, 61 Mich. 275, 28 N. W. 114. 59—*White v. Phelps*, 12 N. H. 382; *Davis v. Rosenbaum*, 179 Ill. 112, 53 N. E. 585.

conversion in him, and, perhaps, in the purchaser also. It would certainly be a conversion in the purchaser, if he took the

*property on a purchase of the whole interest, and persisted in a denial of the mortgagee's rights afterwards.⁶⁰ [*528]

The mere purchase of mortgaged chattels of the mortgagors in possession without notice of the mortgage is held not to be a conversion.⁶¹ And where such property is delivered to a broker for sale by the mortgagor and is sold by the latter, it is held not to be a conversion by the broker.⁶²

Neither the first mortgagee, nor one to whom he has sold the property, is liable in trover to the second mortgagee. Having the right of possession defeasable only on performance of the condition of the mortgage, he may assign his mortgage and sell his mortgaged property to a third person, subject only to the

60—See this discussed in *Milar v. Allen*, 10 R. I. 49, where DURFEE, J., cites and comments upon *Ashmead v. Kellogg*, 23 Conn. 70, and *Coles v. Clark*, 3 *Cush.* 399, with approval, and refers also to *White v. Phelps*, 12 N. H. 382; *Bellune v. Wallace*, 2 Rich. 80; *Spriggs v. Camp*, 2 *Speers* 181. The sale of a chattel which, when bought, is subject to a recorded chattel mortgage, is a conversion as against the mortgagee. *Church v. McLeod*, 58 Vt. 541; *Woods v. Rose*, 135 Ala. 297, 33 So. 41; *Belser v. Youngblood*, 103 Ala. 545, 15 So. 863; *Beall v. Folhnar*, 122 Ala. 414, 26 So. 1; *Chittenden v. Pratt*, 89 Cal. 178, 26 Pac. 626; *Nichols v. Barnes*, 3 Dak. 148, 14 N. W. 110; *Lafayette County Bank v. Metcalf*, 40 Mo. App. 494; *Merchants & Planters Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406. An auctioneer who makes the sale is guilty of conversion. *Brown v. Campbell Co.*, 44 Kan. 237, 22 Pac. 1020, 21 Am. St. Rep. 274. So of wheat sold to an ele-

vator company. *Phillip Best, &c., Co. v. Pillsbury*, 5 Dak. 62, 37 N. W. 763. So is the refusal to deliver the chattel to the mortgagee after the mortgage is due. *Mattingly v. Paul*, 88 Ind. 95. So is the refusal of a mortgagee to accept a tender and his sale of the chattel. *Rice v. Kahn*, 70 Wis. 323, 35 N. W. 465; or, of a pledgee to deliver stock upon tender of the debt. *McIntire v. Blakely*, 12 Atl. Rep. 325 (Penn).

61—*Dean v. Cushman*, 95 Me. 454, 50 Atl. 85, 85 Am. St. Rep. 425, 55 L. R. A. 959. The court says: “We hold that one who purchases in good faith, without actual notice, mortgaged chattels of the mortgagor in possession, if he has merely received the goods into his own possession, and has exercised no other dominion or control over them to the exclusion of the mortgagee or in defiance of his rights, is not liable for a conversion, without demand or refusal.” p. 457.

62—*Dawes v. Rosenbaum*, 179

right of redemption of the mortgagor and those who claim under him.⁶³ But it seems that he cannot sell out the property in parcels, and if he should, trover would lie, as this would impair, and perhaps defeat the right to redeem.⁶⁴ If a mortgagee takes possession of mortgaged chattels and asserts absolute ownership over them, it is a conversion, though the mortgage authorizes him to take possession at any time for the purpose of foreclosure.⁶⁵ If a mortgage authorizes a public sale only, a private sale is a conversion.⁶⁶ So the sale of more than enough to satisfy the mortgagee's claim, is a conversion as to the excess.⁶⁷

One who buys property must, at his peril, ascertain the ownership, and if he buys of one who has no authority to sell, his taking possession, in denial of the owner's right, is a conversion.⁶⁸ The

Ill. 112, 53 N. E. 585. *Contra*,
Lafayette County Bank v. Met-
calf, 40 Mo. App. 494.

63—*Landon v. Emmons*, 97 Mass. 37, citing *Homes v. Crane*, 2 Pick. 610. He may be liable if he assumes to sell the complete title. *Ashmead v. Kellogg*, 23 Conn. 70.

64—*Spaulding v. Barnes*, 4 Gray, 330. It would seem, however, that if the mortgage was past due, this should be regarded as foreclosure and satisfaction to the extent of the sales. Trover will lie against mortgagee who sells before condition broken. *Eslow v. Mitchell*, 26 Mich. 500.

It is a conversion to draw off part of a cask of liquor and fill it up with water. *Richardson v. Atkinson*, 1 Stra. 576. And while one, the identity of whose property is lost, by being commingled with something different, may claim the whole, so he may treat the commingling as a conversion, at his election. See, *Martin v. Mason*, 78 Me. 452; *Morningstar v. Cunningham*, 110 Ind. 328, 59 Am. Rep. 211.

65—*Howery v. Hoover*, 97 Ia. 581, 66 N. W. 772; *Mitchell v. Thomas*, 114 Ala. 459, 21 So. 991. If a second mortgagee participates in sale by mortgagor he is liable in trover to first mortgagee. *Henderson v. Foy*, 96 Ala. 205, 11 So. 441, 38 Am. St. Rep. 94.

66—*Colby v. W. W. Kimball Co.*, 99 Ia. 321, 68 N. W. 786.

67—*Omaha Auction, etc., Co. v. Rogers*, 35 Neb. 61, 52 N. W. 826.

68—*Marx v. Nelms*, 95 Ala. 304, 10 So. 551; *Central Coal & Coke Co. v. John Henry Shoe Co.*, 69 Ark. 302, 63 S. W. 49; *Omaha, etc., Refining Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; *Miller v. Thompson*, 60 Me. 322; *Powers v. Tilley*, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; *Solton v. Gerdon*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843; *McDaniel v. Adams*, 87 Tenn. 756, 11 S. W. 939. See *Hovey v. Bromley*, 85 Hun, 540. 33 N. Y. S. 400. Another who contributes to the purchase price, and gets the vessel insured in his own name, will be jointly liable with him. *Miller v. Thompson*,

vendor is equally liable, whether he sells the property as his own or as officer or agent; and so is the party for whom he acts, if he assists in or advises the sale.⁶⁹ So it is no protection to one who has received property and disposed of it in the usual course of trade, that he did so in good faith, and in the belief that the person from whom he took it was owner, if in fact the possession of the latter was tortious.⁷⁰ But merely receiving property from the wrongful possessor, and returning it before notice of his want of title, is no conversion.⁷¹ Nor is it a conversion

60 Me. 322. See *Hyde v. Noble*, 1; *Cooper v. Chitty*, Burr. 3; *Garrison v. Carlisle*, 4 Cl. & F. 693; *Moore v. Eldred*, 42 Vt. 13; *Calkins v. Lockwood*, 17 Conn. 155, 42 Am. Dec. 729. A town officer who removes a quantity of fence from the land of its owner, mistakenly supposing it to belong to the town, is liable for the value in trover. *Smith v. Colby*, 67 Me. 169.

70—*Hardman v. Booth*, 1 H. & C. 803; *Hollins v. Fowler*, L. R. 7 H. L. Cas. 757; S. C. 14 Moak, 138; S. C. in Ex. Ch. L. R. 7 Q. B. 616; S. C. 3 Moak, 232; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *Shearer v. Evans*, 89 Ind. 400; *Smith v. Clews*, 33 Hun, 501; *Marx v. Nelms*, 95 Ala. 304, 10 So. 551; *Omaha, etc., Refining Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; *Powers v. Tilley*, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304. See *Warren v. Barnett*, 83 Ala. 208, 3 So. 609.

71—*Hill v. Hayes*, 38 Conn. 532; *Nelson v. Iverson*, 17 Ala. 216; *Marks v. Robinson*, 82 Ala. 69; *Hudman Brothers v. DuBose*, 85 Ala. 446, 5 So. 162, 2 L. R. A. 475. The assignee of one who holds goods for sale, with a lien upon them for a certain amount in his own favor, is liable in trover if he proceeds to sell them. For, though he has a right to retain

69—*Billiter v. Young*, 6 El. & Bl.

merely to assist a mortgagor to remove the goods from one place to another, the mortgagor being left in possession.⁷² But one who assists in a wrongful taking of goods is liable, though he acted as agent merely, for agency cannot be recognized as a protection in wrongs.⁷³ So if one hires a horse for another, who

drives it to death, while the hirer drives another beside
[*530] it, the *two are jointly liable to the owner in trover.⁷⁴

But it is no conversion to find a purchaser for one who wrongfully sells the goods, even though defendant also receives the proceeds of the sale, applying them on a demand against the owner.⁷⁵

Where one holds possession of property as the agent or servant of another, his refusal to deliver it on demand is not a conversion.⁷⁶ If one in possession of property asserts ownership in himself it is a conversion as to the true owner,⁷⁷ but otherwise if he never had possession.⁷⁸ And so it is a conversion, if one

them until the lien is satisfied, the authority to sell is a personal trust, and cannot be assigned. *Terry v. Bamberger*, 44 Conn. 558.

72—*Strickland v. Barrett*, 20 Pick. 415. See *Sparks v. Purdy*, 11 Mo. 219; *Nelson v. Whetmore*, 1 Rich. 318; *Bushel v. Miller, Stra.* 128.

73—*McPartland v. Read*, 11 Allen, 231; *Edgerly v. Whalen*, 106 Mass. 307; *Cernahan v. Chrisler*, 107 Wis. 645, 83 N. W. 778. It is a conversion to buy from trespassers fruit stolen from the plaintiff's land. *Freeman v. Underwood*, 66 Me. 229.

74—*Banfield v. Whipple*, 10 Allen 27, 87 Am. Dec. 618.

75—*Presley v. Powers*, 82 Ill. 125. The case was peculiar. A married woman bought the goods on credit, and died before paying for them. The creditor called on the husband for payment, finding him in possession. The husband

offered to sell back the goods, but the creditor declined to purchase, offering, however, to find a purchaser, which he did. The husband sold to the purchaser, handing the proceeds over to the creditor. On suit being subsequently brought by the administrator of the wife against the creditor, *held*, no conversion by him.

Where the horses of one man were taken for government use as the property of another, and the latter was allowed and paid the price therefor, *held*, to be a conversion by him. *Thomas v. Sternheimer*, 29 Md. 268.

76—*Hensey v. Howland*, 10 Misc. 756, 31 N. Y. S. 823; *Phillips v. Shackford*, 21 R. I. 422, 44 Atl. 306.

77—*Oakley v. Randolph*, 54 Kan. 779, 39 Pac. 699.

78—*Shaw v. Swope*, 8 Pa. Supr. Ct. 491.

asserts his intent to hold property until a certain condition is fulfilled, if he has no right to insist upon the condition.⁷⁹ An unauthorized sale of pledged property,⁸⁰ or any unauthorized dealing therewith in antagonism to the rights of the pledgor,⁸¹ is a conversion. So where the pledgee of a note took a renewal note payable to his own order and surrendered the old note.⁸² A delivery of goods by a carrier to the wrong party is a conversion.⁸³ So is delivery to the consignee after notice of stoppage *in transitu*.⁸⁴ So if delivery is wrongfully withheld.⁸⁵ Where the plaintiff had a right to remove his property from the defendant's premises and the defendant forbade it, it was held a conversion.⁸⁶ One selling stolen cattle as an innocent agent of the thief is liable in trover.⁸⁷ A criminal when arrested had certain property of the plaintiff in his possession, which the police took possession of and turned over to the sheriff with the prisoner. The plaintiff demanded the property of the police,

79—Clafin *v.* Gurney, 17 R. I. Ry. Co., 103 Ia. 325, 72 N. W. 185, 20 Atl. 932.

80—Woodworth *v.* Hascall, 59 Neb. 124, 80 N. W. 483; Griggs *v.*

Day, 136 N. Y. 152, 32 N. E. 612, 32 Am. St. Rep. 704, 18 L. R. A. 120; Glidden *v.* Mechanics Nat. Bank, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737; Blood *v.* Erie Dime S. & L. Co., 164 Pa. St. 95, 30 Atl. 362.

81—Schaaf *v.* Fries, 90 Mo. App. 111. The pledgor, in order to maintain trover, must tender the amount of the debt. *Ibid.*

82—Stevens *v.* Wiley, 165 Mass. 402, 43 N. E. 177. The fact that the pledgee collects pledged notes and insists upon retaining more than he is entitled to does not make out a conversion of the notes. De Clark *v.* Bell, 10 Wyo. 1, 65 Pac. 852.

83—Louisville, etc., R. R. Co. *v.* Barkhouse, 100 Ala. 543, 13 So. 534; Hamilton *v.* Chicago, etc.,

536; Gibbons *v.* Farwell, 63 Mich. 344, 29 N. W. 855.

84—Rosenthal *v.* Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527.

85—Railroad Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117; Louisville, etc., R. R. Co. *v.* Lawson, 88 Ky. 496, 11 S. W. 511. In Wamsley *v.* Atlas S. S. Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699, it is held that a carrier is not liable in trover for mere nonfeasance, as not being able to find or account for the goods, but may be for misfeasance.

86—Erskine *v.* Savage, 96 Me. 57, 51 Atl. 242.

87—Laughlin *v.* Barnes, 76 Mo. App. 258. So is an auctioneer who sells property by direction of one who had no right to sell it. Robinson *v.* Bird, 158 Mass. 357, 33 N. E. 523, 35 Am. St. Rep. 495.

but they did not notify the sheriff of the claim. After conviction the sheriff turned the property back to the prisoner. This was held a conversion by the sheriff.⁸⁸ Where one wrongfully converts a chiffonier, he is liable for articles locked in it, whether he knew they were there or not.⁸⁹ Where a clerk of court deposited trust funds in his own name without special authority so to do, he was held guilty of a conversion.⁹⁰

A livery stable keeper, having possession of the plaintiff's horses under a lien for board, may use them in his business to the extent necessary for proper exercise and such use does not amount to a conversion.⁹¹ It is not a conversion for the defendant to put his brand upon the calves of the plaintiff, if they remain in the plaintiff's possession.⁹² A bank which receives a draft with a bill of lading for flour attached, and collects the draft and pays over the proceeds as directed by the consignor, is not liable in trover for the flour, though the consignee had no title thereto.⁹³

Demand of Possession and Refusal to Deliver. Where the defendant has come into the possession of property lawfully or without fault, it is in general necessary to make demand of possession of him before suit will lie.⁹⁴ "What is meant by one coming lawfully into possession of the property is, where he finds it and retains it for the true owner, or where he obtains the possession of the property by the permission or consent of

88—Loeffel v. Pohlman, 47 Mo. App. 574.

89—Jesurun v. Kent, 45 Minn. 222, 47 N. W. 784.

90—Dirks v. Juel, 59 Neb. 353, 80 N. W. 1045.

91—Brintnall v. Smith, 166 Mass. 253, 44 N. E. 223.

92—Sawyer v. Kenan, 95 Ga. 552, 22 S. E. 324.

93—Walker v. First Nat. Bank, 43 Ore. 102, 72 Pac. 635. Trover cannot be brought against a receiver without permission of the court. Montgomery v. Enslen, 126 Ala. 654, 28 So. 626.

94—Moore v. Monroe Refrigerator Co., 128 Ala. 621, 29 So. 447; Dieterle v. Bekin, 143 Cal. 683, 77 Pac. 664; Phelps, Dodge & Palmer Co. v. Halsell, 11 Okl. 1, 65 Pac. 340. Where one buys or leases property in good faith of one who has no title, he is not liable in trover therefor until demand and refusal or until he has done some other act with respect to the property that amounts to a conversion. Metcalfe v. Dickman, 43 Ill. App. 284; Hovey v. Bromley, 85 Hun, 540, 33 N. Y. S. 400.

the plaintiff, as where the relation of bailor and bailee exists. In this latter class of cases a demand and refusal would be necessary, unless it could be shown the defendant had appropriated the article so found to his own use, or had disposed of the property bailed contrary to the terms and stipulations of the contract of bailment.⁹⁵ An instance has been given of an abuse of the contract of bailment in the case of *property [*531] hired for one purpose and appropriated or used for another. In such a case the abuse terminates the bailment, and the owner may retake his property without demand, or sue for its value. It has been made a question whether the pledgee of property repledging it without authority before the debt is paid for which he held it, does not thereby terminate the bailment so as to render him liable for a conversion; but it is settled that he does not.⁹⁶ Neither would he had the pledge been sold instead of repledged.⁹⁷ This, it will be observed, was a case in which the plaintiff was not, according to the contract of bailment, entitled to have the property restored to him until his debt was paid. Had the pledgee held the property subject to the owner's order, a sale⁹⁸ or a mere delivery to another, without right,⁹⁹ would have constituted a conversion and rendered demand of possession unnecessary. And he would have held it subject to the owner's order had he purchased it of one who had no authority to sell it.¹

95—WARNER, J., in *Liptrot v. Md.* 269; *Lawrence v. Maxwell*, 53 N. Y. 19.
Jones, 1 Kelly 381, 391-2. See *Dean v. Turner*, 31 Md. 52. And, further, instances where disregard of contract of bailment relieves of need of demand. *Scott v. Hodges*, 62 Ala. 337; *Haas v. Taylor*, 80 Ala. 459, 2 So. 633; *Bunger v. Roddy*, 70 Ind. 26; *Rodick v. Co-burn*, 68 Me. 170.

96—Donald *v. Suckling*, L. R. 1 Q. B. 585.

97—*Halliday v. Holgate*, L. R. 3 Exch. 299. Compare *Bulkeley v. Welch*, 31 Conn. 339; *Baltimore, &c., Co. v. Dalrymple*, 25

98—*Bloxam v. Hubbard*, 5 East 407. See *Rosenweig v. Frazer*, 82 Ind. 342.

99—*Syeds v. Hay*, 4 T. R. 260.

1—*Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581, citing *Coles v. Clark*, 3 Cush. 399. The property was government bonds, received and sold by the defendant in good faith, but of course his good faith could not protect him when sued by the owner for the conversion. It was held in *Gilmore v. Newton*, 9 Allen 171, 85

A man acquires rightful possession of chattels if they are upon land at the time he recovers it in ejectment, and trover will not lie for their conversion until after demand and refusal to allow the plaintiff to take them away.² There need, however, be no formal demand in such a case, for if the owner attempts to remove his property, and is not suffered to do so, his attempt is equivalent to a demand.³ A demand and refusal are unnecessary if a conversion is otherwise shown,⁴ or if possession is obtained by fraud.⁵

[*532] *The refusal to surrender possession in response to a demand is not of itself a conversion; it is only evidence

Am. Dec. 749, that one who receives possession from another who had no right, and treats the property as his own, is not entitled to a demand. See, also, *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Prime v. Cobb*, 63 Me. 200.

2—*Thorogood v. Robinson*, 6 Q. B. 769. See *Witherspoon v. Blewett*, 47 Miss. 570.

3—*Badger v. Batavia Paper Co.*, 70 Ill. 302. See, also, *Woodis v. Jordan*, 62 Me. 490. Merely selling and giving a deed of land by the landlord is no conversion of the tenant's fixtures; the tenant's right to take them away is not affected by the conveyance. *Davis v. Buffum*, 51 Me. 160, citing *Burnside v. Twitchell*, 43 N. H. 390. If a refusal is based on a claim of title, a demand for a building is sufficient though defendant has not at hand means to take it away. *Edmundson v. Bric*, 136 Mass. 189.

4—*Ensley Lumber Co. v. Lewis*, 121 Ala. 94, 25 So. 729; *Boutwell v. Parker*, 124 Ala. 341, 27 So. 309; *Woods v. Rose*, 135 Ala. 297, 33 So. 41; *Anderson v. Agnew*, 38 Fla. 30, 20 So. 766; *Howitt v. Es-*

telle, 92 Ill. 218; *Hayes v. Mass. Mut. Life Ins. Co.*, 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; *Union Stock Yards & T. Co. v. Mallory, etc., Co.*, 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341; *Freehill v. Hueni*, 103 Ill. App. 118; *Buntin v. Fritchett*, 85 Ind. 247; *Hake v. Buell*, 50 Mich. 89; *Kenrick v. Rogers*, 26 Minn. 344; *Adams v. Castle*, 64 Minn. 505, 67 N. W. 637; *Gross v. Scheel*, 67 Neb. 223, 93 N. W. 418; *Porell v. Cavanaugh*, 169 N. H. 364, 41 Atl. 860; *Willard v. Monarch El. Co.*, 10 N. D. 400, 87 N. W. 996; *Railroad Co. v. Donnell*, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117; *Velzian v. Lewis*, 15 Ore. 539, 16 Pac. 631; *Claflin v. Gurney*, 17 R. I. 185, 20 Atl. 932.

5—*Thompson v. Roe*, 16 Conn. 71; *Thurston v. Blanchard*, 22 Pick. 18; *Moody v. Drown*, 58 N. H. 45; *Green v. Russell*, 5 Hill, 183; *Powell v. Powell*, 71 N. Y. 71; *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846; *Warner v. Vallily*, 13 R. I. 483. But if before contract is avoided goods have passed to vendee's assignee

of a conversion, and like other inconclusive acts is open to explanation.⁶ It may, for instance, be shown that the property has perished, or been lost without the bailee's fault, and that he does not surrender possession simply because it has become impossible.⁷ Thus in trover for three bales of cotton the plaintiff's evidence showed that he held and owned certificates for the cotton in the defendant's warehouse, that the plaintiff's agent made demand therefor, that at the time of the demand the agent and the defendant searched through the warehouse for it and did not find it and that it had not been found or received by the plaintiff. The defendant's evidence showed that the cotton was not in his possession at the time of the demand or afterwards and that it had not been delivered to anyone else. This evidence was held insufficient to sustain the action and the court says: "Without pursuing further an examination of authorities, it may safely be said, that a mere failure by a bailee on demand made, to deliver goods which have been entrusted to him, is not a conversion which will support an action of trover, if he sets up no title hostile to or inconsistent with the title of the bailor, or has not appropriated them to his own use, or to the use of a third person, or exercised over them a dominion inconsistent with the bailment. * * * The failure to deliver, unexplained, raises a presumption of negligence against them, and may involve them in a liability for a breach of the contract of bailment, or for negligence in the performance of the duty

in insolvency, demand must be made of him. *Goodwin v. Wertheimer*, 99 N. Y. 149.

6—*Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28;

Coffin v. Anderson, 4 Blackf. 395; *Beckman v. McKay*, 14 Cal. 250; *Dietus v. Fuss*, 8 Md. 148; *Gordon v. Stockdale*, 89 Ind. 240; *Sprague Collecting Agency v. Spiegel*, 107 Ill. App. 508. But it is sufficient evidence if one holds wrongfully. *Weston v. Carr*, 71 Me. 356; *Sunny*

South Lumber Co. v. Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. 902; *Bigelow Co. v. Heintz*, 53 N. J. L. 69, 21 Atl. 109; *Towne v. St. Anthony, etc., El. Co.*, 8 N. D. 200, 77 N. W. 608.

7—*Dearbourn v. Union National Bank*, 58 Me. 273; *Jefferson v. Hale*, 31 Ark. 286. As where it was taken from him by an armed force without his fault. *Abraham v. Nunn*, 42 Ala. 51. See *Griffith v. Zippenwick*, 28 Ohio St. 388.

springing from the contract, but it is not the conversion; the positive, tortious act, indispensable to maintain trover.⁷⁸ In any case where at the time of the demand the defendant has neither the actual nor constructive possession, and, therefore, cannot deliver the property in response to the demand, his liability is in no manner affected by the demand and refusal; for if he had been guilty of a conversion before, the demand was unnecessary, and if he had not been, a failure to do what for any reason he was unable to do, could not render him so.⁹ Still the demand may, even under such circumstances, have this importance: it may put the defendant apparently in the wrong, and throw upon him the burden of showing why he fails to surrender the property.¹⁰

8—Davis *v.* Hunt, 114 Ala. 146, 151, 152, 21 So. 468.

9—Dawes *v.* Rosenbaum, 179 Ill. 112, 53 N. E. 585. If the defendant has not the property he should put his refusal on that ground. An unqualified refusal is *prima facie* evidence of conversion. Hartford Ice Co. *v.* Greenwoods Co., 61 Conn. 166, 23 Atl. 91, 29 Am. St. Rep. 189.

10—Davis *v.* Buffum, 51 Me. 160. See Hill *v.* Belasco, 17 Ill. App. 194. A refusal must be shown. Taylor *v.* Hanlon, 103 Pa. St. 504. Refusal to comply with a premature demand is no evidence of conversion. Hagar *v.* Randall, 62 Me. 439. If demand is made by an agent, and is not complied with because the agent gives no evidence of authority, this does not make out a conversion. Watt *v.* Potter, 2 Mason, 77. Compare Ingalls *v.* Bulkley, 15 Ill. 224; Robinson *v.* Burleigh, 5 N. H. 225. So, if demand is made on an agent for property held by him for his principal, his refusal to deliver does not render him liable in trover. Carey *v.* Bright, 58 Penn. St. 70. If at the time of demand the property is present, and no objection is made to its being taken, and the only refusal is a refusal to carry and deliver it to the owner at his home, this is no conversion, even though defendant ought to have so carried it. Farrar *v.* Rollins, 37 Vt. 295. There must be a definite demand and refusal. Ware *v.* First Cong. Soc. 125 Mass. 584. Instances Richards *v.* Pitts Ag'l Wks., 37 Hun, 1; Ingersoll *v.* Barnes, 47 Mich. 104; Wykoff *v.* Stevenson, 46 N. J. L. 326. A qualified reasonable refusal for the purpose of ascertaining ownership is not enough. Buffington *v.* Clarke, 15 R. I. 437, 8 Atl. 247; Flannery *v.* Brewer, 66 Mich. 509, 33 N. W. 522; Butler *v.* Jones, 80 Ala. 436. A demand and refusal need not be alleged, but may be proved, if necessary, under the allegation that the defendant converted and disposed of the property to his own use. Daggett *v.* Gray, 110 Cal. 169, 42 Pac. 568.

***Conversion by Tenant in Common.** The authorities [*533] are irreconcilably at variance as to what may constitute a conversion by one tenant in common of his co-tenant's interest, agreeing only in this, that a culpable loss or destruction by one will render him liable.¹¹ The rule in England is that neither a claim to exclusive ownership by one, nor the exclusion of the other from possession, nor even the sale of the whole, can be treated in the law as the equivalent of loss or destruction, or be considered a conversion;¹² and this rule is adopted in some cases in Vermont,¹³ and in North Carolina it is also followed, but with this qualification, that a sale of the property out of the State may be treated as a loss or destruction.¹⁴ But in other cases any sale of the whole interest by one tenant in common has been held a conversion.¹⁵ And in still others it has been held that

11—*Mayhew v. Herrick*, 7 C. B. 229; *Hyde v. Stone*, 9 Cow. 230; *White v. Brooks*, 43 N. H. 402; *Reed v. McRill*, 41 Neb. 206, 59 N. W. 775; *Gates v. Bowers*, 168 N. Y. 14, 60 N. E. 1043; *McCarthy v. McCarthy*, 40 Misc. 180, 81 N. Y. S. 660. “One joint tenant or tenant in common cannot maintain trover against his co-owner for a thing still in his possession, for the possession of one is the possession of both. It is only when one tenant in common has destroyed, sold or otherwise disposed of the thing in common, so as to exclude the right of the other, that the other may bring trover.” *Moore v. Walker*, 124 Ala. 199, 202, 26 So. 984.

12—*Mayhew v. Herrick*, 7 C. B. 229. See *Barnardistone v. Chapman*, Bull. N. P. 34.

13—*Tubbs v. Richardson*, 6 Vt. 442, 27 Am. Dec. 570; *Sanborn v. Morrill*, 15 Vt. 700, 40 Am. Dec. 701; *Barton v. Burton*, 27 Vt. 93; *Lewis v. Clark*, 59 Vt. 363. So levy of attachment where posses-

sion is not changed. *Spaulding v. Orcutt*, 56 Vt. 218. In Maine, the mere claim to the exclusive ownership of a horse is held to be no conversion. *Dain v. Cowing*, 22 Me. 347, 39 Am. Dec. 585. See *Symonds v. Harris*, 51 Me. 14, 81 Am. Dec. 533; *Osborn v. Schenck*, 83 N. Y. 201. But if one distinctly appropriates the whole to his own use, it is. *Needham v. Hill*, 127 Mass. 133. See *Baylis v. Cronkhite*, 39 Mich. 413. And in *Gilbert v. Dickerson*, 7 Wend. 449, 22 Am. Dec. 592, the same ruling was made where the property was not only detained from the co-tenant, but locked up. Mere detention is not enough. *Heller v. Hufsmith*, 102 Pa. St. 533.

14—*Pitt v. Petwey*, 12 Ired. 69. Or if perishable, has so acted that the other cannot recover it. *Grim v. Wicker*, 80 N. C. 343. See *Shearin v. Rigsbee*, 97 N. C. 216, 1 S. E. 770.

15—*Wilson v. Reed*, 3 Johns. 175; *Hyke v. Stone*, 9 Cow. 230; *Gilbert v. Dickerson*, 7 Wend. 449,

even a sale is not necessary to make out a conversion; that the doctrine that one tenant in common cannot maintain trover against his co-tenant without proving a loss, destruction, or sale of the article, applies only to things in their nature so far indivisible that the share of one cannot be distinguished from that of the other. It can have no reasonable application to [*534] such com^{*}modities as are readily divisible, by tale or measure, into portions absolutely alike in quality, such as grain or money. "Where the property is alike in quality and value and divisible by weight, tale or measure, one of several tenants in common may sever and take out his share even without the assent of his co-tenant, and may maintain an action for the value of his share against a co-tenant, who being in possession of the property, refuses to divide it or who converts it to his own use."¹⁶ Thus, if one is entitled to the half of a certain number of bushels of wheat, he is entitled to the half in severalty; and if his co-tenant in actual possession refuse to surrender the half on demand, and deny his right, this is a conversion, because it deprives him of his right as effectually as would a sale.¹⁷

22 Am. Dec. 592; Mumford *v.* McKay, 8 Wend. 442, 24 Am. Dec. 34; Dyckman *v.* Valiente, 42 N. Y. 549; Weld *v.* Oliver, 21 Pick. 559; White *v.* Brooks, 43 N. H. 402; Neilson *v.* Slade, 49 Ala. 253; Courts *v.* Happle, 49 Ala. 254; Green *v.* Edick, 66 Barb. 564; Wheeler *v.* Wheeler, 33 Me. 347; Sullivan *v.* Lawler, 72 Ala. 74; Goell *v.* Morse, 126 Mass. 480; Person *v.* Wilson, 25 Minn. 189; Shepard *v.* Pettit, 30 Minn. 119; Ballentine *v.* Joplin, 105 Ky. 70, 48 S. W. 417; Fleming *v.* Katahdin Pulp & P. Co., 93 Me. 110, 44 Atl. 378.

16—Gates *v.* Bowers, 168 N. Y. 14, 17, 60 N. E. 1043.

17—CAMPBELL, J., in Fiquet *v.* Allison, 12 Mich. 328, 331, 86 Am. Dec. 54. See Ripley *v.* Davis, 15 Mich. 75, 90 Am. Dec. 262. And

see Clark *v.* Griffith, 24 N. Y. 595. Refusal to sever a share where the property is easily separable is a conversion. Stall *v.* Wilbur, 77 N. Y. 158; Burns *v.* Winchell, 44 Hun, 261. The rule has been applied to cattle. Felts *v.* Collins, 46 App. Div. 332, 61 N. Y. S. 482; hogs, Gates *v.* Bowers, 168 N. Y. 14, 60 N. E. 1043; shares of stock, Doyle *v.* Burns, 123 Ia. 488, 99 N. W. 195; and to manure on a farm, Pickering *v.* Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698. Of course trover will not lie where one has only a right to have an undistinguished portion of a greater quantity set out to him, but the title to which has never passed. Morrison *v.* Dingley, 63 Me. 553. See Browning *v.* Hamilton, 42 Ala. 484; Lehr *v.*

In a subsequent case this doctrine was applied to an interest a machine which one of the tenants in common had taken or annexed to the freehold, denying the right of the other.¹⁸ At later cases hold generally that if one tenant in common in possession of the common property, claims exclusive ownership or denies any right in the other tenant in common, he is guilty of a conversion without regard to whether the property is severable.¹⁹

Bailees. It is no conversion by a common carrier or other bailee who has received property from one not rightfully entitled to possession, to deliver it in pursuance of the bailment, if this is done before notice of the rights of the real owner.²⁰ After such notice he acts at his peril. A delivery to the party entitled to the possession will be a protection to him, and he may defer in the right of such party before delivery.²¹

Taylor, 90 Penn. St. 381. Nor where property is not susceptible of exact division in quality, and has not been sold, lost or destroyed. *Balch v. Jones*, 61 Cal. 234.

18—*Grove v. Wise*, 39 Mich. 161. See, also, *Strickland v. Parker*, 54 Me. 263. It is a conversion of a joint owner's interest in a note if the other joint owner takes it for collection and surrenders it to the maker for cancellation. *Winner v. Penniman*, 35 Md. 163, 6 Am. Rep. 385. If one tenant in common takes the joint property and disposes of it to a third person for uses not justified by the joint holding, the other co-tenant may maintain trover against the purchaser. *Agnew v. Johnson*, 17 Pa. St. 373. See *Collins v. Ayres*, 57 Ind. 239.

19—*Lawatsch v. Cooney*, 86 Hun, 546, 33 N. Y. S. 775; *Waller v. Bowling*, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261; *Rosenan v. Syring*, 25 Ore. 386, 35 Pac. 844.

20—*Nelson v. Iverson*, 17 Ala.

216; *Burditt v. Hunt*, 25 Me. 41 43 Am. Dec. 665. See *Nelson Anderson*, 1 B. & Ad. 450; *Mori v. Hall*, 41 Ala. 510; *Nanson Jacob*, 93 Mo. 331, 6 S. W. 246.

21—*Sheridan v. New Quay Co.*, C. B. (n. s.) 619; *Ogle v. Atkinson*, 5 Taunt. 759; *Thorne v. T bury*, 3 H. & N. 534; *Biddle Bond*, 6 Best & S. 225; *Hardman v. Willcock*, 9 Bing. 382; *King Richards*, 6 Whart. 418; *Bates Stanton*, 1 Duer. 79; *Bliven Hudson R. R. Co.*, 36 N. Y. 40 *Young v. East Ala., &c., Co.*, Ala. 100. See *Dusky v. Rudder*, 80 Mo. 400. It is a defense to the bailee if goods are taken from him on legal process. *Bliven v. Hudson R. R. Co.*, 35 Barb. 18 and 36 N. Y. 403; *Wells v. Thornton*, 45 Barb. 390; *Van Winkle Mail, &c., Co.*, 37 Barb. 122; *Button v. Wilkinson*, 18 Vt. 186, Am. Dec. 145; *Pingree v. Detroit &c., Co.*, 66 Mich. 143, 33 N. 298. See *Stiles v. Davis*, 1 Black 101. Compare *Kiff v. Old Color*

[*535] ***Extent of Injury.** Trover is most commonly brought when a complete conversion of the property has taken place, but as it lies in all cases where one makes an unlawful use of another's personality, the injury is sometimes very small. Thus, if one hires a horse for one journey, and starts with him in an opposite direction on another, a conversion has then taken place, and the owner may bring suit. But here, if the bailee returns the horse before the trial, as he may, the owner is not injured to the extent of his value, since the horse has only temporarily been converted to the wrong-doer's use, and the injury is likely to be small, perhaps nominal. But where a conversion has taken place, the owner is not bound to receive back the property, if tendered, either before or after suit,²² and if he does take it back, this does not bar his suit, but goes in mitigation of damages only.²³ Where the conversion is complete, the injury suffered, of course, is the value of what is converted.²⁴

&c., Co., 117 Mass. 591, 19 Am. Rep. 429.

22—Whittingham *v.* Owen, 8 Mackey, 277; Hamilton *v.* Chicago, etc., Ry. Co., 103 Ia. 325, 72 N. W. 536; Louisville, etc., R. R. Co. *v.* Lawson, 88 Ky. 496; 11 S. W. 511; Carpenter *v.* Am. B. & L. Ass., 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345; Allen *v.* Am. B. & L. Ass., 55 Minn. 86, 56 N. W. 577; Gilbert *v.* Peck, 43 Mo. App. 577; Hanmer *v.* Wilsey, 17 Wend. 91; Higgins *v.* Whitney, 24 Wend. 379; Otis *v.* Jones, 21 Wend. 394; Brewster *v.* Silliman, 38 N. Y. 423; Kelly *v.* Mesier, 21 App. Div. 253, 47 N. Y. S. 675; Robinson *v.* Lewis, 6 Misc. 37, 25 N. Y. S. 1004; Stephens *v.* Koonce, 103 N. C. 266, 9 S. E. 315; Waller *v.* Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261; Railroad Co. *v.* O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117. But see Bigelow Co. *v.* Heintz, 53 N. J. L. 69, 21 Atl. 109,

where it is held that, if the property remains in the same condition and the defendant offers to restore it, the plaintiff is bound to receive it.

23—Ibid.; Cartlidge *v.* Sloan, 124 Ala. 596, 26 So. 918; Watson *v.* Coburn, 35 Neb. 492, 53 N. W. 477; Coburn *v.* Watson, 48 Neb. 257, 67 N. W. 171; Gibbs *v.* Chase, 10 Mass. 125; Brewster *v.* Silliman, 38 N. Y. 423; Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. 778.

24—Although the consideration of damages more properly belongs to a work specially devoted to the remedies for torts, it may not be inappropriate here to say, that in respect to actions of trover, the rule of damages has always been more or less unsettled. When the conversion was complete, it has been held in some cases that the plaintiff should be entitled to the highest market price between the time of conversion and the time of trial. Markham *v.* Jaudon, 41 N.

Even this statement does not fully cover the ground, for the value may depend largely on the time when the conversion is deemed to have taken place. If, for example, [*536 one has received property to be returned on demand, and declines to return it, the property is not changed by the demand and refusal, but the owner may still replevy the good and if, in the meantime they have largely increased in value, would seem that he should be entitled to that increase, if he fai

Y. 235; *Burt v. Dutcher*, 34 N. Y. 462. See *Weymouth v. Chicago &c., R. R. Co.*, 17 Wis. 567, 84 Am. Dec. 763; *Meixell v. Kirkpatrick* 33 Kan. 282; *Seymour v. Ives*, Conn. 109. But in most cases where the circumstances are such as to warrant exemplary damages, a just indemnity will consist in the value of the property at the time of the conversion with interest thereon to the time of trial. *Greeley v. Stilson*, Mich. 153; *Winchester v. Craig*, Mich. 205; *Ripley v. Davis*, Mich. 75, 90 Am. Dec. 262; *Dalton v. Laudahn*, 27 Mich. 529; *Allison v. Kinyon*, 41 Mich. 281; *Brink v. Freoff*, 40 Mich. 610; *Yater v. Miller*, 24 Ind. 277; *Keaggy v. Hill*, 12 Ill. 99; *Otter v. Williams*, Ill. 118; *Turner v. Retter*, 58 I 264; *Jefferson v. Hale*, 31 Ariz. 286; *Ryburn v. Pryor*, 14 Ariz. 505; *Sledge v. Reid*, 73 N. C. 44; *Thomas v. Sternheimer*, 29 Md. 26; *Herzberg v. Adams*, 39 Md. 30; *Polk's Admr. v. Allen*, 19 Mo. 46; *Kennedy v. Whitwell*, 4 Pick. 46; *Fowler v. Gilman*, 13 Met. 26; *Greenfield Bank v. Leavitt*, Pick. 1; *Pierce v. Benjamin*, Pick. 356, 25 Am. Dec. 396; *Sergeant v. Franklin Ins. Co.*, 8 Pick. 90, 19 Am. Dec. 306; *Johnson v. Sumner*, 1 Met. 172; *Barry v. Bennett*, 7 Met. 354; *Hurd v. Hubbell*, 26 Conn. 389; *Cook v. Loomis*,

to recover the goods. The rule seems to be, however, that if he treats the demand and refusal as a conversion, his injury is measured by the value at that time,²⁵ but he might, no doubt, make

Conn. 483; *Robinson v. Hartridge*, 13 Fla. 501; *Vaughan v. Webster*, 5 Harr. 256; *Lillard v. Whittaker*, 3 Bibb, 92; *Thrall v. Lathrop*, 30 Vt. 307, 73 Am. Dec. 306; *Hayden v. Bartlett*, 35 Me. 203; *Tenney v. State Bank*, 20 Wis. 152; *Carlyon v. Lannan*, 4 Nev. 156; *Neiler v. Kelley*, 69 Penn. St. 403; *Whitfield v. Whitfield*, 40 Miss. 352; *Newton, &c., Co. v. White*, 53 Geo. 395; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; *Blotch v. Sweeney*, 62 Tex. 419; *Omaha, etc., Refining Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236; *Sutton v. Dana*, 15 Colo. 98, 25 Pac. 90; *Gravel v. Clough*, 81 Ia. 272, 46 N. W. 1092; *Gensburg v. Field*, 104 Ia. 599, 74 N. W. 3; *Powers v. Tilley*, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; *Wing v. Melliken*, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; *Heinekamp v. Beaty*, 74 Md. 388, 21 Atl. 1098; *Russell v. Cole*, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432; *Barlass v. Brash*, 27 Neb. 212, 42 N. W. 1028; *McGill v. Chilhowee Lumber Co.*, 111 Tenn. 552, 82 S. W. 210. Cases of conversion of notes, or choses in action. *Benjamin, &c., Co. v. Merch. Bank*, 63 Wis. 470; *Powell v. Powell*, 71 N. Y. 71; *State v. Berning*, 74 Mo. 87; *Ray v. Light*, 34 Ark. 421; *Penniman v. Winner*, 54 Md. 127; *Moody v. Drown*, 58 N. H. 45; *Dean v. Nichols & S. Co.*, 95 Ia. 89, 63 N. W. 582. See *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 91, as to stock certificate without indorsement. Cases of mortgaged chattels, or chattels in which one has a special property. *Becker v. Dunham*, 27 Minn. 32; *Fowler v. Haynes*, 91 N. Y. 346; *White v. Allen*, 133 Mass. 423; *Rosenweig v. Frazer*, 82 Ind. 342; *Cole v. Dalziel*, 13 Ill. App. 23; *Seibold v. Rogers*, 110 Ala. 438, 18 So. 312; *California Cured Fruit Co. v. Ainsworth*, 134 Cal. 461, 66 Pac. 586; *Stanley v. Citizens C. & C. Co.*, 24 Colo. 103, 49 Pac. 35; *Lander v. Propper*, 6 Dak. 64, 50 N. W. 400; *Straw v. Jenks*, 6 Dak. 414, 43 N. W. 941; *Holmes v. Langston*, 110 Ga. 861, 36 S. E. 251; *Mantonya v. Emerich Outfitting Co.*, 172 Ill. 92, 49 N. E. 721; *Thompson v. Anderson*, 86 Ia. 703, 53 N. W. 418; *Jones v. Cobb*, 84 Me. 153, 24 Atl. 798; *Vandiver v. O'Gorman*, 57 Minn. 64, 58 N. W. 831; *Harvey v. Morse*, 69 N. H. 475, 45 Atl. 239; *Lord v. Buchanan*, 69 Vt. 320, 37 Atl. 1048, 60 Am. St. Rep. 933. The damages for the conversion of a paper of no intrinsic value, but which is the evidence of a valuable right or interest, as against the one from whom such right or interest is derived who converts the paper and denies the right, is the value of the right or interest itself. *Olds v. Chicago Open Board of Trade*, 33 Ill. App. 445. See *Hayes v. Mass. Mut. Life Ins. Co.*, 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303. 25—*Burk v. Webb*, 32 Mich. 173. See *Third National Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35.

a subsequent demand, and rely upon a failure to respond to that as his grievance.²⁶

***Effect of Judgment.** It was decided in *Adams v. [*537] Broughton*²⁷ that judgment in trover or trespass for the value of the property vested the title in the defendant: and this decision has been followed in this country to some extent.²⁸ But the present English rule is, that it is not the judgment alone, but judgment and the satisfaction thereof, that passes the title

26—If the property is largely increased in value by the action of the wrong-doer himself, as, for instance, where he takes heavy articles a long distance to market, it seems he should be charged only with the value at the time of the wrongful taking, and interest thereon, unless there were bad faith or circumstances of aggravation. *Winchester v. Craig*, 33 Mich. 205. See *Barton Coal Co. v. Cox*, 39 Md. 1, 17 Am. Rep. 525; *Hinman v. Heyderstadt*, 32 Minn. 250; *Whitney v. Huntington*, 37 Minn. 197, 33 N. W. 561, 57 Am. Rep. 68; *Tuttle v. Wilson*, 52 Wis. 643; *Ivy Coal & Coke Co. v. Ala. Coal & Coke Co.*, 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46; *Omaha*, etc., *Refining Co. v. Tabor*. 13 Colo. 41, 21 Pac. 925; 16 Am. St. Rep. 185, 5 L. R. A. 236; *St. Claire v. Cash Gold M. & M. Co.*, 9 Colo. App. 235, 47 Pac. 466; *Anderson v. Besser*, 131 Mich. 481, 91 N. W. 737; *Whitney v. Huntington*, 37 Minn. 197, 33 N. W. 561; *Bond v. Griffin*, 74 Miss. 599, 22 So. 187; *Illinois Cent. R. R. Co. v. LeBlanc*, 74 Miss. 626, 21 So. 748; *Dyke v. National Transit Co.* 22 App. Div. 360, 49 N. Y. S. 180; *United States v. Homestake Min. Co.*, 117 Fed. 481, 54 C. C. A. 303. If the trespasser acted willfully no deduction is to be made for his labor. *Woodenware Co. v. U. S.* 106 U. S. 432; *Everson v. Seller*, 106 Ind. 266; *Tuttle v. White*, 46 Mich. 485; *Skinner v. Pinney*, 19 Fla. 42; *Alta, &c., Co. v. Benson, &c., Co.*, 2 Ariz. 362, 16 Pac. 565. But see *Railroad Co. v. Hutchins*, 37 Ohio St. 282; *St. Claire v. Cash Gold M. & M. Co.*, 9 Colo. App. 235, 47 Pac. 466; *Sunnyside Coal & Coke Co. v. Reitz*, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; *Wright v. Skinner*, 34 Fla. 453, 16 So. 335; *Powers v. Tilley*, 87 Me. 34, 32 Atl. 714, 47 Am. St. Rep. 304; *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; *Moret v. Mason*, 106 Mich. 340, 64 N. W. 193; *King v. Merriman*, 38 Minn. 47, 35 N. W. 570; *Holt v. Hayes*, 110 Tenn. 42, 73 S. W. 111; *Fisher v. Brown*, 70 Fed. 570, 17 C. C. A. 225; *United States v. Homestake Min. Co.* 117 Fed. 481, 54 C. C. A. 303.

27—*Stra. 1078; S. C. Andrews, 18.*

28—*Carlisle v. Burley*, 3 Me. 250; *Rogers v. Moore, Rice (S. C.)*, 90; *Bogan v. Wilburn*, 1 Speers 179; *Floyd v. Browne*, 1 Rawle 121, 18 Am. Dec. 602; *Marsh v. Pier*, 4 Rawle, 273, 26 Am. Dec. 131; *Fox v. Northern Liberties*, 3 Watts & S. 103; *Merrick's Estate*, 5 W. & S. 9; *Curtis v. Groat*, 6 Johns. 168; *Fox v. Prickett*, 34 N. J. 13.

to the defendant;²⁹ and this may be said to be the accepted doctrine in this country at the present time.³⁰ The title by relation vests as of the time when the conversion took place; but this relation is not effectual for all purposes; it could not render a third party a trespasser upon the rights of the defendant for anything done by him intermediate the conversion and the judgment;³¹ and if, after conversion, the plaintiff has sold his interest in the property, the purchaser will not be affected by the suit, and the plaintiff will be entitled to recover nominal damages only, since, by the sale, he has disabled himself from passing title to the defendant.³² And in neither trover nor trespass will the title be changed if the recovery was only for an injury to the property, or for a temporary use, and not for the value.

Justification Under Process. When an interference with the property of another is justified under legal proceedings, [*538] it is *important to know the position the party justifying occupies in respect to them. In some particulars the rules of protection are somewhat different as respects the several cases of magistrate, ministerial officer and party, or complainant, and they will therefore be given separately.

The Officer. For the purpose of interfering with one's possession of chattels, the ministerial officer is always supposed to be armed with legal process, which he can exhibit as his authority. There may be a few special cases in which this would not be necessary to his justification. Such a case would be that of a thief caught *flagrante delicto*, with the stolen property in his possession. No doubt the officer might take the thief without

29—Brinsmead *v.* Harrison, L. R. 6 C. P. 584.

30—Lovejoy *v.* Murray, 3 Wall.

Elliott *v.* Hayden, 104 Mass. 180;

United Society *v.* Underwood, 11 Bush, 265, 21 Am. Rep. 214;

Smith *v.* Smith, 51 N. H. 571;

Hyde *v.* Noble, 13 N. H. 494; Bell

v. Perry, 43 Iowa, 368; Bacon *v.*

Kimmell, 14 Mich. 201; Atwater

v. Tupper, 45 Conn. 144, 29 Am. Rep. 674; Thayer *v.* Manley, 73

N. Y. 305; Miller *v.* Hyde, 161

Mass. 472, 37 N. E. 760, 42 Am.

St. Rep. 424, 25 L. R. A. 42; John

A. Tolman Co. *v.* Waite, 119 Mich.

341, 78 N. W. 124, 75 Am. St. Rep.

400; Singer Mfg. Co. *v.* Skillman,

52 N. J. L. 263, 19 Atl. 260.

31—Bacon *v.* Kimmel, 14 Mich.

201. See *ante*, *95, *96.

32—Brady *v.* Whitney, 24 Mich.

154.

warrant, and he might also take the stolen property, and retain it for identification and evidence of ownership. So, in making arrest for a supposed felony, the officer might take from the person arrested whatever was supposed to have been the instrument in committing the crime, or whatever would probably be important to be used in evidence on the trial. So, doubtless, under proper statute or municipal by-law, implements of gaming found in actual use in violation of law, might be seized. These cases suggest others, but they cannot be numerous. In general, the officer must seek protection behind process.

The process that shall protect an officer must, to use the customary legal expression, be *fair on its face*. By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority.³³ When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it.³⁴

33—Cooley on Taxation, 559, Ill. 156; *Gott v. Mitchell*, 7 562; *Rousey v. Wood*, 47 Mo. App. Blackf. 270; *Noland v. Busby*, 28 465; *Rousey v. Wood*, 57 Mo. App. Ind. 154; *Brainard v. Head*, 15 La. Ann. 489; *Ford v. Clough*, 8 Me. 650.

34—*Parsons v. Lloyd*, 3 Wils. 341; *Ives v. Lucas*, 1 C. & P. 7; *Erskine v. Hohnbach*, 14 Wall. 613; *Lott v. Hubbard*, 44 Ala. 593; *Grumon v. Raymond*, 1 Conn. 40; *Thames Manufg. Co. v. Lathrop*, 7 Conn. 550; *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324; *Neth v. Crofut*, 30 Conn. 580; *Brother v. Cannon*, 2 Ill. 200; *Shaw v. Dennis*, 10 Ill. 405; *Allen v. Scott*, 13 Ill. 80; *Hill v. Figley*, 25

Blackf. 270; *Noland v. Busby*, 28 Ind. 154; *Brainard v. Head*, 15 La. Ann. 489; *Ford v. Clough*, 8 Me. 650; *Caldwell v. Hawkins*, 40 Me. 526; *Judkins v. Reed*, 48 Me. 386; *Bethel v. Mason*, 55 Me. 501; *Nowell v. Tripp*, 61 Me. 426, 14 Am. Rep. 572; *Seekins v. Goodale*, 61 Me. 400, 14 Am. Rep. 568; *Colman v. Anderson*, 10 Mass. 105; *Holden v. Eaton*, 8 Pick. 436; *Sprague v.*

[*539] *The word process is made use of in this rule in a very comprehensive sense, and will include any writ, warrant, order, or other authority which purports to empower a ministerial officer to arrest the person, or to seize or enter upon the property of an individual, or to do any act in respect to such person or property which if not justified, would consti-

Bailey, 19 Pick. 436; Upton *v.* Holden, 5 Met. 360; Aldrich *v.* Aldrich, 8 Met. 102; Lincoln *v.* Worcester, 8 Cush. 55; Hayes *v.* Drake, 6 Gray 387; Howard *v.* Proctor, 7 Gray 128; Williamson *v.* Willis, 15 Gray 427; Cheever *v.* Merritt, 5 Allen 563; Underwood *v.* Robinson, 106 Mass. 296; Le Roy *v.* East Saginaw Railroad Co., 18 Mich. 233; Bird *v.* Perkins, 33 Mich. 28; Wood *v.* Thomas, 38 Mich. 686; Turner *v.* Franklin, 29 Mo. 285; Glasgow *v.* Rowse, 43 Mo. 479; St. Louis Building, &c., Assn. *v.* Lightner, 47 Mo. 393; State *v.* Dulle, 48 Mo. 282; Walden *v.* Dudley, 49 Mo. 419; Blanchard *v.* Goss, 2 N. H. 491; Henry *v.* Sargeant, 13 N. H. 321, 40 Am. Dec. 146; State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188; Rice *v.* Wadsworth, 27 N. H. 104; Keniston *v.* Little, 30 N. H. 318; Kelley *v.* Noyes, 43 N. H. 209; Beach *v.* Furman, 9 Johns. 228; Warner *v.* Shed, 10 Johns. 138; Savacool *v.* Boughton, 5 Wend. 171, 21 Am. Dec. 181; Wilcox *v.* Smith, 5 Wend. 231, 21 Am. Dec. 213; McGuinty *v.* Herrick, 5 Wend. 240; Alexander *v.* Hoyt, 7 Wend. 89; Reynolds *v.* Moore, 9 Wend. 35, 26, 24 Am. Dec. 116; Coon *v.* Congdon, 12 Wend. 496, 499; Webber *v.* Gay, 24 Wend. 485; People *v.* Warren, 5 Hill 440; Cornell *v.* Barnes, 7 Hill 35; Bennett *v.* Burch, 1 Denio, 141; Abbott *v.* Yost, 2 Denio, 86; Dunlap *v.* Hunting, 2 Denio, 643, 43 Am. Dec. 763; Patchin *v.* Ritter, 27 Barb. 34; Sheldon *v.* Van Buskirk, 2 N. Y. 473; Chegaray *v.* Jenkins, 5 N. Y. 376; State *v.* Lutz, 65 N. C. 503; Gore *v.* Martin, 66 N. C. 371; Loomis *v.* Spencer, 1 Ohio St. 153; Moore *v.* Alleghany City, 18 Pa. St. 55; Billings *v.* Russell, 23 Pa. St. 189; Burton *v.* Fulton, 49 Pa. St. 151; Cunningham *v.* Mitchell, 67 Pa. St. 78; State *v.* Jersey, 4 Strob. 304; McLean *v.* Cook, 23 Wis. 364; Orr *v.* Box, 22 Minn. 485; Leib *v.* Shelby Iron Co., 97 Ala. 626, 12 So. 67; Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; Stephens *v.* Head, 138 Ala. 455, 35 So. 565; Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760; Heath *v.* Halfhill, 106 Ia. 133, 76 N. W. 522; Chambers *v.* Oehler, 107 Ia. 155, 77 N. W. 853; Jaques *v.* Parks, 96 Me. 268, 52 Atl. 763; Martin *v.* Collins, 165 Mass. 256, 43 N. E. 91; Schultz *v.* Huebner, 108 Mich. 274, 66 N. W. 57; Miller *v.* Hahn, 116 Mich. 607; Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791; Rousey *v.* Wood, 47 Mo. App. 465; Rousey *v.* Wood, 57 Mo. App. 650; Merchant *v.* Bothwell, 60 Mo. App. 341; Kelsey *v.* Klobunde, 54 Nev. 760, 74 N. W. 1066, 1099; Hann *v.* Lloyd, 50 N. J. L. 1, 11 Atl. 346; Jennings *v.* Thompson, 54 N. J. L. 56, 22 Atl. 1008; Rice *v.* Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630; Gaines *v.* Newbrough, 12 Tex. Civ. App. 466, 34 S. W.

tute a trespass.³⁵ Thus, a *capias ad respondendum*, [*540] or any warrant of arrest, is process;³⁶ so is a writ of possession;³⁷ so is any execution which authorizes a levy upon property;³⁸ and so is any authority which is issued to a col-

1048; *Holz v. Rediska*, 116 Wls. 353, 92 N. W. 1105. Such a writ, though based on a defective affidavit, issued by a court of general jurisdiction, within which are parties and subject matter, protects the officer serving it properly from action by a third person, claiming the goods, if the goods were liable to attachment in that suit. *Matthews v. Densmore*, 109 U. S. 216. See *Philips v. Spotts*, 14 Neb. 139. So where eight tax warrants were levied at once, and the taxes called for by three had been paid and those by the other five were illegal. *Woolsey v. Morris*, 96 N. Y. 311. So *prima facie* if the officer seizes property in the hands of a third person. *Brichman v. Ross*, 67 Cal. 601. The result of the suit does not affect the officer who has attached property under valid process. *Lashus v. Matthews*, 75 Me. 446; *Grady v. Bowe*, 11 Daly, 259. See *Chipstead v. Porter*, 63 Ga. 220. Nor the reversal of a judgment in case of seizure under execution. *Smith v. People*, 99 Ill. 445.

In Vermont an exception to this rule seems to be made in tax cases, it being held that the tax bill and warrant in due form do not constitute protection to the collector without a showing that the antecedent proceedings were legal. *Hathaway v. Goodrich*, 5 Vt. 65; *Collamer v. Drury*, 16 Vt. 574; *Downing v. Roberts*, 21 Vt. 441; *Spear v. Tilson*, 24 Vt. 420; *Shaw v. Peckett*, 25 Vt. 423; *Wheeloock v. Archer*, 26 Vt. 380.

If an officer seizes goods of third persons on the ground that their title is fraudulent, he must show plaintiff to be a judgment creditor. *Howard v. Manderfield*, 31 Minn. 337; *State v. Rucker*, 19 Mo. App. 587. It is a trespass *per se* to seize A's goods on a writ against B without regard to probable cause. *Holton v. Taylor*, 80 Ga. 508, 6 S. E. 15.

Where before service the officer was informed of facts, which showed that the court had no jurisdiction, he was held liable, though the process was regular on its face. *Tellefsen v. Fee*, 168 Mass. 188, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481. See *Rice v. Miller*, 70 Tex. 613, 85 S. W. 317, 8 Am. St. Rep. 630.

35—See *McGuinty v. Herrick*, 5 Wend. 240; *Loomis v. Spencer*, 1 Ohio St. 153.

36—*Parsons v. Lloyd*, 3 Wils. 341; *Neth v. Crofut*, 30 Conn. 580; *Brother v. Cannon*, 2 Ill. 200; *Brainard v. Head*, 15 La. Ann. 489; *State v. McNally*, 34 Me. 210, 66 Am. Dec. 650; *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188; *Warner v. Shed*, 10 Johns. 138; *Underwood v. Robinson*, 106 Mass. 296.

37—*Lombard v. Atwater*, 43 Iowa, 599. Or a writ of right. *Colman v. Anderson*, 10 Mass. 105.

38—*Thames Manuf. Co. v. Lathrop*, 7 Conn. 550; *Ives v. Lucas*, 1 C. & P. 7; *Hill v. Figley*, 25 Ill. 156; *Gott v. Mitchell*, 7 Blackf. 270; *Watkins v. Wallace*, 19 Mich. 57. To justify under an execution, a sheriff must show a

lector of taxes and which purports to empower him to collect the tax by distress of goods.³⁹ These are only illustrations of a class too numerous to be specified in detail.⁴⁰

But the writ being found to be a lawful one, it next becomes necessary to the officer's protection that he proceed upon it according as the law directs. He cannot demand and secure the protection of the law while disregarding the commands laid upon him for the protection of the rights of others. By this is not meant that he shall obey to the letter every direction of the law, whether important or unimportant, and whether or not beneficial to any of the parties concerned. Many directions are given in legal proceedings which do not have specially in view the inter-

ests of parties; and where these fail of observance it is [*541] generally *said of them that they are merely directory,

and that a failure to comply with them does not constitute an invalidity, but an irregularity only. But provisions which are made for the very purpose of protecting individual interests cannot be disregarded with impunity. A suitable illustration is found in the case of one distraining cattle *damage feasant*, and proceeding to impound them before having his damages appraised. Where the appraisement is made by the statute a necessary preliminary to the impounding, and has in view a benefit to the owner of the beast, that he may know precisely what his liability is, the failure to obtain it will render the dis-

valid writ and judgment. *Masters v. Teller*, 7 Okl. 668, 56 Pac. 1067; *Masters v. Teller*, 8 Okl. 271, 56 Pac. 1067; *Palmer v. McMaster*, 10 Mont. 390, 25 S. W. 1056; *Chetelat v. Kelter*, 7 Colo. App. 768, 42 Pac. 495. But see *O'Briant v. Wilkerson*, 122 N. C. 304, 30 S. E. 126.

39—*Erskine v. Hohnbach*, 14 Wall. 613; *Shaw v. Dennis*, 10 Ill. 405; *Noland v. Bushby*, 28 Ind. 154; *Kelley v. Savage*, 20 Me. 199; *Caldwell v. Hawkins*, 40 Me. 526; *Nowell v. Tripp*, 61 Me. 426, 14

Am. Rep. 572; *Clark v. Axford*, 5 Mich. 182.

40—A *mittimus* is such process. *Martin v. Collins*, 165 Mass. 256, 43 N. E. 91. An order of court appointing a receiver and directing him to take possession of property protects the receiver in the same manner. *Steele v. Walker*, 115 Ala. 485, 21 So. 942, 67 Am. St. Rep. 62; *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400. So of a trustee in bankruptcy. *Turrentine v. Blackwood*, 125 Ala. 436, 28 So. 95, 82 Am. St. Rep. 254.

trainer a trespasser *ab initio*.⁴¹ So, as notice of the time and place of sale of chattels on execution is of high importance to the parties, an officer who fails to give it when the statute requires him to do so, and, nevertheless, proceeds to a sale, becomes trespasser *ab initio*, for the law will impute to him the indulgence of a purpose to sell thus wrongfully at the time he made the levy.⁴² So the officer is liable in like manner if he sells on his process more property than is necessary to satisfy the demand,⁴³ or if he proceeds to sell before the time when under the statute he is at liberty to do so;⁴⁴ or if he makes a levy on household goods by handling them in a rough and improper manner, and then carries them away exposed to a severe rain;⁴⁵ or if, having levied on the interest of one tenant in common, he proceeds to sell the whole title,⁴⁶ or in any manner misuses or misappropriates the property attached by him.⁴⁷

41—Pratt *v.* Petrie, 2 Johns. 191; Hopkins *v.* Hopkins, 10 Johns. 369; Sackrider *v.* McDonald, 10 Johns. 252; Merritt *v.* O’Neil, 13 Johns. 477; Smith *v.* Gates, 21 Pick. 55.

42—Blake *v.* Johnson, 1 N. H. 91; Purrington *v.* Loring, 7 Mass. 388.

43—Williamson *v.* Dow, 32 Me. 559. See Ross *v.* Philbrick, 39 Me. 29; Davis *v.* Webster, 59 N. H. 471. Where an officer seizes without allowing an exemption he is a trespasser *ab initio* as to such excess seized. Wentworth *v.* Sawyer, 76 Me. 434; Cone *v.* Forrest, 126 Mass. 97. But not if in selling several articles to make the amount the last article sold is indivisible and goes for more than enough to make the balance. Wheeler *v.* Raymond, 130 Mass. 247.

44—Wallis *v.* Truesdell, 6 Pick. 455. See Smith *v.* Gates, 21 Pick. 55; Knight *v.* Herrin, 48 Me. 533.

45—Snydacker *v.* Breese, 51 Ill. 357, 99 Am. Dec. 551.

46—Melville *v.* Brown, 15 Mass. 81; Michalover *v.* Moses, 19 App. Div. 343, 46 N. Y. S. 456; Spaulding *v.* Allred, 23 Utah, 355, 64 Pac. 1000; Burton *v.* Kennedy, 63 Vt. 350, 21 Atl. 529, 25 Am. St. Rep. 769.

47—Brackett *v.* Vining, 49 Me. 356. See Sawyer *v.* Wilson, 61 Me. 529; Ash *v.* Dawnay, 8 Exch. 237; Playfair *v.* Musgrove, 14 M. & W. 239; Attack *v.* Bramwell, 3 Best & S. 520, and cases cited.

To render one a trespasser *ab initio* the facts should warrant the conclusion that the officer intended from the first to abuse his lawful authority. Griel *v.* Hunter, 40 Ala. 542, citing Taylor *v.* Jones, 42 N. H. 25. The wrongful act must be done to the property itself, and not to the fund realized from a legal sale, as by returning it to the wrong officer. Bentley *v.* White, 54 Vt. 564. It is not enough that he threshes and elevates grain levied on in the stack. Ladd *v.* Newell, 34 Minn. 107. But any obviously un-

[*542] *For a mere non-feasance an officer does not become a trespasser *ab initio*. As where he fails to keep safely property taken in execution by him,⁴⁸ or to proceed to a sale as in duty bound to do,⁴⁹ or to restore property attached after the debt has been satisfied.⁵⁰ But in each of these cases he will be liable on the special case; but not in trespass, because in none of his conduct has there been any wrongful force.⁵¹

Extent of the Protection. The protection the officer receives from the apparent validity of the process is personal to the officer.

necessary and oppressive action may render the officer liable in case, as where a collector of taxes makes distress which is greatly and obviously excessive. *Jewell v. Swain*, 57 N. H. 506; *Davis v. Webster*, 59 N. H. 471.

The officer is liable if he makes defective service on the person after seizing goods, so that jurisdiction is not obtained. *Fairbanks v. Bennett*, 52 Mich. 61. So if he serves by mistake valid process on the wrong person. *Formwalt v. Hylton*, 66 Tex. 288; or on the property of such person; *Meadow v. Wise*, 41 Ark. 285. So if he levies on the property of a person not named in the writ. *Moores v. Winter*, 67 Ark. 189, 53 S. W. 1057; *Schulter v. Jacobs*, 10 Colo. 449, 15 Pac. 813; *Johnson v. Jones*, 16 Colo. 138, 26 Pac. 584; *Holton v. Taylor*, 80 Ga. 508, 6 S. E. 15; *Waldrop v. Almand*, 94 Ga. 623, 19 S. E. 994; *Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122; *Hanchett v. Williams*, 24 Ill. App. 56; *Whitney v. Preston*, 29 Neb. 243, 45 N. W. 619; *Thomas v. Markman*, 43 Neb. 823, 62 N. W. 206; *Southern Ry. Co. v. Scarrett*, 58 S. C. 98, 36 S. E. 504. See *Jordan v. Wells*, 104 Ala. 383, 16 So. 23. "A sheriff is undoubtedly protected as to all acts done by him in obedience to the mandate of a legal process, regular on its face and issued by competent authority. But ordinarily a writ issued to carry into effect the judgment of a court runs only against the parties named therein as defendants, and is not regular on its face so far as concerns strangers not named therein, and does not authorize, and will not justify, its execution against strangers thereto." *West v. Hayes*, 120 Ala. 92, 97, 23 So. 727, 74 Am. St. Rep. 24.

48—*Waterbury v. Lockwood*, 4 Day, 257; *Stoughton v. Mott*, 25 Vt. 668.

49—*Bell v. North*, 4 Lit. (Ky.) 133.

50—*Gardner v. Campbell*, 15 Johns. 401. See *Baker v. Fales*, 16 Mass. 147, 153; *Hale v. Clark*, 19 Wend. 498; *Stoughton v. Mott*, 25 Vt. 668.

51—Where an act is lawfully done, it cannot be made unlawful *ab initio* unless by some positive act incompatible with the exercise of the legal right to do the first act. *Gates v. Lounsbury*, 20 Johns. 427. An officer cannot defend trover under a replevin unless he has returned it into court. *Wright v. Marvin*, 59 Vt. 437.

cer and those called in by him to assist in the service;⁵² that is to say, it protects them against being made liable as trespassers in obeying its command. But if the officer has taken property under it, and the fact that he acquired a special property in the goods by the seizure comes in question, it is not sufficient for him to show merely an apparently valid writ, but he must go *further and show that the writ had lawful [*543] authority for its issue. Thus, if the writ was an execution, it must appear that there was a valid judgment; and if an attachment, then that the proper legal showing was made before its issue, for until this appears, the sheriff has only a personal protection, and no special property.⁵³ Such is the case where the officer, for any reason, finds himself under the necessity of bringing replevin for the goods,⁵⁴ or where he is sued for taking them by a third person who claims them by assignment from the defendant in the process, and whose title would consequently be valid as against any levy that could not be supported by valid anterior proceedings.⁵⁵ And here it may be well to say, what it may be necessary to repeat hereafter, that mere irregularities in either the writ or what precedes it are not fatal defects.

What Process is Not Fair on its Face. Some old cases made a distinction between process issuing from courts of general jurisdiction and that issued by other and inferior tribunals, and required an officer in the last case to take notice of whatever might appear, or not appear, in all the proceedings on which the right to issue the process might depend. But since the thorough ex-

- 52—That whoever assists the officer at his request is protected as he is, see *Payne v. Green*, 18 Miss. 507; *Killpatrick v. Frost*, 2 Grant, 168; *Goodwine v. Stephens*, 63 Ind. 112. In Michigan one called to aid a sheriff in an arrest is justified, if he follows the officer's orders and does nothing wantonly, even though from lack of a warrant the sheriff himself is not justified in making the ar- rest. *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 886. Protection does not extend to volunteers. *Kirbie v. State*, 5 Tex. App. 60.
- 53—*Earle v. Camp*, 16 Wend. 562.
- 54—*Spafford v. Beach*, 2 Doug. (Mich.) 199; *Leroy v. East Saginaw*, 18 Mich. 233.
- 55—*Parker v. Walrod*, 16 Wend. 514, 517, and cases cited.

amination the whole subject received in *Savacool v. Boughton*,⁵⁶ it has generally been conceded that the distinction is unwarranted, so far as it concerns the personal protection of the officer. It is not unimportant, however, as it may bear upon the form of the process itself, for recitals may be sufficient in one case and not in another. When a court of general jurisdiction assumes authority to act there is a presumption of law that the authority exists, and the officer need not inquire further; but the inferior court must not only have authority in fact, but upon the face of its records and of its process enough should appear to show it. This is a general rule.

The following are illustrative instances of process not fair on its face: A warrant of arrest issued by a justice in a case of which its recitals showed he had no jurisdiction;⁵⁷ a writ [*544] of *habeas corpus* issued by and returnable before an officer not by law having authority over that writ,⁵⁸ a tax warrant the verification to which was made prematurely;⁵⁹ a warrant for the collection of a personal tax where one on real estate only could be levied;⁶⁰ an order made by a commissioner in bankruptcy to detain a debtor until he should pay certain costs, the law giving him no authority to make such an order;⁶¹ a conviction which showed on its face that the party had been convicted on default in responding to a summons returnable less than ten days from date, the statute requiring ten days "at

56—5 Wend. 170. See, also, *Ressler v. Peats*, 86 Ill. 275; *Barr v. Boyles*, 96 Penn. St. 31.

St. 81; *Hilbush v. Hower*, 58 Pa. St. 93.

57—*Shergold v. Holloway*, Star. 1002; *Rosen v. Fischel*, 44 Conn. 371; *Pooler v. Reid*, 75 Me. 488; *Elsemore v. Longfellow*, 76 Me. 128. So a warrant for a "person whose name is unknown, &c., of V." *Harwood v. Siphers*, 70 Me. 464. See as to warrant of commitment; *Patzack v. Von Gerichten*, 10 Mo. App. 424.

59—*Westfall v. Preston*, 49 N. Y. 349. For other illustrations in tax cases, see *Eames v. Johnson*, 4 Allen, 382; *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Nat. Bank of Chemung v. Elmira*, 53 N. Y. 49; *Gale v. Mead*, 4 Hill, 109; *Jaques v. Parks*, 96 Me. 268, 52 Atl. 763.

60—*American Bank v. Mumford*, 4 R. I. 478.

61—*Watson v. Bodell*, 14 M. & W. 58.

58—*Cable v. Cooper*, 15 Johns. 152. See *Chalker v. Ives*, 55 Pa.

least";⁶² process of contempt issued by a judge of a court when only the court as a body had authority to issue it;⁶³ process issued under an unconstitutional law;⁶⁴ a warrant for taxes which directed the collection of costs when the law allowed none;⁶⁵ an order of a military officer for the seizure of the property of a citizen not in the military service;⁶⁶ a conviction by a military commission for an offense only triable in the regular courts,⁶⁷ etc. In all these cases the rule prevails that the officer who is called upon to execute the orders of any tribunal is bound to take notice of the law and to know that his process is bad if in fact the law will not uphold it.

Whether, where an officer knows that back of process fair on its face are facts which render it void, he is nevertheless protected in serving it, is a point upon which the authorities are not *agreed. In Illinois there are *dicta* in a number of cases,⁶⁸ followed at length by an authoritative decision,⁶⁹ that where an officer has notice of an excess or want of jurisdiction in the magistrate or board from which his process emanates, he would render himself liable for acting under it. This doctrine is approved in Wisconsin,⁷⁰ but it has not met with general acceptance. It was expressly denied in New York, in a case in which jurisdiction to issue the particular process depended on the defendant's residence within the jurisdiction of

62—*Mitchell v. Foster*, 12 A. & E. 472. If a special drainage proceeding is jurisdictionally void as against a defendant, an officer is not protected by his writ in enforcing the judgment. *Cottingham v. Fortville, &c., Co.*, 112 Ind. 522, 14 N. E. 479.

63—*Van Sandau v. Turner*, 6 Q. B. 773.

64—*Ely v. Thompson*, 3 A. K. Marsh, 70; *Kelly v. Bemis*, 4 Gray, 83; *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49; *United Lines Tel. Co. v. Grant*, 137 N. Y. 7, 32 N. E. 1005. Process from a State court in an admiralty case would be of this sort. *Campbell v.*

Sherman, 35 Wis. 103; *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49.

65—*Clark v. Woods*, 2 Exch. 395.

66—*Mitchell v. Harmony*, 13 How. 115.

67—*Milligan v. Hovey*, 3 Biss. 13.

68—*Barnes v. Barber*, 6 Ill. 401; *Guyer v. Anderson*, 11 Ill. 494; *McDonald v. Wilkie*, 13 Ill. 22, 54 Am. Rep. 423.

69—*Leachman v. Dougherty*, 81 Ill. 324.

70—*Sprague v. Birchard*, 1 Wis. 457, 464, 60 Am. Dec. 393; *Grace v. Mitchell*, 31 Wis. 533, 539, 11 Am. Rep. 613.

the court, and the officer knew him to be a non-resident.⁷¹ In Massachusetts, also, it was decided that an officer was not liable for serving process by the arrest of a person who had been discharged under the insolvent laws, though he knew of the discharge.⁷² But in a later case an officer was held liable for false imprisonment for the arrest of a person under a warrant fair on its face, because, prior to the arrest, he was informed of facts which showed that the court, issuing the warrant, had no jurisdiction of the case.⁷³ The case has been noticed at length in a previous chapter.⁷⁴ A case in Connecticut is very pointed and clear. The officer was sued in trespass for executing a writ of replevin issued for a horse as having been distrained or impounded. Says HOSMER, Ch. J.: "The writ was put in his hands, as an officer, to serve, and he accordingly served the same by replevying the before mentioned horse. The first objection to this act of his is founded on a fact proved at the trial of the cause, to-wit: that he knew the said horse had not been distrained or impounded. From this the plaintiff infers that he ought not to have served the replevin; and that in thus doing he became a trespasser. I reply to this objection, that the defendant, Phelps, being a legal officer, it became his duty, regardless of any knowledge or supposed knowledge of his own, that there existed no cause of action, to serve the writ committed to him promptly, unhesitatingly, and without restraint from the above mentioned cause. This I consider so firmly established as to render the proposition self evident. The facts on the face of the writ constitute his justification, because he was obliged to obey its mandate; nor was it any part of his duty to determine whether the allegations contained in the replevin were true. The proof of these positions results, incontrovertibly, from his relative condition. He was an executive officer, whose sole duty it

[*546] *was to execute, and not to decide on, the truth or suffi-

71—*Webber v. Gay*, 24 Wend. 485. See, also, *People v. Warren*, 5 Hill, 440. 73—*Tellefsen v. Fee*, 168 Mass. 188, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481.

72—*Wilmarth v. Burt*, 7 Met. 257. See *Twitchell v. Shaw*, 10 Cush. 46. 74—See *ante*, p. 317.

ciency of the process committed to him for service. He has no portion of judicial authority, nor the means of inquiring into the causes of action contained in the writs and declarations put into his hands for service. Obedience to all precepts committed to him to be served is the first, second and third part of his duty; and hence, if they issue from competent authority, and with legal regularity, and so appear on their face, he is justified for every action of his within the scope of their command.'"⁷⁵ "The ground of these principles is simply this: That to the magistrate is confided the issuing of writs, and to the sheriff and other executive officers is confided the duty of serving them. It is easy to see what widespread mischief might result from permitting an executive officer to decide, on his own knowledge, that he ought not to serve a precept or warrant put into his hands for service, and to consider what justly must follow from such doctrine; that is, that his return of the fact would be a justification for his omission. In short, the executive officer must do his duty, which is to obey all legal writs, and must not arrogate to himself the right of disobeying the paramount commands of those to whose mandates he by law is subjected."⁷⁶

A doctrine precisely identical has been laid down in Louisiana⁷⁷ and in Michigan.⁷⁸ The cases decided are specially significant in this: that in each case the fact which made the process illegal was within the official knowledge of the officer claiming the protection. It seems to us therefore that the weight of authority and of reason is clearly in favor of the proposition, that the officer may safely obey all process fair on its face, and is not bound to judge of it by facts within his knowledge which may be supposed to invalidate it. But when it is settled that an offi-

75—Citing *Belk v. Broadbent*, 3 T. R. 183, 185; *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Miller v. Davis, Comyn*, 590.

76—*Watson v. Watson*, 9 Conn. 140, 146. See *Cunningham v. Mitchell*, 67 Penn. St. 78.

77—*Brainard v. Head*, 15 La. Ann. 489.

78—*Wall v. Trumbull*, 16 Mich.

228; *Bird v. Perkins*, 33 Mich. 28. See, also, *Richards v. Nye*, 5 Ore. 382. The same rule obtains in Texas. *Tierney v. Frazier*, 57 Tex. 437; *Rainey v. State*, 20 Tex. App. 455; *Johnson v. Randall*, 74 Minn. 44, 76 N. W. 791; *Rice v. Miller*, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

cer may safely execute process, though he may know of facts to invalidate it, it does not of necessity follow that he cannot safely refuse to do so. It is, indeed, intimated by Chief Justice [*547] *HOSMER, in the citation above given, that duty requires him to proceed and serve the process; but the courts in New York have held otherwise.⁷⁹ And, indeed, it would seem an anomaly that a plaintiff should be at liberty to hold an officer responsible for refusing to serve a writ, the service of which would render the plaintiff himself liable as a trespasser. Says WALKER, J., "As a general rule, an officer may justify, under a writ regular on its face, whether the court had jurisdiction or not, although the writ may be void. Or he may, if he chooses, refuse to execute such a writ."⁸⁰

Magistrate, When Liable. The rule of judicial irresponsibility, where the magistrate has acted within his jurisdiction, is given, with the authorities which support it, in another place. The converse of the rule is true, that if he acts without jurisdiction he is liable, even though his process is perfectly valid on its face, and he has acted with proper motive: The principle is illustrated by cases in which a justice of the peace proceeded to punish for an offense not committed within his jurisdiction; the facts on which his jurisdiction depended being known to him.⁸¹ So assessors are liable who impose taxes on persons not taxable within their districts, and issue process for their collection,⁸²

79—*Horton v. Hendershot*, 1 Hill, 118; *Cornell v. Barnes*, 7 Dunlap v. Hunting, 2 Denio, 643, 43 Am. Dec. 763; *Earl v. Camp*, 16 Wend. 562. See, however, *Clearwater v. Brill*, 11 N. Y. Sup. Ct. (4 Hun.) 728.

80—*Davis v. Wilson*, 61 Ill. 527, 529. See, also, *Hill v. Wait*, 5 Vt. 124.

81—*Miller v. Grice*, 2 Rich. 27, 44 Am. Dec. 271; *Piper v. Pearson*, 2 Gray, 120; *People v. Jarrett*, 7 Ill. App. 566. So if complaint shows the offense barred by lapse of time. *Vaughn v. Cong-*

don, 56 Vt. 111, 48 Am. Rep. 758. So if having power to bind over, he convicts and sentences. *Patzack v. Von Gerichten*, 10 Mo. App. 424. And see *Hathaway v. Smith*, 117 Ga. 946, 43 S. E. 984; *Holz v. Rediske*, 116 Wis. 353, 92 N. W. 1105.

82—*Mygatt v. Washburn*, 15 N. Y. 316; *Bennett v. Buffalo*, 17 N. Y. 383; *Clark v. Norton*, 49 N. Y. 243; *Dorwin v. Strickland*, 57 N. Y. 492; *Suydam v. Keys*, 13 Johns. 444; *Martin v. Mansfield*, 3 Mass. 419; *Argy v. Young*, 11 Mass. 220; *Gage v. Currier*, 4 Pick. 399; Ly-

or spread upon the tax roll a sum never lawfully voted, or in excess of that which the law allows to be levied,⁸³ or a sum which has been levied for an unauthorized purpose,⁸⁴ or issue a warrant for the collection of sums which have not been *properly reported to them as allowed by the competent [*548] authority,⁸⁵ or alter the assessment after, by law, it has passed from their control, so that the alteration is wholly an unofficial act.⁸⁶

Liability of Party. The party is liable where he participates in the unlawful action of either the magistrate or the ministerial officer. He is in general, responsible for setting the court or magistrate in motion in a case where they have no authority to act;⁸⁷ and perhaps to this rule there is no exception but this: that if the jurisdiction depends upon the facts, and these are presented to a court having general jurisdiction of that class of cases, and the court decides that it has authority to act, and proceeds to do so, this decision protects not the officer merely, but the party also.⁸⁸ But every party has a right to assume that the *officer will proceed to execute lawful process in [*549] a lawful manner, and if, instead of doing so, the officer

man *v.* Fiske, 17 Pick. 231, 28 Am. Dec. 293; Fairbanks *v.* Kittredge, 24 Vt. 9; Harriman *v.* Stevens, 43 Me. 497; Ware *v.* Percival, 61 Me. 391, 14 Am. Rep. 565.

83—Grafton Bank *v.* Kimball, 20 N. H. 107; Cooley on Taxation, 554, and numerous cases cited.

84—Stetson *v.* Kempton, 13 Mass. 271, 7 Am. Dec. 145; Drew *v.* Davis, 10 Vt. 506, 33 Am. Dec. 213.

85—Clark *v.* Axford, 5 Mich. 182.

86—Bristol Manuf. Co. *v.* Gridley, 28 Conn. 201; Ferton *v.* Feller, 33 Mich. 199. See Garfield *v.* Douglass, 22 Ill. 190, 74 Am. Dec. 137.

87—Stetson *v.* Goldsmith, 30 Ala. 602; S. C. 31 Ala. 649; Connelly *v.* Woods, 31 Kan. 359; *Ex parte* Thompson, 1 Flipp, 507; Birmingham Dry Goods Co. *v.* Finley, 122 Ala. 534, 26 So. 138; Bradford *v.* Boozer, 139 Ala. 502, 36 So. 716; Adkins *v.* Lacy, 68 Ark. 170, 56 S. W. 876; Strozzi *v.* Wines, 24 Nev. 389, 55 Pac. 828, 57 Pac. 832. An execution which will protect an officer may not a party. Collins *v.* Mann, 15 W. Va. 171.

88—West *v.* Smallwood, 3 M. & W. 418. “Where a magistrate has a general jurisdiction over the subject matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his author-

proceeds illegally, the party is not responsible, unless he participated in or advised the abuse.⁸⁹

ity, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously." Lord AINGER, Ch. B. But it was agreed in the same case that the party would have been liable if he had participated with the officer in the service of the warrant. An order of arrest made by a judge having jurisdiction protects the party "unless there is entire lack of evidence of some essential fact required to be shown." *Dusy v. Helm*, 59 Cal. 188. See *Goodwine v. Stephens*, 63 Ind. 112; *Ogg v. Murdock*, 25 W. Va. 139; *Hann v. Lloyd*, 50 N. J. L. 1, 11 Atl. 346. But if the party draws up the complaint and warrant and orders arrest at any cost, he may be liable. *Loomis v. Render*, 41 Hun, 268. If a party has caused a seizure under a valid writ he is not liable, because the magistrate, by his own error, afterwards loses jurisdiction and enters a void judgment. *Grafton v. Carmichael*, 48 Wis. 660. If one presents an application to a court of competent jurisdiction and the court, adjudicating upon the law and facts, orders an arrest which is afterwards vacated as erroneous, the applicant is not liable in trespass. *Fischer v. Langbein*, 62 How. Pr. 238, 103 N. Y. 84; *Bamberg v. Kahn*, 43 Hun, 411; *Marks v. Townsend*, 97 N. Y. 590. So, if after execution, the judgment is reversed. *Field v. Anderson*, 103 Ill. 403. In *Day v.*

Bach, 87 N. Y. 56, where an attachment was vacated, it is said that a void writ furnishes no justification and an action may be brought for what is done under it without setting it aside; an irregular writ must be set aside before it ceases to protect; if the process is regularly issued in a case where the court has jurisdiction, there is no liability in trespass, even when it has been set aside, but property taken under it must be restored.

89—*Perrin v. Clafin*, 11 Mo. 13; *Princeton Bank v. Gibson*, 20 N. J. 138; *Snively v. Fahnestock*, 18 Md. 391; *Averill v. Williams*, 1 Denio, 501; *Clay v. Sandefer*, 12 B. Mon. 334; *Michels v. Stork*, 44 Mich. 2; *Bartlett v. Hawley*, 38 Minn. 308, 37 N. W. 580; *Corner v. Mackintosh*, 48 Md. 374; *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905; *Sutherland v. Ingalls*, 63 Mich. 620, 30 N. W. 342, 6 Am. St. Rep. 332; *Tell v. Miles*, 51 Neb. 542, 71 N. W. 296. If the party participates in or advises or ratifies the abuse he will be liable along with the officer. *Clark v. Nordholt*, 121 Cal. 26, 53 Pac. 400; *Riethmann v. Godsman*, 23 Colo. 202, 46 Pac. 684; *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664; *Teel v. Miles*, 51 Neb. 542, 71 N. W. 296. If a third person's goods are seized, the burden is on the party seizing to show that he did not procure, direct or ratify the act. *Peterson v. Foli*, 67 Ia. 402. A party is liable for an arrest caused by his attorney. *Guillaume v. Rowe*, 94 N. Y. 268, 46 Am. Rep. 141. One

Protection of Purchaser Under Execution. One who becomes purchaser of personal property at an execution sale is concerned only with the judgment, the levy, the execution and the sale; if these are apparently valid, he need look no further.⁹⁰ To say that if the court rendering the judgment had no jurisdiction all proceedings upon the execution are merely void, is stating a proposition that should be self evident.⁹¹ But the rule is the same if, for any other reason, the judgment was void,^{91a} or had been satisfied,⁹² or if, the judgment being valid, the execution for any reason was void,⁹³ or was issued when none was allowed by law.⁹⁴ The sale would also be void if made privately, *because the officer has no authority to sell in [*550] that manner, and the purchaser must take notice of such an illegality.⁹⁵ The same would be true if the property was not present, or within view of the bidders.⁹⁶

not a party is liable if he causes tacked. *Collins v. Miller*, 64 Tex. the officer's wrongful seizure. 118.

Fish v. Street, 27 Kan. 270.

90—*Wheaton v. Sexton*, 4 Wheat. 503; *Lenox v. Clark*, 52 Mo. 115. So where judgment was after service on a lunatic. Heard *v. Sack*, 81 Mo. 610. And where goods of a third person were sold. *Gloss v. Black*, 91 Pa. St. 418.

91—*Falkner v. Guild*, 10 Wis. 563; *Wilson v. Arnold*, 5 Mich. 98; *Gray v. Hawes*, 8 Cal. 562; *Miller v. Handy*, 40 Ill. 448; *Mulvey v. Carpenter*, 78 Ill. 580; *Borders v. Murphy*, 78 Ill. 81; *Abbott v. Sheppard*, 44 Mo. 273; *Clark v. Fowler*, 5 Allen, 45.

91a—*Conrad v. McGee*, 9 Yerg. 428; *Welch v. Butter*, 24 Ga. 445; *Hollingsworth v. Bagley*, 35 Tex. 345; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *Sanders v. Rains*, 10 Mo. 770; *Higgins v. Peltzer*, 49 Mo. 152. Title acquired through sale on such judgment may be collaterally at-

92—*Jackson v. Morse*, 18 Johns. 441; *Cameron v. Irwin*, 5 Hill, 272; *King v. Goodwin*, 16 Mass. 63; *Loomis v. Storrs*, 4 Conn. 440; *Kennedy v. Duncklee*, 1 Gray, 65; *Laval v. Rowley*, 17 Ind. 36.

93—*Woodcock v. Bennett*, 1 Cow. 711, 13 Am. Dec. 568; *Palmer v. Palmer*, 2 Conn. 462; *Boal's Lessee v. King*, 6 Ohio, 11; *French v. Eaton*, 11 N. H. 337; *Brem v. Jamieson*, 70 N. C. 566.

94—*Sheetz v. Wynkoop*, 74 Pa. St. 198; *Cadmus v. Jackson*, 52 Pa. St. 295. The case would of course be still plainer, if possible,

if no judgment at all had been rendered. *Crawford v. Dalrymple*, 70 N. C. 156; *Craft v. Merrill*, 14 N. Y. 456; *Vastine v. Fury*, 2 S. & R. 432.

95—*Ricketts v. Unangst*, 15 Pa. St. 90, 53 Am. Dec. 572; *Hutchinson v. Cassidy*, 46 Mo. 431.

96—*Carson v. Stout*, 17 Johns.

The rule of protection, moreover, is not so broad when the plaintiff in the process, or his attorney, or anyone fully cognizant of all the proceedings, becomes purchaser, as it is when the purchaser is one technically known as a purchaser in good faith; that is to say, a purchaser who has paid the purchase price without notice of defects in the proceedings. For example, if the officer sells without giving the proper notice of sale, the title of a purchaser in good faith would not thereby be affected;⁹⁷ but the plaintiff and his attorney must be supposed to have known of the officer's default, and a sale to either would be set aside on motion. So a purchase by one in good faith would be protected, even though the judgment under which it was made should subsequently be set aside for errors;⁹⁸ but it would be otherwise if the purchase were made by one who *had charge of the proceedings, actually or by implication of law.⁹⁹

[*551] 122; Linendoll *v.* Dok, 14 Johns. 223; Ray *v.* Harcourt, 19 Wend. 497; Lowry *v.* Coulter, 9 Pa. St. 349; Carey *v.* Bright, 58 Pa. St. 70, 84; Kennedy *v.* Clayton, 29 Ark. 270; Rowan *v.* Refeld, 31 Ark. 648; Winfield *v.* Adams, 34 Mich. 437. In Missouri it seems that such a sale is only voidable on motion. Eads *v.* Stephens, 63 Mo. 90. In Mississippi a sale made after the return day of the execution is void. Williamson *v.* Williamson, 52 Miss. 725. In other States, however, this will be found provided for by statute in many cases.

97—Whittaker *v.* Sumner, 7 Pick. 551; White *v.* Cronkhite, 35 Ind. 483; Hobein *v.* Murphy, 20 Mo. 447, 44 Am. Dec. 194; Curd *v.* Lachland, 49 Mo. 451; Hanks *v.* Neal, 44 Miss. 212; Osgood *v.* Blackmore, 59 Ill. 261; Pollard *v.* King, 63 Ill. 36; Wallace *v.* Trustees, 52 Ga. 164; Wade *v.* Saunders, 70 N. C. 270; Lee *v.* Howes, 30 Up. Can. Q. B. 292. So it is

held even if the attorney buys, the title may not be attacked laterally. Barton *v.* Spiers, 92 N. C. 503. The innocent purchaser is not affected by subsequent acts or omissions of the officer. Millis *v.* Lombard, 32 Minn. 259; Caldwell *v.* Blake, 69 Me. 458. The plaintiff is not such purchaser as to irregularities in the proceedings, but is as to all prior equities. Bole *v.* Newberger, 81 Ind. 274; Vitiito *v.* Hamilton, 86 Ind. 127. But see Humphrey *v.* McGill, 59 Ga. 649.

98—Clark *v.* Pinney, 6 Cow. 297; Woodcock *v.* Bennett, 1 Cow. 711, 13 Am. Dec. 568; Dorsey *v.* Thompson, 37 Md. 25; Vogler *v.* Montgomery, 54 Mo. 577; Stinson *v.* Ross, 51 Me. 556, 81 Am. Dec. 591; Guiteau *v.* Wisely, 47 Ill. 433; Goodwin *v.* Mix, 38 Ill. 115; Hubbell *v.* Broadwell, 8 Ohio, 120; Keene *v.* Sallenbech, 15 Neb. 200; see Shultz *v.* Sanders, 38 N. J. Eq. 154.

99—Corwith *v.* State Bank, 15

Locality of Wrongs. It is a general rule that for the purpose of redress it is immaterial where a wrong was committed; in other words, a wrong being personal, redress may be sought for it wherever the wrong-doer may be found.¹ To this there are a few exceptions, in which actions are said to be local, and must, therefore, be brought not only within the country, but also within the very county where they arose. The distinction between transitory and local actions is this: If the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local. Therefore, while an action of trespass to the person or for the conversion of goods is transitory, action for flowing lands is

Wis. 289; S. C. 18 Wis. 560; Buchanan *v.* Clarke, 10 Gratt. 164; Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459; Hays *v.* Cassell, 70 Ill. 669; Holland *v.* Adair, 55 Mo. 40; Twogood *v.* Franklin, 27 Iowa, 239; Bank of U. S. *v.* Bank of Washington, 6 Pet. 8. The general rule that the purchaser *bona fide* is not concerned with mere irregularities is laid down in so many cases that no attempt will be made to give them. They are collected in Rorer on Judicial Sales, with industry and discrimination, and also in Freeman on Executions. The following may be mentioned: Hamilton *v.* Shrewsbury, 4 Rand. 427, 15 Am. Dec. 779; Jackson *v.* Rosevelt, 13 Johns. 97; Dowdell *v.* Neal, 10 Geo. 148; Dingledine *v.* Hershman, 53 Ill. 280; Boles *v.* Johnson, 23 Cal. 226; Sabin *v.* Austin, 19 Wis. 421; Cooper *v.* Borrall, 10 Pa. St. 491; Reid *v.* Largent, 4 Jones (N. C.) 454; Mordecai *v.* Speight, 3 Dev. 428; Doe *v.* Myers, 9 Up. Can. Q. B. 465. If the plaintiff's assignee is purchaser, he gets no better title than the plaintiff would. McJil-

ton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449; Reynolds *v.* Hosmer, 45 Cal. 616.

1—Such are actions for injuries to the person: Helton *v.* Ala. Midland R. R. Co., 97 Ala. 275, 12 So. 276; St. Louis, etc., Ry. Co. *v.* Brown, 67 Ark. 295, 54 S. W. 865; Burdick *v.* Missouri Pac. Ry. Co., 123 Mo. 221, 27 S. W. 453, 45 Am. St. Rep. 528, 26 L. R. A. 384; Burdick *v.* Freeman, 120 N. Y. 420, 24 N. E. 949; Morissetti *v.* Canadian Pac. Ry. Co., 76 Vt. 267, 56 Atl. 1102; McCarthy *v.* Whitcomb, 110 Wis. 113, 85 N. W. 707; Bain *v.* Northern Pac. R. R. Co., 120 Wis. 412, 98 N. W. 241; Mexican Central Ry. Co. *v.* Jones, 107 Fed. 64, 48 C. C. A. 227. For injuries to personal property: Lipscomb *v.* Tanner, 31 S. C. 49, 9 S. E. 933. For fraud: McQueen *v.* New, 87 Hun, 206, 33 N. Y. S. 802. Where a building is put on the land of another with right of removal, it is personal property and an action for injury thereto is transitory. Laird *v.* Railroad Co., 62 N. H. 254, 13 Am. St. Rep. 564.

local, because they can be flooded only where they are. For the most part the actions which are local are those brought for the recovery of real estate, or for injuries thereto or to easements.

In the leading case of *Mostyn v. Fabrigas*, the governor of a British colony was prosecuted in England, and a heavy judgment recovered against him for an assault and imprisonment of the plaintiff without authority of law in the colony.² In a later case it is held to be unimportant whether the foreign tort was or

was not committed within territory subject to the British
[*552] crown;³ *but it is agreed that to support an action the

act must have been wrongful or punishable where it took place, and that whatever would be a good defense to the action, if brought there, must be a good defense everywhere.⁴

2—*Mostyn v. Fabrigas*, Cowp. 161. See *Buron v. Denman*, 2 Exch. 167.

3—*Scott v. Lord Seymour*, 1 H. & C. 219. In *Wilson v. McKenzie*, 7 Hill, 95, it was decided that an action would lie against an officer of the navy for illegally assaulting and imprisoning one of his subordinates on the high seas, though the act was done under color of naval discipline. *Nelson*, Ch. J., cites in his opinion, among other cases, *Warden v. Bailey*, 4 *Taunt* 67; S. C. 4 *Maule & S.* 400; *Hanneford v. Hun*, 2 C. & P. 148.

4—*Phillips v. Eyre*, L. R. 4 Q. B. 225; S. C. in Exch. Ch. L. R. 6 Q. B. 1; *The China*, 7 Wall. 53, 64; *Smith v. Condry*, 1 How. 28; *Stout v. Wood*, 1 Blackf. 71; *Wall v. Hoskins*, 5 Ired. 177; *Mahler v. New York*, etc., *Trans. Co.*, 35 N. Y. 352; *Kohl v. Memphis*, etc., R. R. Co., 95 Ala. 337, 10 So. 661; *Hilton v. Ala. Midland R. R. Co.*, 97 Ala. 275, 12 So. 276; *St. Louis, etc., Ry. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865; *Holderman v. Pond*, 45 Kan. 410, 25 Pac. 872, 23 Am. St. Rep. 734, 11 L. R. A. 542; *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490, 79 S. W. 664; *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 30 N. E. 69; *Railway Co. v. Lewis*, 89 Tenn. 235, 14 S. W. 603; *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349; *Sartin v. Oregon Short Line R. R. Co.*, 27 Utah, 447, 76 Pac. 219; *Morrisetti v. Canadian Pac. Ry. Co.*, 76 Vt. 267, 56 Atl. 1102; *Bain v. Northern Pac. R. R. Co.*, 120 Wis. 412, 98 N. W. 241. A common law action for a tort in another state can be maintained without proof of the law of the latter state, the common law being presumed to be in force in such state in the absence of proof. *Burdick v. Missouri Pac. R. R. Co.*, 123 Mo. 221, 27 S. W. 453, 45 Am. St. Rep. 528, 26 L. R. A. 384. An action was held to lie in Illinois under a statute of Indiana making the master liable to his servant for injuries by reason of the negligence of a fellow

That actions for trespasses on lands in a foreign country cannot be sustained, is the settled law in England⁵ and in this country. The decision of Chief Justice MARSHALL to that effect in the suit brought by Mr. Edward Livingston against Mr. Jefferson, for having forcibly dispossessed him of the batture in New Orleans, has been often followed without question.⁶ But if by means of the trespass anything is severed from the realty so as to become personal property, and this is afterward converted by the trespasser to his own use, it seems that for the conversion he may be sued anywhere.⁷

In New York it is held that the courts of that state have jurisdiction of a suit for injury to land in another state and that, if no objection is made and the case proceeds to judgment, the judgment will be valid and that a default is a waiver of the objection.⁸ But the court may decline jurisdiction of its own motion.⁹

servant. Chicago, etc., R. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410.

5—Doulson v. Mathews, 4 T. R. 503, overruling some early *nisi prius* cases.

6—Livingston v. Jefferson, 1 Brock. 203. And see Watts' Adm. v. Kinney, 23 Wend. 484; S. C. 6 Hill, 82; Champion v. Doughty, 18 N. J. 3, 35 Am. Dec. 523; Ham v. Rogers, 6 Blackf. 559; Prichard v. Campbell, 5 Ind. 494; Chapman v. Morgan, 2 Green, (Iowa), 374; Brown v. Irwin, 47 Kan. 50, 27 Pac. 184; Allin v. Conn. Riv. Lumber Co., 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416; Jacobson v. Lynn, 54 Neb. 794, 75 N. W. 243; Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703. See Niles v. Howe, 57 Vt. 388, where the trespass was in Mass.; Am. Un. Tel. Co. v. Middleton, 80 N. Y. 408, in N. J.; Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703, in Ga. But a bill to set aside a conveyance as fraud-

ulent, is not local. Johnson v. Gibson, 116 Ill. 294. Nor an action for negligently burning fences. Railroad Co. v. Weakas, 13 Lea, 148.

7—Tyson v. McGuineas, 25 Wis. 656. Sand was severed in Missouri, and carried to Kansas. Trespass *de bon asp.* or trover will lie in Kansas, McGonigle v. Atchison, 33 Kan. 726. In Louisiana, actions for injuries to real estate are transitory, and on that ground an action for an injury to real estate in Illinois was sustained. Holmes v. Barclay, 4 La. Ann. 63.

8—Sentenis v. Ladew, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569.

9—Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 S. C. Rep. 771, 39 L. Ed. 913. See Morris v. Missouri Pac. R. R. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349.

It has been made a question whether, if by a wrongful act committed in one State, real property is injured in another, action may not be brought in the former for that injury; and in

[*553] one case Mr. Justice GRIER, at the circuit, held that it might.¹⁰ In *New Hampshire, however, it is held that suit can be brought only in the jurisdiction where the land lies.¹¹

Where a new right of action is given by statute for that for which an action at common law would not lie, the courts are not agreed as to where such action must be brought. The question has often arisen under statutes giving an action for causing death by wrongful act, neglect or default and as has been stated in a former chapter, some cases hold that the action can only be brought within the State or country whose statute gives the right and for wrongs there suffered, while others allow the action to be brought in any State which has substantially similar statutes.¹² And where a further remedy is given for that which is an actionable wrong at the common law, it can be enforced only

10—*Rundle v. Del. & Rar. Canal*, held to have arisen in the former state. *Cameron v. Vandergriff*, 1 Wall. Jr. 275. The conclusion of the learned judge was that the plaintiff might elect to sue in either jurisdiction, the act done being in one and the injury accomplished in the other. In Ohio an action was sustained for the diversion of water in Pennsylvania to the injury of lands in the former State. *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474. And see *Little v. Chicago, etc.*, R. R. Co., 65 Minn. 48, 67 N. W. 846.

11—*Worster v. Winnipiseogee Lake Co.*, 25 N. H. 525. Compare *Sutton v. Clarke*, 6 Taunt. 29; *Thompson v. Crocker*, 9 Pick. 59. Where the plaintiff was hit in Arkansas by a fragment thrown by a blast fired in the Indian Territory, the cause of action was

*311-*313, *supra*. An action will

lie in Vermont, for injury suffered in the Province of Quebec, from failure of defendant to comply with a statute of the Province. *McLeod v. Railroad Co.*, 58 Vt. 727. An action which lies in Iowa under a statute changing the common law rule as to the non-liability of the master to the servant for a fellow servant's negligence, may, if the injury is suffered in Iowa, be brought against the master in Minnesota, though there the common law rule is followed. *Herrick v. Minn., &c., R. Co.*, 31 Minn. 11, 47 Am. Rep. 771.

by the courts of the jurisdiction giving it, and for wrongs there suffered.¹³

13—One cannot sue in Massachusetts under its statutes for an injury done by a dog in New Hampshire, though the dog is owned and kept in the former State, and strayed away to commit the injury. *Le Forest v. Tolman*, 117 Mass. 109.

FRAUDS, OR WRONGS ACCOMPLISHED BY DECEPTION.

The maxim which underlies the law of negligence is, as will be more fully shown hereafter, that every man must so use and enjoy his own as not to impede a corresponding use and enjoyment of their own by others. This is the legal duty of every man in respect to his neighbor, and this is the rule of good neighborhood which the law prescribes. The rule of morals is higher, and requires selfishness to be put aside, and every man to do by others what he would have them do by him. The remark has already been made that it would be futile for the law to attempt the enforcement of such a rule,¹ and it must be content with the regulation of selfishness as the best that is practicable.

The remark has special application in the law of frauds. There must be a legal standard by which the existence of actionable frauds can be determined, and this must be one capable of being practically applied, and by which the ordinary dealings of men with each other can be judged for the purposes of legal redress.

Fraud is either actual or constructive. Constructive frauds, or frauds by construction of law, are of two kinds: *First*, those, the indirect effect of which is to deprive some person or persons not a party to the transaction of some lawful right, or to hinder or embarrass him or them in the enforcement of such a right; and *Second*, those which consist in accepting benefits under circumstances where, as a general fact, it would be unconscionable to do so, and where, for that reason, the law assumes the existence of fraud or overreaching. Of the first class the following are illustrations: Making a voluntary conveyance of so much of one's property as to leave insufficient for the payment of his debts; or giving secret liens on property, the possession of which

1—*Ante*, p. *3.

is retained, and thereby misleading those dealing with the person giving them. These frauds are either re*dressed in equity, or at law by the transfers being treated as void [*555] on the principle that whatever fraud creates justice will destroy.² Of the second class, the chief illustrations are to be had in the dealings between persons standing in confidential relations, and they will be considered in the next chapter.

Actual or positive fraud consists in deception practiced in order to induce another to part with property or to surrender some legal right, and which accomplishes the end designed.³ The deception must relate to facts then existing or which had previously existed, and which were material *to the dealings between the parties in which the deception was em- [*556] ployed. In order to render it actionable, the following facts should appear: *First*, that the representations were made as alleged. *Second*, that they were made in order to influence the plaintiff's conduct. *Third*, that, relying upon them, the plaintiff did enter into a contract, or otherwise act as was desired. *Fourth*, that the representations were untrue. *Fifth*, that the plaintiff suffered damage from the action he was induced to

2—See cases in illustration of this maxim collected in Vreeland *v.* N. J. Stone Co., 29 N. J. Eq. 188. See Davis *v.* Davis, 20 Ore. 78, 25 Pac. 140.

3—Definition approved. Alexander *v.* Church, 53 Conn. 561; Fottler *v.* Moseley, 179 Mass. 295, 60 N. E. 788; Beard *v.* Bliley, 3 Colo. App. 479, 34 Pac. 271. Sir John Romily, in Green *v.* Nixon, 23 Beav. 530, 535, says: "Fraud implies a willful act on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to." "Fraud," it is said in another case, "consists in a person being induced to act to his prejudice by untruthful statements made by another, upon whom he had a

right to rely, and whose duty it was to state the case truly." Detroit *v.* Weber, 26 Mich. 284, 288; Tong *v.* Marvin, 15 Mich. 60. A fraud is sometimes said to be a gross fraud; but this merely indicates how the transaction affects the moral sensibilities; the epithet passes it into no new category of legal wrongs, and gives for it no additional remedy.

Whether or not the fraudulent actor expected to make any personal gain to himself in the transaction is of no importance. Haycraft *v.* Creasy, 2 East, 92. Fraud in equity, it is said, "properly includes all acts, omissions and concealments by which an undue and unconscientious advantage is taken of another." Story Eq.

take; and *Sixth*, that this damage followed proximately the deception.⁴

Burden of Proof. Fraud is never presumed, and the party alleging and relying upon it must prove it.⁵ This, however, is

Juris. § 187; 1 Fonb. Eq. b. 1, c. 263; Belcher *v.* Belcher, 10 Yerg. 121; Story *v.* Norwich, &c., R. R. Co., 24 Conn. 94. Still fraud, it is apprehended, is the same at law and in equity, though many frauds are redressed in the courts of equity for which the legal remedies are not adequate, or to which they are not adapted.

A definition of fraud often met with in law books, is the following: The unlawful appropriation of another's property, with knowledge, by design, and without criminal intent. This definition is both inadequate and erroneous. In the first place an appropriation of one's property unlawfully, with knowledge and by design, is not always a fraud; it may be made openly and without deception, and so be a mere trespass or a conversion. The definition does not at all distinguish between an appropriation through fraud and a conversion without fraud, and therefore fails to indicate what it assumes to define. In the second place, fraud is not limited to cases in which property is obtained. Every invasion of the right of another by a fraudulent act or omission is a legal fraud, though to obtain property be not the object. In the third place, the design to commit fraud is not essential in all cases, and it may be accomplished sometimes, though the party chargeable with it is ignorant that his statements or devices do not present the real facts. And in the fourth place,

deception by which an individual is wronged, is no less a fraud because of its having been accomplished with criminal intent. The criminal intent only adds a new characteristic, and makes that which is a private wrong a public wrong also. Therefore the definition given is faulty in every one of its particulars.

4—Sellar *v.* Clelland, 2 Colorado, 532, 544; Byard *v.* Holmaes, 34 N. J. 296; Lummis *v.* Stratton, 1 Pen. & W. 245; Tryon *v.* Whitmarsh, 1 Met. 1, 35 Am. Dec. 339. In Southern Development Co. *v.* Silva, 125 U. S. 247, 8 S. C. Rep. 881, 31 L. Ed. 678, the court says: "In order to establish a charge of this character the complainant must show by clear and decisive proof—*First*. That the defendant has made a representation in regard to a material *fact*; *Secondly*, that such representation is false; *Thirdly*, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; *Fourthly*, that it was made with intent that it should be acted on; *Fifthly*, that it was acted on by complainant to his damage; and, *Sixthly*, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true." p. 250. The plaintiff must show that the damage complained of was the necessary result of the wrongful act. Nelson County *v.* Northcote, 6 Dak. 378, 43 N. W. 897.

5—Hill *v.* Reifsneider, 46 Md.

one of those rules of law which is to be applied with caution and circumspection. "So far as it goes, it is based on a principle which has no more application to frauds than any other subject of judicial inquiry. It amounts but to this, that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial."⁶ Fraud is therefore as properly made out by marshaling the circumstances surrounding the transaction, and deducting therefrom the fraudulent purpose, when it manifestly appears, as by presenting the more positive and direct testimony of actual purpose to deceive;⁷ and, indeed, circumstantial *proof in most cases can alone bring the [*557] fraud to light, for fraud is peculiarly a wrong of secrecy and circumvention, and is to be traced not in the open proclamation of the wrong-doer's purpose, but by the indications of covered tracks and studious concealments.⁸ And while it is often said that to justify the imputation of fraud, the facts must be such as are not explicable on any other hypothesis,⁹ yet this can

555; Tompkins *v.* Nichols, 53 Ala. 197; Baldwin *v.* Buckland, 11 Mich. 389; Bowden *v.* Bowden, 75 Ill. 143; Farmer *v.* Calvert, 44 Ind. 209; London, etc., Bank *v.* Lempriere, L. R. 4 P. C. 572; S. C. 5 Moak, 137; Hoeller *v.* Haffner, 155 Mo. 589, 56 S. W. 312; Davidson *v.* Crosby, 49 Neb. 60, 68 N. W. 338; Alter *v.* Stockham, 53 Neb. 223, 73 N. W. 667; Keel *v.* Levy, 19 Ore. 450, 24 Pac. 253. If the representations are proved false the burden is cast upon the defendant to show they were not relied on. Fishback *v.* Miller, 15 Nev. 428.

6—BLACK, Ch. J., in Kaine *v.* Weigley, 22 Pa. St. 179, 182. See O'Donnell *v.* Segar, 25 Mich. 367. It is not enough that the facts are ambiguous, and as consistent with innocence as guilt. Shultz *v.* Hoagland, 85 N. Y. 464. The

plaintiff must show that he understood ambiguous words to mean what was false and had thereby incurred loss. Smith *v.* Chadwick, L. R. 9 App. Cas. 187.

7—Kaine *v.* Weigley, 22 Pa. St. 179; Watkins *v.* Wallace, 19 Mich. 57; McDaniel *v.* Baca, 2 Cal. 326, 56 Am. Dec. 339; Waddingham *v.* Loker, 44 Mo. 132, 100 Am. Dec. 160; Bank of Orange County *v.* Fink, 7 Paige 87.

8—Hopkins *v.* Sievert, 58 Mo. 201; Vance *v.* Phillips, 6 Hill 433; Hennequin *v.* Naylor, 24 N. Y. 139; Hoeller *v.* Haffner, 155 Mo. 589, 56 S. W. 312; Alter *v.* Stockham, 53 Neb. 223, 73 N. W. 667.

9—The Alabama, etc., Co. *v.* Pettway, 24 Ala., 544; Buck *v.* Sherman, 2 Doug. (Mich.) 176; McConnell *v.* Wilcox, 2 Ill. 343. In Alabama it is now denied that this is a correct statement of the

mean no more than this, that the court or jury should be cautious in deducing the fraudulent purpose; for whatever satisfies the mind and conscience that fraud has been practiced is sufficient.¹⁰

What is Not Deception. In general mere silence, a mere failure to apprise the party with whom one is dealing of facts important for him to know for the protection of his own interest in the particular transaction, is no fraud. *Caveat emptor* is the motto of commercial law, and in other dealings, as well as in sales, every person is expected to look after his own interest, and is not at liberty to rely upon the other party to protect him against the consequences of his own blunders or heedlessness. Therefore, where the sources of information are equally open to both parties to any dealings, and the one obtains an advantage of the other without resort to any trick or artifice of concealment calculated to throw the other off his guard, or to any false presentation of facts, the advantage he gains is deemed legitimate, and the losing party must bear such loss as has resulted

from his own want of vigilance or prudence.¹¹ Nor is this [*558] the rule as regards *merely the quality or value of that

which is the subject of negotiation, but it extends to all those facts and circumstances which would be likely to influence the minds of the contracting party if they were known to him when the contract was entered into. Therefore, if one who is insolvent buys goods of another without disclosing his circumstances to his vendor, who is ignorant of them, but makes no inquiries, and is not deceived by misrepresentation or artifice, there is in law no fraud, although the vendor when he sold, fully be-

law. "Fraud requires no higher measure of proof" in civil proceedings "than is required in many other cases where the presumption of honesty, etc., is to be overcome." *Adams v. Thornton*, 78 Ala. 489, 56 Am. Rep. 49.

10—*Kaine v. Weigley*, 22 Pa. St. 179; *Hildreth v. Sands*, 2 Johns. Ch. 35; S. C. in error, 14 Johns. 493; *Devoe v. Brandt*, 53 N. Y. 462, 465. It need not be shown

"conclusively." *Sparks v. Dawson*, 47 Tex. 138.

11—*Mooney v. Miller*, 102 Mass. 217; *Starr v. Bennett*, 5 Hill 303; *Brown v. Leach*, 107 Mass. 364; *Hobbs v. Parker*, 31 Me. 143; *Williams v. Spurr*, 24 Mich. 335; *Law v. Grant*, 37 Wis. 548; *Mitchell v. McDougall*, 62 Ill. 498. See *Jordan v. Pickett*, 78 Ala. 331 for statement of what circumstances make silence fraudulent and what

lieved the vendee to be responsible and entitled to credit.¹² But there is a strong dissent from this doctrine which is ably expressed by the Supreme Court of Alabama as follows: "One who comes to buy goods on credit impliedly represents that he is or will be able to pay for them, and that he intends to pay for them, and he impliedly promises to pay for them; and he knows that the seller parts with them on the faith of these implied representations and this implied promise. If in fact he intends not to pay for them, or if he has no reasonable expectation of paying for them, and is insolvent or in failing circumstances, so that payment cannot be enforced, he deceives the seller and practices a fraud upon him in the very act of purchasing his property. The purchase itself being a representation that the buyer intends to pay the price, to so represent or profess by the act of

do not. It is no fraud in a purchaser to fail to disclose special circumstances giving great value to the land he is buying, such as the existence of a mine, of which he knows the vendor is ignorant. *Harris v. Tyson*, 24 Pa. St. 347; *Williams v. Spurr*, 24 Mich. 335.

In Missouri it is said that if there is a defect not open to observation, which the vendor knows, but the vendee does not, the former is bound to disclose it. "Common honesty in such a case requires a man to speak out." *McAdams v. Cates*, 24 Mo. 223. See *Barron v. Alexander*, 27 Mo. 530; *Cecil v. Spurger*, 32 Mo. 462, 82 Am. Dec. 140. But unless the defect is one which artifice has been employed to conceal, there can be no such general rule. Artifice with the concealment, may make out fraud. *Singleton v. Kennedy*, 9 B. Mon. 222. As to the general rule, see, further, *Smith v. Countryman*, 30 N. Y. 655; *Hanson v. Edgerly*, 29 N. H. 343. A failure of the vendor to

correct the vendee's erroneous views of what he is buying is no fraud. *Law v. Grant*, 37 Wis. 548. Compare *Williams v. Beazley*, 3 J. J. Marsh, 578.

But it is said if the vendor knows a horse he is selling has an internal and secret malady, rendering him worthless, he must disclose it. *Paddock v. Strobridge*, 29 Vt. 470; *Lunn v. Shermer*, 93 N. C. 164. But, see *Hill v. Balls*, 2 H. & N. 299.

12—*Nichols v. Pinner*, 18 N. Y. 295; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Cross v. Peters*, 1 Me. 376, 10 Am. Dec. 78; *Gavin v. Armistead*, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117; *Illinois Leather Co. v. Flynn*, 108 Mich. 91, 65 N. W. 519; *Sprague, Warner & Co. v. Kempe*, 74 Minn. 465, 77 N. W. 412; *Dalton v. Thurston*, 15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905. There is if the insolvent buyer practices some deceit. *Des Farges v. Pugh*, 93 N. C. 31, 53 Am. Rep. 446.

purchasing, when in truth he intends to do the contrary, 'is as clear a case of misrepresentation and of fraud as could be made.' Obviously there need be no misrepresentation by word of mouth, and no affirmative concealment, so to speak, of the purchaser's insolvent condition, or of his intention not to pay, or of his want of reasonable expectation of being able to pay. If these facts exist, *and are not disclosed*, the seller, proceeding, and known by the purchaser to be proceeding, on the assumption of their non-existence, or, in other words, on the assumption that the purchaser is solvent and intends and reasonably expects to pay, is deceived and defrauded. * * * A sale and purchase of goods is fraudulent and open to disaffirmance by the seller, when the purchaser was at the time thereof insolvent, or in failing circumstances, and had the design not to pay for them, or had no reasonable expectation of being able to pay for them, and either represented that he was solvent or intended to pay or failed to disclose his financial condition or the fact that he did not intend to pay or expect to be able to pay for the goods."¹³

What is Deception. In order to make out deception, it is not essential that false assertions should be made in words. A nod, a wink, a shake of the head, or a smile artfully contrived to induce the other party to believe in a non-existent fact which might influence the negotiations may have all the effect of false assertions, and be equally deceptive and fraudulent.¹⁴ "If, with intent to deceive, either party to a contract of sale conceals

13—*Maxwell v. Brown Shoe Co.*, buyer does not know or think that 114 Ala. 304, 308, 309, 21 So. 1009. he is insolvent and intends to pay, Same rule affirmed, *McKenzie v. Rothschild*, 119 Ala. 419, 24 So. 716. To same effect: *Cross v. Memphis, etc., R. R. Co.*, 96 Ala., 447, 11 So. 480; *Hudson v. Bauer Grocery Co.*, 105 Ala. 200, 16 So. 693; *Diggs v. Denny*, 86 Md. 116, 37 Atl. 1037; *Standard Horseshoe Co. v. O'Brien*, 88 Md. 335, 41 Atl. 898; *Courtney v. Knabe & Co. Mfg. Co.*, 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456; *Elsass v. Harrington*, 28 Mo. App. 300. But if a buyer does not know or think that he is insolvent and intends to pay, the fact that he was insolvent and that he had good reason to think so does not render his purchase fraudulent. *Diggs v. Denny*, 86 Md. 116, 37 Atl. 1037. Where goods are obtained upon credit by means of false representation, it is no defense to an action for the fraud that the defendant intended and expected to pay for them. *Judd v. Weber*, 55 Conn. 267, 11 Atl. 40.

14—*Walters v. Morgan*, 3 DeG. F. & J. 718.

or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.¹⁵ So one may accomplish a fraud by encouraging and taking advantage of a delusion known to exist in the mind of the other, though nothing is directly asserted which is calculated to keep it up.¹⁶ So it is a "gross deception [*559] and fraud to pass off a note as duly endorsed upon a person who cannot read, when in fact the endorsement is one made without recourse.¹⁷ And a familiar case of fraud, often redressed by means of the application of the doctrine of estoppel, is where one keeps silence when he sees his own property sold as the property of another, or property sold upon which he has a lien, and fails in either case to disclose the facts.¹⁸

15—*Stewart v. Wyoming Ranch Co.* 128 U. S. 383, 9 S. C. 101, 32 L. Ed. 439. See *Union Mfg. Co. v. East Ala. Nat. Bank*, 129 Ala. 292, 29 So. 781. case of false representation." p. 314.

16—*Hill v. Gray*, 1 Stark. 434; *Trigg v. Read*, 5 Humph. 529, 42 Am. Dec. 447; *Busch v. Wilcox*, 82 Mich. 315, 46 N. W. 940; *Lomerson v. Johnston*, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. Rep. 410. In the latter case it is said:

"In order to establish a case of false representation it is not necessary that something which if false should have been stated as if it were true. If the presentation of that which is true creates an impression which is false, it is, as to him who, seeing the misapprehension, seeks to profit by it, a

17—*Decker v. Hardin*, 5 N. J. 579. If a mortgagee of goods which have been attached by a creditor of the mortgagor demands payment of his mortgage, knowing that his claim is false and fraudulent, and the attaching creditor, supposing the claim valid, releases his attachment, the latter may recover of the mortgagee the amounts of his debt thereby lost in an action on the case. *Brown v. Castles*, 11 Cush. 348.

18—*Tomlin v. Den*, 19 N. J. 76; *Aortson v. Ridgeway*, 18 Ill. 23; *Gray v. Bartlett*, 20 Pick. 186, 32 Am. Dec. 208; *Dann v. Cudney*, 13 Mich. 239, 87 Am. Dec. 755. Where

When Silence is Fraudulent. There are a few other cases in which silence itself is fraudulent, because the silence amounts to an affirmation that a state of things exists which does not, and the party is deceived to the same extent that he would have been by positive assertion. Thus, one who sells goods on credit has a right to suppose his vendee intends to pay for them; and although an insolvent may lawfully buy on credit, even though his insolvency is not known to the seller, yet if he makes the purchase intending at the time to take advantage of his insolvency and not pay for them, the concealment of this intention is a gross fraud, and the title to the goods will not pass.¹⁹

one, in the course of negotiations for a marriage, let the woman have money, in order to make her fortune apparently equal to what was insisted upon on the other side, taking her obligation for payment, this obligation was set aside for fraud. *Gale v. Lindo*, 1 Vern. 475. So a creditor who, under like circumstances, conceals and denies the fact of indebtedness, may be enjoined from enforcing it. *Neville v. Wilkinson*, 1 Bro. C. C. 543. And, see, *Bell v. Clarke*, 25 Beav. 437. So if one allows his money to stand to the credit of a company to give it a fictitious credit, he cannot claim it when the company is wound up. *In re Grt. Berlin, etc. Co.*, L. R. 26 Ch. D. 616.

19—*Ferguson v. Carrington*, 9 B. & C. 59; *Load v. Green*, 15 M. & W. 216; *Ex parte Whittaker*, L. R. 10 Ch. App. 446; S. C. 14 Moak, 722; *Congers v. Ennis*, 2 Mar. 236; *Donaldson v. Farwell*, 93 U. S. 631; *Nichols v. Michael*, 23 N. Y. 264; 80 Am. Dec. 259; *Hennequin v. Naylor*, 24 N. Y. 139; *Devoe v. Brandt*, 53 N. Y. 462; *Wright v. Brown*, 67 N. Y. 1; *Thompson v. Rose*, 16 Conn. 71,

41 Am. Dec. 121; *Ayres v. French*, 41 Conn. 142; *Dow v. Sanborn*, 3 Allen 181; *Stewart v. Emerson*, 52 N. H. 301; *Bishop v. Small*, 63 Me. 12; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Powell v. Bradlee*, 9 Gill. & J. 220; *Shipman v. Seymour*, 40 Mich. 274; *Oswego, &c., Co. v. Lendrum*, 57 Ia. 573, 42 Am. Rep. 53; *Hough-taling v. Hills*, 59 Ia. 287; *Wilk v. Key*, 117 Ala. 285, 23 So. 6; *Max-well v. Brown Shoe Co.*, 114 Ala. 304, 21 So. 1009; *McKenzie v. Rothschild*, 119 Ala. 419, 24 So. 716; *Gavin v. Armistead*, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262; *Bugg v. Wertheimer-Schwartz Shoe Co.*, 64 Ark. 12, 40 S. W. 134; *People v. Healy*, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90; *Huth-macher v. Lowman's Sons*, 66 Ill. App. 448; *Cox Shoe Co. v. Adams*, 105 Ia. 402, 75 N. W. 316; *Phelps, Dodge & Palmer Co. v. Samson*, 113 Ia. 145, 84 N. W. 1051; *Deere v. Morgan*, 114 Ia. 287, 86 N. W. 271; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117; *Ross v. Miner*, 67 Mich. 410, 35 N. W. 60; *Illinois Leather Co. v. Flynn*, 108 Mich. 91, 65 N. W. 519; *Slagle v. Goodnow*, 45 Minn. 531, 48 N. W. 402;

*A still plainer case is where one makes a purchase of [*560] goods and gives his own bank check in payment. The giving of a bank check is universally understood in commercial circles as an affirmation that there are funds on deposit to meet it, and the payee receives it on that understanding. But if in fact the check is drawn on a bank where the drawer had no funds, and without any reasonable expectations on his part that it will be paid, the fraud is manifest.²⁰ So, if negotiations are had on the basis of certain facts known to the parties, but before they are concluded a change material to the negotiations takes

Sprague, Warner & Co. v. Kempe, 74 Minn. 465, 77 N. W. 412; *McCready v. Phillips*, 56 Neb. 446, 76 N. W. 885; *Whitton v. Fitzwater*, 129 N. Y. 626, 29 N. E. 298; *Pilcher v. Levins*, 80 Hun, 399, 30 N. Y. S. 314; *Luhrig Coal Co. v. Ludlum*, 69 Ohio St. 311, 69 N. E. 562, 100 Am. St. Rep. 675; *Wilmot v. Lyon*, 11 Ohio C. C. 238; *Dalton v. Thurston*, 15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905; *Swift v. Rounds*, 19 R. I. 527, 35 Atl. 45, 61 Am. St. Rep. 791. See *Elsass v. Harrington*, 28 Mo. App. 300.

There are cases to the contrary. *Smith v. Smith*, 21 Penn. St. 367; *Backentos v. Speicher*, 31 Penn. St. 324; *Rodman v. Thalheimer*, 75 Penn. St. 232; *Bell v. Ellis*, 33 Cal. 620, 630. There must be a pre-conceived intention never to pay for the goods. *Burrill v. Stevens*, 73 Me. 395, 40 Am. Rep. 366. Mere absence of purpose to pay is not enough. *Catlin v. Warren*, 16 Ill. App. 418; *Flower v. Farwell*, 18 Id. 254. But if the intent is not to pay and to avoid payment by mortgaging the goods, it is a fraud although there were no false representations. *Ross v. Miner*, 67 Mich. 410, 35 N. W. 60. In *Whitton v. Fitzwater*, 129 N. Y.

626, 29 N. E. 298, it is held to be sufficient if the purchaser had the intent not to pay either when he ordered the goods or when he received them.

If one seeking to buy on credit is required to state his condition, his failure to state his indebtedness is more than passive non-disclosure, if his statement, though literally true, is calculated to convey a false impression. *Newell v. Randall*, 32 Minn. 171, 50 Am. Rep. 562.

20—*Harner v. Fisher*, 58 Pa. St. 453; *Mizner v. Kussell*, 29 Mich. 229; *True v. Thomas*, 16 Me. 36; *Earl of Bristol v. Wilsmore*, 1 B. & C. 514. It is a fraud knowingly to make payment in worthless bank bills, the other party supposing them to be good; and an understanding that the payment should be conclusive unless the bills were returned within a certain number of days, would not be binding under such circumstances. *Smith v. Click*, 4 Humph. 186. So, knowingly, to give in payment a note of one man supposed by the seller to be that of another of like name. *Parrish v. Thurston*, 87 Ind. 437.

place to the knowledge of one party, but not of the other, the latter has a right to be informed by the former of this change, and if he is not informed, he is deceived and defrauded.²¹ So, where one is making a purchase for a specific purpose, which is disclosed to the seller, and the latter knows that what he offers for sale is wholly unfit for that purpose by reason of some defect not manifest, it is his duty to make known to the purchaser that fact.²² Thus, if one were to apply to a *dealer for [**561] grain for seed, and shquld be shown that which to all appearance was suitable, but the germinating power of which the dealer knew had in some manner been destroyed, and if the applicant were to be suffered to buy this, supposing it was suitable for the purpose, the fraud would be as gross, if no words were uttered, as it would be if the sale were accompanied by the most positive assertions of its adaptability to the purchaser's wants.

A case of this sort is where one having diseased meats or other unwholesome provisions, and knowing the fact, nevertheless exposes them for sale as provisions to those who will be expected to take them for consumption into their own households. The offer of provisions to consumers is of itself a warranty that they are fit for consumption as such,²³ but if the seller knows they are unfit, it is a gross fraud to offer them, for purchasers

21—*Traill v. Baring*, 4 DeG., J. & S. 318; *Underhill v. Harwood*, 10 Ves. 225; *Nichols v. Pinner*, 18 N. Y. 295; *Van Campen v. Bruns*, 54 App. Div. 86, 66 N. Y. S. 344. And see, for the same principle, *Lancaster Co. Bank v. Albright*, 21 Pa. St. 228; *Reynell v. Sprye*, 1 DeG., M. & G. 660, 679.

22—As where a bull was bargained for to put with cows, and the vendor knew that he was without power of propagation. *Maynard v. Maynard*, 49 Vt. 297. See *Paddock v. Strobridge*, 29 Vt. 470; *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339; French

v. Vining, 102 Mass. 132, 3 Am. Rep. 440. An insurance is void if obtained when the applicant knows that because of something which has already occurred the event insured against must happen. *Bigelow on Fraud*, 39. But if one buys with full opportunity for inspection and without disclosing the specific purpose of the purchase from one not the manufacturer of the article there is no implied warranty of fitness. *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639.

23—*Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; *Croft v. Parker*,

are not expected to inquire; indeed, the inquiry of a respectable dealer whether he did not know that the provisions he was offering to his customers were poisonous or otherwise unfit for use, might well be taken as an insult. The sale without disclosing the facts is of itself a fraud, because the offer is of itself a representation of suitableness for use.²⁴ The reasons for the rule have been thus stated: "Where articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor that the article

96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139. It has always been held that while there is no implied warranty that provisions disposed of by wholesale dealers for resale are fit for use—*Emerson v. Brigham*, 10 Mass. 196, 6 Am. Dec. 109; *Moses v. Mead*, 1 Denio, 378, 43 Am. Dec. 676; *Hart v. Wright*, 17 Wend. 267; *Goldrich v. Ryan*, 3 E. D. Smith, 324; *Hyland v. Sherman*, 2 E. D. Smith, 234; *Hargous v. Stone*, 5 N. Y. 73; *Rinschler v. Jeliffe*, 9 Daly 469; *Ryder v. Neitge*, 21 Minn. 70, (but see *contra* where vendee has no chance to inspect. *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570)—yet that there was such a warranty when they were sold by a retail dealer for consumption. *Van Brocklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339; *Moses v. Mead*, 1 Denio, 378, 43 Am. Dec. 676; *Hoe v. Sanborn*, 21 N. Y. 552. See *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715. And it is said that a warranty arises whether the vendor is a dealer or not, if he knows the article is purchased for immediate consumption.

Hoover *v. Peters*, 18 Mich. 51. As to which see *Goad v. Johnson*, 6 Heisk. 340; *Burnby v. Bollett*, 16 M. & W. 644.

24—*Emerson v. Brigham*, 10 Mass. 196, 6 Am. Dec. 109; *Peckham v. Holman*, 11 Pick. 484; *Van Brocklin v. Fonda*, 12 Johns. 468; *Devine v. McCormick*, 50 Barb. 116; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; *Croft v. Parker*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139. And see *Winsor v. Lombard*, 18 Pick. 57, 62. There is an implied warranty of fitness in sale by manufacturer to retailer of a piano. *Snow v. Schomacher, &c., Co.*, 69 Ala. 111, 44 Am. Rep. 509; in sale of article as Paris green to kill worms. *Jones v. George*, 61 Tex. 345. So where sale was of leather by one who did not manufacture it to a shoe manufacturer and a latent defect was not seen by latter on examination though known by the former. *Downing v. Dearborn*, 77 Me. 457. And see *Poag v. Charlotte Oil, etc., Co.*, 61 S. C. 190, 39 S. E. 345.

sold is sound and fit for the use for which it was purchased. It may be said that the rule is a harsh one; but, as a general rule, in the sale of provisions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale than are possessed by the purchaser, that it is much safer to hold the vendor liable than it would be to compel

the purchaser to assume the risk.²⁵

[*562] *This doctrine has recently and with entire justice been applied to the sale of food for domestic animals. The case was one of the sale of hay upon which a poisonous fluid had been accidentally spilled. The hay was fed to a cow which was poisoned from eating it. "It is perfectly well settled," say the court, "that there is an implied warranty in regard to manufactured articles purchased for a particular use, which is made known at the time of the sale to the vendor, that they are reasonably fit for the use for which they are purchased. It may, perhaps, be more accurate to say that, independently of any express and formal stipulation, the relation of the buyer to the seller may be of such a character as to impose a duty upon the seller differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part as to the quality of the thing sold. A grocer, for instance, who sells at retail may be presumed to have some general notion of the uses which his customers will probably make of the articles which they buy of him. If they purchase flour or sugar, or other articles of daily domestic use for their families, or grain or meal for their cattle, the act of selling to them under such circumstances is equivalent to an affirmation that the things are at least wholesome and reasonably fit for use; and proof that he knew, at the time of the sale, that they were not wholesome and reasonably fit for use, would be enough to sustain an action against him for deceit, if he had not disclosed the true state of the facts. The buyer has a right to suppose that the thing which he buys under such circumstances is what it appears to be, and such purchases are usually made with a reliance upon the

supposed skill or actual knowledge of the vendor. In the case at bar the plaintiff bought the hay in small quantities and the defendant must be considered as knowing, generally, the kind of use to which it was to be applied. The act of sale, under such circumstances, was equivalent to an express assurance that the *hay was suitable for such use. If he knew that [*563] the hay had a defect about it, or had met with an accident that rendered it not only unsuitable for that use, but dangerous or poisonous, it would plainly be a violation of good faith and an illegal act to sell it to the plaintiff without disclosing its condition. Silence in such a case would be deceit.²⁶

On the same reasons it would seem that the sale of animals which the seller knows, but the purchaser does not, have a contagious disease, should be regarded as a fraud when the fact of disease is not disclosed; and so it has been held in New York.²⁷ So infecting the grass and other herbage of a field by one in possession as mere licensee, and allowing the owner to turn in

26—AMES, J., in *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, citing *Langridge v. Levy*, 2 M. & W. 519; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *McDonald v. Snelling*, 14 Allen, 290, 295, 92 Am. Dec. 768. See also *Provost v. Cook*, 184 Mass. 315, 68 N. E. 336. But where there were copper clasps in bran sold by dealers, which killed a cow, held no liability, that the rule as to food sold for human use did not apply. *Lukens v. Freiund*, 27 Kan. 644, 41 Am. Rep. 429.

27—*Jeffery v. Bigelow*, 13 Wend. 518. *Caveat emptor* does not apply to sale of cattle with Texas fever. *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. 421. A different view was taken in *Hill v. Balls*, 2 H. & N. 299. It was there said that as the law does not require the vendor of a horse who is guilty of no fraud or deception,

and makes no warranty, to disclose defects, if he sells a diseased horse without informing the purchaser of the facts, the subsequent communications of the disease to other animals will not convert the lawful sale into a tort. The conclusion certainly follows if the sale is lawful, but if the sale is fraudulent, the seller will be responsible for all consequences. *Mullett v. Mason*, L. R. 1 C. P. 559; *Fultz v. Wycoff*, 25 Ind. 321.

In Illinois there is a statute making persons responsible for the communication of disease by Texas cattle brought into the State by them. See *Frazee v. Milk*, 56 Ill. 435; *Yeazel v. Alexander*, 58 Ill. 254; *Somerville v. Marks*, 58 Ill. 371; *Sangamon*, etc., Co. v. *Young*, 77 Ill. 197. So in Kansas a railway company which after an accident drives infected animals along a highway acts at its peril.

his beasts without informing him of the fact, is a gross fraud.²⁸ And it would seem that the fraud would not only be more censurable, but more clearly actionable, if that which is exposed to injury by the concealment is the health—perhaps the [*564] life—of human *beings, as might be the case if one were to induce another to receive into his family as a boarder a person who had been exposed to some contagious disease, and should fail to communicate that fact.

Cases not different in principle sometimes arise in the law of suretyship, where the surety is induced to assume his obligation by the concealment of facts which, under the circumstances he had a right to have disclosed to him by the obligor or creditor. A surety, it may generally be supposed, is the friend of his principal rather than of the party the principal proposes to secure, and he is expected to apply to his principal for the facts likely to affect his liability, or to inquire them out independently. Therefore, the creditor, or party to be secured, is not in general under any obligation to disclose the facts within his knowledge, but he may deal with the principal exclusively, and accept and rely upon such security as the latter brings him. But there may be circumstances under which his duty to speak would be

Missouri Pac. Ry. Co. v. Finley, 38 St. Rep. 128. Unless the owner Kan. 550, 16 Pac. 951. So if it negligently permits them to escape and thereby the fever is communicated to the plaintiff's cattle. Grimes v. Eddy, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638. But otherwise if the escape is without negligence. Selvege v. St. Louis, etc., Ry. Co., 135 Mo. 163, 36 S. W. 652. And see Croff v. Cresse, 7 Okl. 408, 54 Pac. 558; Grayson v. Lynch, 163 U. S. 468, 16 S. C. Rep. 1064, 41 L. Ed. 230.

28—Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; Railway Co. v. Goolsby, 58 Ark. 401, 24 S. W. 1071; Costello v. Ten Eyck, 86 Mich. 348, 49 N. W. 152, 24 Am.

very plain. Thus, where a bank was in good credit, and its published reports showed it to be well managed, when, in fact, its cashier was a defaulter, and the fact should have been known to the directors, and might have been known to them by the exercise of very slight care, it was very properly held that if one, under these circumstances became surety to the bank on the official bond of the cashier, without the defalcation being made known to him, the bond was tainted with fraud and could not be enforced.²⁹ What facts the directors knew, or by the exercise of ordinary care ought to have known, in the dealings of the cashier with the corporation, and which were not accessible except through the corporation itself, it was their duty to make known.³⁰ So, if a creditor, knowing that his debtor is in failing circumstances, after obtaining from him for a part of his claim a mortgage substantially covering all his property, induces the debtor to obtain the endorsement of a third person for another part, without *revealing the fact of the mortgage, this is [*565] such a fraud upon the endorser as relieves him from liability.³¹ So if the husband induces his wife to give a mortgage on her property to enable him to purchase goods and continue in business, the mortgagee knowing the purpose, but by a secret arrangement not disclosed to the wife a part of the consideration of the mortgage is to be old indebtedness of the husband, this secret arrangement is a fraud, and the mortgage, to that extent, inoperative.³² And so wherever the creditor has any secret arrangement with his debtor, which would increase the surety's liability, or which, if known, would be likely to prevent one assuming the obligation of suretyship, the accepting of the

29—*Graves v. Lebanon Nat. land v. Pryor*, 33 Ohio St. 19. Bank, 10 Bush, 23, 19 Am. Rep. 50. See, also, *Lee v. Jones*, 17 C. B. (n. s.) 386. If the surety applies for information to the person guaranteed the latter must make full disclosure. *Remington, &c., Co. v. Kezertee*, 49 Wis. 409. But the surety cannot defend against the creditor on the debtor's false representations to him. *Kings-*

30—*Graves v. Lebanon Nat. Bank*, 10 Bush, 23. See *Lee v. Jones*, 17 C. B. (n. s.) 386; *Aetna Fire Ins. Co. v. Mabbett*, 18 Wis. 667; *State v. Bates*, 36 Vt. 387.

31—*Lancaster Co. Bank v. Albright*, 21 Penn. St. 228.

32—*Smith v. Osborn*, 33 Mich. 410.

surety's obligation without disclosure is a fraud.³³ These were cases in which the ordinary rule which requires every man to protect his interests by his own inquiries had no application; for the facts were such as suspicion would not be likely to seize upon or prudence look for, and on the face of the transaction a state of things was assumed which was directly the opposite of the real facts.

Where the defendant knows that the plaintiff is relying upon his knowledge and judgment in a matter and does not reveal material facts within his knowledge, it is held to be a fraud, though no confidential relation exists.³⁴ But if the defendant does not know of such reliance and has done nothing intentionally to induce it, his silence is not fraudulent.³⁵ Where the defendant sold a note to the plaintiff and kept silent as to the insolvency of the maker, of which he had knowledge, it was held that an action for deceit would lie.³⁶ So where the defendants induced the plaintiff to join them, in the purchase of certain land and did not disclose the fact that they already owned a part interest therein.³⁷

Matters of Opinion. Mere expressions of matters of opinion, however strongly or positively made, though they are false, are no fraud, because, as is said in one case, these are matters in respect to which many men will be of many minds, and judgments are often governed by whim and caprice.³⁸ There-

33—Booth *v.* Storrs, 75 Ill. 438. See Franklin Bank *v.* Cooper, 36 Me. 179.

34—Bennett *v.* McMillan, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. Rep. 591.

35—Chicora Fertilizer Co. *v.* Dunan, 91 Md. 144, 45 Atl. 347, 50 L. R. A. 401; Burt *v.* Mason, 97 Mich. 127, 56 N. W. 365.

36—Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151.

37—Constant *v.* Lehman, 52 Kan. 227, 34 Pac. 745.

38—Pasley *v.* Freeman, 3 T. R. 51. See Ross *v.* Estates Invest-

ment Co., L. R. 3 Eq. 122; Payne *v.* Smith, 20 Geo. 654; Fish *v.* Cleland, 33 Ill. 238; Lehman *v.* Shackleford, 50 Ala. 437; Reed *v.* Sidener, 32 Ind. 373; Ellis *v.* Andrews, 56 N. Y. 83, 15 Am. Rep.

379; Bristol *v.* Braidwood, 28 Mich. 191; Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664; Tuck *v.* Downing, 76 Ill. 71; Bellairs *v.*

Tucker, L. R. 13 Q. B. D. 562; Anderson *v.* McPike, 86 Mo. 293; Crown *v.* Carriger, 66 Ala. 590; Moses *v.* Katzenberger, 84 Ala. 95,

4 So. 237; East *v.* Worthington Co., 88 Ala. 537, 7 So. 189; American

fore, for *a vendor to assert that the lands he is negotiating to sell are of a particular value, greatly above their real worth, or to exaggerate their good qualities and productiveness, is no fraud.³⁹ This is especially true where the vendee

Nat. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. 1090; Wren *v.* Truitt, 116 Ga. 708, 43 S. E. 52; Swan *v.* Mathre, 103 Ia. 261, 72 N. W. 522; Allison *v.* Ward, 63 Mich. 128, 29 N. W. 528; Nostrum *v.* Halliday, 39 Neb. 828, 58 N. W. 429; Albion Milling Co. *v.* First Nat. Bank, 64 Neb. 116, 89 N. W. 638; Max Meadows L. & I. Co. *v.* Bradley, 92 Va. 71, 22 S. E. 845; Baker *v.* Bicknell, 14 Wash. 29, 44 Pac. 107; Warner *v.* Benjamin, 89 Wis. 290, 62 N. W. 179. A mistaken estimate upon one's best judgment of the value of land gives no action. Gordon *v.* Butler, 105 U. S. 553. See Silverthorne *v.* Hunter, 5 Ont. App. 157. But a false and dishonest representation does, though the person making it gets no benefit from it. Busterud *v.* Farrington, 36 Minn. 320. In Haycraft *v.* Creasy, 2 East 92, it is said that the assertions must be considered in the light of the subject matter, and that a statement that another is entitled to credit upon one's own knowledge, is to be understood as being only a strong expression of one's belief on the subject. Such representations, if known to be false, are actionable. Endsley *v.* Johns, 120 Ill. 469, 60 Am. Rep. 572; McKoun *v.* Furgason, 47 Ia. 636. See Cowley *v.* Smyth, 46 N. J. L. 381, 50 Am. Rep. 432; Potts *v.* Chapin, 133 Mass. 276; Babcock *v.* Libbey, 82 N. Y. 144. So if made recklessly though ignorantly. Einstein *v.* Marshall, 58 Ala. 153, 25 Am. Rep. 729. But if made by the buyer himself they are not. Lyons *v.* Briggs, 14 R. I. 222. At least, if made on an honest belief in their truth. Dilworth *v.* Bradner, 85 Penn. St. 238. See, further, Fenton *v.* Browne, 14 Ves. 144; White *v.* Cuddon, 8 Cl. & Fin. 766; Colby *v.* Gadsden, 34 Beav. 416. If the vendor of a tenement represents the rent of it to be £30 when it is only £20, this is a fraud. Dimmock *v.* Hallett, L. R. 2 Ch. App. 21.

39—Mooney *v.* Miller, 102 Mass. 217; Manning *v.* Albee, 11 Allen, 520; Gordon *v.* Parmelee, 2 Allen, 212; Sherwood *v.* Salmon. 2 Day, 128; Credle *v.* Swindell, 63 N. C. 305. Compare Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Wise *v.* Fuller, 29 N. J. Eq. 257; Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212; Wilkinson *v.* Clauson, 29 Minn. 91; Hartman *v.* Flaherty, 80 Ind. 472; Shade *v.* Creviston, 93 Ind. 591; Lee *v.* McClelland, 120 Cal. 147, 52 Pac. 300; Moore *v.* Recek, 163 Ill. 17, 44 N. E. 868; Allison *v.* Ward, 63 Mich. 128, 29 N. W. 528; Cash Register Co. *v.* Townsend, 137 N. C. 652; Tretheway *v.* Hulett, 52 Minn. 448, 54 N. W. 486; Farr *v.* Peterson, 91 Wis. 182, 64 N. W. 863. It is no fraud to aver strongly that the purchaser would make a good and profitable purchase by the trade. Sievekin *v.* Litzler, 31 Ind. 13. It might be otherwise if the parties stood to each other in confidential relations. Fisher *v.* Budlong, 10 R. I. 525. Or if in connection with

has examined the property or made inquiries concerning it.⁴⁰ But if the land is at a distance so that examination is impossible or impracticable, or if any deception or artifice is used to prevent examination or throw the purchaser off his guard, then false representations as to value may be actionable.⁴¹ It is not a fraud to assert that shares in an incorporated company which the party is selling are worth a certain sum, when, in fact, they are worth very much less,⁴² or to make exaggerated statements of the profits and prospects of the company.⁴³ It is otherwise, if the representations relate to past profits, or to the existing condition and business of the company,⁴⁴ or if the vendee is ignorant of the value and the vendor knows this and that the

the expression of opinion there were false assertions of fact calculated, if true, to give a basis for the opinion. *McAleer v. Horsey*,

35 Md. 439. "The rule is well settled that a naked assertion by a vendor of the value of the property offered for sale, even although untrue of itself and known to be such by him, unless there is a want of knowledge by the vendee, and the sale is made in entire reliance upon the representations made, or unless some artifice is employed to prevent inquiry, or the obtaining of knowledge by the vendee, will not render the vendor responsible to the vendee for damages sustained by him." *MILLER, J. Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166.

40—*Allison v. Ward*, 63 Mich. 128, 29 N. W. 528; *Farr v. Petersen*, 91 Wis. 182, 64 N. W. 863.

41—*Mountain v. Day*, 91 Minn. 249, 97 N. W. 883; *Morgan v. Dinges*, 23 Neb. 271, 36 N. W. 544, 8 Am. St. Rep. 121; *McKnight v. Thompson*, 39 Neb. 752, 58 N. W. 453; *Daiker v. Strelinger*, 28 App. Div. 220, 50 N. Y. S. 1074; *Stack*

v. Nolte, 29 Wash. 188, 69 Pac. 753; *Horton v. Lee*, 106 Wis. 439, 82 N. W. 360; *Culley v. Jones*, 164 Ind. 168.

42—*State Bank v. Gates*, 114 Ia. 323, 86 N. W. 311; *Swan v. Mathre*, 103 Ia. 261, 72 N. W. 522; *Mumford v. Tolman*, 157 Ill. 258, 41 N. E. 617; *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 379. See *Cronk v. Cole*, 10 Ind. 485. But if false quotations of value in a newspaper are exhibited at the same time, this is a plain fraud. *Manning v. Albee*, 11 Allen 520. And see *McAleer v. Horsey*, 35 Md. 439.

43—*New Brunswick R. Co. v. Conybeare*, 9 H. L. Cas. 711; *Kisch v. R. Co.*, 3 DeG., J. & S. 122. So, an exaggerated estimate of the value of a patented invention is no fraud. *Hunter v. McLaughlin*, 43 Ind. 38. Or of the value of lands, or probable profits of a proposed railroad. *Walker v. Mobile, &c., R. R. Co.*, 34 Miss. 245. See *Markel v. Moody*, 11 Neb. 213.

44—*French v. Ryan*, 104 Mich. 625, 62 N. W. 1016; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056; *Carruth v. Harris*, 41 Neb. 789, 60 N. W. 106.

vendee is relying upon his statements.⁴⁵ The rule is general that, in case of sales, fraud cannot be predicated on a mere representation, as to the value of the thing sold, though known to be false,⁴⁶ but false representations as to any matter of fact affecting the value of the property are an actionable fraud. Such are false statements as to the actual earnings, profits or rents of the property or business,⁴⁷ or that the vendor has been offered a certain sum for the property,⁴⁸ or as to the amount of work a machine has done,⁴⁹ and the like. False representation as to the cost of the property would seem to be of the same sort,⁵⁰ since the price actually paid for property, if recently purchased, would be important evidence of value,⁵¹ but the authorities are

45—*Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748. Where an officer of the company represented that its stock was worth \$80 a share and that he would not sell his own, but could procure fifty shares for the plaintiff at \$75 from a person who was obliged to sell in order to pay a mortgage and thereby induced the plaintiff to purchase the fifty shares, and the fact was the fifty shares was made up of twenty-five shares owned by the officer and twenty-five shares which he bought for less than \$50, it was held that an action of deceit would lie. *Cook v. Gill*, 83 Md. 177, 34 Atl. 248.

46—*Bain v. Withey*, 107 Ala. 223, 18 So. 217; *Blumenthal v. Greenberg*, 130 Cal. 384, 62 Pac. 599; *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 Atl. 104 66 Am. St. Rep. 92, 39 L. R. A. 644; *Wightman v. Tucker*, 50 Ill. App. 75; *Nostrum v. Halliday*, 39 Neb. 828, 58 N. W. 429; *Doran v. Eaton*, 40 Minn. 35, 41 N. W. 244; *Mosher v. Post*, 89 Wis. 602, 62 N. W. 516.

47—*O'Donnell, etc., Brewing Co. v. Farrar*, 163 Ill. 471, 45 N.

E. 283; *Ettinger v. Weil*, 94 App. Div. 291, 87 N. Y. S. 1049; *Fargo Gas & C. Co. v. Fargo Gas & Elec. Co.*, 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593.

48—*Seaman v. Becar*, 15 Misc. 616, 38 N. Y. S. 69; *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475.

49—*Merrillat v. Plummer*, 111 Ia. 643, 82 N. W. 1020.

50—So held in the following cases: *Ives v. Carter*, 24 Conn. 392; *Somers v. Richards*, 46 Vt. 170; *Green v. Bryant*, 2 Kelly, 66; *Van Epps v. Harrison*, 5 Hill. 63, 40 Am. Dec. 314; *McFadden v. Robison*, 35 Ind. 24; *McAleer v. Horsey*, 35 Md. 439; *Teachout v. Van Horsen*, 76 Ia. 113, 40 N. W. 96, 14 Am. St. Rep. 206, 1 L. R. A. 664; *Welch v. Burdick*, 101 Ia. 70, 70 N. W. 94; *Johnson v. Gavitt*, 114 Ia. 183, 86 N. W. 256; *Elerick v. Reid*, 54 Kan. 579, 38 Pac. 814; *Hoxie v. Small*, 86 Me. 23, 29 Atl. 920; *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701.

51—See *St. Louis, etc., Ry. Co. v. Smith*, 42 Ark. 265; *Ham v. Salem*, 100 Mass. 350, 352; *Hoff-*

conflicting on this point.⁵² The defendant, owning a worthless leasehold conveyed it to A, who conveyed it to B for an expressed consideration of \$100,000, and B gave a trust deed on the property to secure \$75,000 of the purchase money represented by notes. The transactions were all fictitious and were made at the instance of the defendant. The plaintiff, through a broker, bought \$4,000 of the notes, relying upon the abstract and upon the transactions being genuine. It was held, on demurrer to a declaration setting forth the facts, that the defendant, in effect, represented that the property had been sold *bona fide* for the price named in the deed and he was held liable in an action of deceit.⁵³ So where a contractor for work represented that the price charged was the usual one and the same as specified parties had paid for the same work, when, in fact, these parties had paid much less.⁵⁴ So where the defendant, who had sold his stock for \$100 a share, represented to the plaintiff that he had sold it for \$80, in order to induce the latter to sell to the same purchaser.⁵⁵

man *v.* Connor, 76 N. Y. 121; New Orleans, etc., R. R. Co. *v.* Barton, 43 La. Ann. 171, 9 So. 19.

52—False representations as to cost held not a fraud. Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212; Cooper *v.* Lovering, 106 Mass. 77; Hemmer *v.* Cooper, 8 Allen, 334; Medbury *v.* Watson, 6 Met. 246, 260, 39 Am. Dec. 726; Mooney *v.* Miller, 102 Mass. 217; Bishop *v.* Small, 63 Me. 12. This last case holds that an action for deceit will not lie upon false representations either as to what a patent right cost the vendor or was sold for by him; or as to offers made for it; or profits that could be derived from it; or for any mere expressions of opinion of any kind about the property sold. PETERS, J. "None of them are representations of facts affecting the quality of the article sold, known to the vendor, but unknown to the

vendee, and such as a vendee using common care would be deceived by. They are only 'dealer's talk.' This is the well settled doctrine in this State and Massachusetts. Long *v.* Woodman, 58 Me. 49; Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212." See, further, Tuck *v.* Downing, 76 Ill. 71; Banta *v.* Palmer, 47 Ill. 99. So as to statement of valuation placed by appraisers on property. Bourn *v.* Davis, 76 Me. 223. Representation of price paid is not actionable if parties are dealing at arms length; otherwise if confidential relations exist. Hauk *v.* Brownell, 120 Ill. 161.

53—Leonard *v.* Springer, 197 Ill. 532, 64 N. E. 299.

54—Conlan *v.* Roemer, 52 N. J. L. 53, 18 Atl. 858.

55—Weaver *v.* Cone, 174 Pa. St. 104, 34 Atl. 551.

*There are some cases, however, in which even a false [*567] assertion of opinion will amount to a fraud, the reason being that, under the circumstances, the other party has a right to rely upon it without bringing his own judgment to bear. Such is the case where one is purchasing goods, the value of which can only be known to experts, and is relying upon the vendor, who is a dealer in such goods, to give him accurate information concerning them.⁵⁶ The same rule has been applied where a dealer in patent rights sold certain territory to one who was ignorant of its value, representing it to be very valuable, when he knew it was not;⁵⁷ and, also, to a vendor of a saltpetre *cave making false assertions as to the [*568] quantity of saltpetre which a certain quantity of nitrous earth would produce.⁵⁸ "False expressions of opinion by one possessing special knowledge concerning the subject of the contract, which the other party, ignorant on the subject and with unequal means of information, relies on to his injury, may be actionable for fraud. If a party's situation, with reference to the property contracted for, is such that he cannot fairly and reasonably exercise his own judgment in reference thereto, he is not a dealer on equal terms, and he has a right to rely on the representations of value by the seller made to induce the purchaser."⁵⁹

56—*Picard v. McCormick*, 11 Mich. 68; *Kost v. Bender*, 25 Mich. 515; *Pike v. Fay*, 101 Mass. 134. If the buyer has not equal means of knowledge, or having such is induced to forego inquiry and relies on seller's statement of value, they are binding. *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Bradbury v. Haines*, 60 N. H. 123; *Hanger v. Evins*, 38 Ark. 334; *Weidner v. Phillips*, 39 Hun, 1; *Grim v. Byrd*, 32 Grat. 293. See *Collins v. Jackson*, 54 Mich. 186.

57—*Allen v. Hart*, 72 Ill. 104. See *Peffley v. Noland*, 80 Ind. 164; *McKee v. Eaton*, 26 Kan. 226. The

purchaser of a mill who is ignorant of the business has a right to rely upon the positive assertions of the seller as to the business the mill is capable of performing. *Fariabault v. Sater*, 13 Minn. 223. See *Wise v. Fuller*, 29 N. J. Eq. 257.

58—*Perkins v. Rice*, Lit. Sel. Cas. 218, 12 Am. Dec. 298. See, as to representations of the value of oil lands, *Kost v. Bender*, 25 Mich. 515; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212.

59—*Ruberg v. Brown*, 50 S. C. 397, 27 S. E. 873. To same effect: *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep.

An honest expression of opinion as to the financial standing of another imposes no liability, though the defendant was mistaken in his opinion,⁶⁰ but if solvency is positively affirmed as a fact within the personal knowledge of the defendant, and the fact is otherwise and the affirmation is relied on by the plaintiff to his injury, the defendant is liable.⁶¹ Where the defendant, who was the president and head physician of a medical institute, falsely and fraudulently represented to the plaintiff that certain injuries he had sustained were curable and that they could and would cure him, and thereby induced him to pay \$500 for treatment, from which he received no benefit, the defendant was held liable for deceit.⁶² So, it is held the vendee of lands

92, 39 L. R. A. 644; *Wilson v. Nichols*, 72 Conn. 173, 43 Atl. 1052; *Moon v. McKinstry*, 107 Mich. 668, 65 N. W. 546; *Herschberg Optical Co v. Richards*, 62 Mo. App. 408; *Jackson v. Foley*, 53 App. Div. 97, 65 N. Y. S. 920; *Charbonnel v. Seabury*, 23 R. I. 543, 51 Atl. 208. Where the defendant, desiring to purchase the plaintiff's equity in certain property, represented that, if she did not sell, the mortgagee would foreclose and she would get nothing, when in fact the equity was valuable and there was no such alternative, he was held liable for the fraud. *Fox v. Duffy*, 95 App. Div. 202, 88 N. Y. S. 401. In *Whitney v. Richards*, 17 Utah, 226, 53 Pac. 1122, it is said: "The general rule undoubtedly is that the vendor of personal property, or the grantor of real estate may express his opinions to the vendee or grantee as to the value of the property; and, if it turns out that he was honestly mistaken, such representation will not be the basis of an action or authorize a rescission of the contract. But when the seller makes representations as to the

value of the property which, as a reasonable man, he should not have believed, and they are part of a scheme resorted to by him to induce the purchase, and, the purchaser has no opportunity of examination, and is otherwise uninformed as to the value, and is inexperienced as to such matters, and relies upon them, and is deceived and injured by them, and such representations are false, he may elect to rescind on account of fraud, or sue to recover damages in consequence thereof." p. 230. And see *Moses v. Katzenberger*, 84 Ala. 95, 4 So. 237; *East v. Worthington Co.*, 88 Ala. 537, 7 So. 189.

60—*Wren v. Truitt*, 116 Ga. 709, 43 S. E. 52; *Albion Milling Co. v. First Nat. Bank*, 64 Neb. 116, 89 N. W. 638.

61—*American Nat. Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090; *Browning v. National Capital Bank*, 13 App. D. C. 1; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188.

62—*Hedin v. Minneapolis Medical, etc., Institute*, 62 Minn. 146, 64 N. W. 158, 54 Am. St. Rep. 628,

has a right to rely upon the representations of his vendor respecting the quantity of land contained in a parcel he is buying,⁶³ or respecting the size of a lot,⁶⁴ or the boundaries of the parcel.⁶⁵ So it is a fraud if the defendant fraudulently points out a different and more valuable property, as the one involved

35 L. R. A. 417. "Where parties possess special learning or knowledge on the subject with respect to which their opinions are given, such opinions are capable of approximating to the truth. And for a false statement of them, when deception is designed and injury has followed from reliance on the opinions, an action will lie." p. 148.

63—*Pringle v. Samuel*, 1 Litt. 44, 13 Am. Dec. 214; *Earl v. Bryan*, Phill. Eq. (n. s.) 278; *Culium v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Whitney v. Allaire*, 1 N. Y. 305; *Beardsley v. Duntley*,

69 N. Y. 577; *Starkweather v. Benjamin*, 32 Mich. 305; *Hill v. Brower*, 76 N. C. 124; *Coon v. Atwell*, 46 N. H. 510; *Sangster v. Prather*, 34 Ind. 504; *Ledbetter v. Davis*, 121 Ind. 119, 22 N. E. 744; *King v. Mott*, 37 App. Div. 124, 56 N. Y. S. 213; *Cawston v. Sturges*, 29 Ore. 331, 43 Pac. 656; *Griswold v. Gebbie*, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878. In *Gordon v. Parmelee*, 2 Allen 212, 214, it is held that an action will not lie on such representations. "The vendors pointed out to the vendees the true boundaries of the land which they sold. The defendants had, therefore, the means of ascertaining the precise quantity of land included in the boundaries. They omitted to measure it or to cause it to be surveyed. By the use of ordinary

vigilance and attention they might have ascertained that the statement concerning the number of acres, on which they placed reliance, was false. They cannot now seek a remedy for placing confidence in affirmations which, at the time they were made, they had the means and opportunity to verify or disprove." *BIGELOW*, Ch. J. And where the vendor placed in the hands of the plaintiff documents showing the exact amount of lands, an unintentional overstatement was held immaterial. *Boddy v. Henry*, 113 Ia. 462, 85 N. W. 771, 53 L. R. A. 769.

In general, it is probably true that a statement by the vendor that the piece of land he is selling contains so many acres, would not be relied upon as a statement of exact fact. Most deeds of land are given as so many acres, "more or less," and statements of quantity are regarded as approximations only. And where land is sold for a gross sum, and not by quantity, the statement that it contains so much is not even a warranty. *Johnson v. Taber*, 10 N. Y. 319; *Martin v. Hamlin*, 18 Mich. 354.

64—*Douglass v. Plotkin*, 13 Ohio C. C. 461.

65—*Clark v. Baird*, 9 N. Y. 183; *Weatherford v. Fishback*, 4 Ill. 170; *Sanford v. Handy*, 23 Wend. 260; *Ramsey v. Wallace*, 100 N. C. 75, 6 S. E. 638.

in the deal.⁶⁶ So are false representations as to the situation, character or quality of the land when it is at a distance,⁶⁷ or when the condition of the land does not admit of examination by the vendee,⁶⁸ or if any artifice is used to prevent examination.⁶⁹

Matters of Law. Misrepresentation as to the legal effect or consequence of a proposed transaction or contract cannot, in general, be looked upon as a cheat.⁷⁰ Thus, where the agent procuring subscriptions to the stock of a corporation represented that the subscribers would only be liable to a certain percentage, when the law made them responsible for the whole amount, a subscriber was held not entitled to defend a suit upon his subscription on the ground of fraud. Says Mr. Justice HUNT: "There was here no error, mistake or misrepresentation of any fact. The defendant made the subscription he intended to make, and received the certificate he had stipulated for; * * * but in law the defendant incurred a larger liability than he anticipated."⁷¹ So where there were misrepresentations as to the powers of the corporation.⁷²

66—*Lee v. Tarplin*, 183 Mass. 52, 66 N. E. 431; *Nelson v. Carlson*, 54 Minn. 90, 55 N. W. 821.

67—*Willey v. Clements*, 146 Cal. 91, 79 Pac. 850; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691; *Borders v. Kattleman*, 142 Ill. 96, 31 N. E. 19; *Phelps v. James*, 79 Ia. 262, 44 N. W. 543; *Boddy v. Cover*, 126 Ia. 31, 101 N. W. 447; *Stevens v. Allen*, 51 Kan. 144, 32 Pac. 922; *Augus v. Smith*, 90 Tenn. 728, 18 S. W. 398; *Hecht v. Metzler*, 14 Utah 408, 48 Pac. 37, 60 Am. St. Rep. 906; *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367; *Horton v. Lee*, 106 Wis. 439, 82 N. W. 360. Where the vendor misrepresented the quantity of bottom land and of corn land in the farm sold, he was held liable for deceit; though the vendee was on the farm, the latter making no measurements but relying on the representations. *Speed v. Hollings-*

worth

54 Kan. 436, 38 Pac. 496. Misrepresentations as to the manner in which a house was constructed in respect to matters not open to inspection, were held actionable. *Velsor v. Seeberger*, 35 Ill. App. 598.

68—*Ladner v. Balsley*, 103 Ia. 674, 72 N. W. 787.

69—*Brady v. Finn*, 162 Mass. 260, 38 N. E. 506.

70—*Champion v. Woods*, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; *Johnston v. Covenant Mut. Life Ins. Co.*, 93 Mo. App. 580. Material misrepresentation as to the provision of a contract to one unable to read is a fraud. *McKeldin v. McKeldin*, 104 Ky. 345, 47 S. W. 246.

71—*Upton v. Tribilcock*, 91 U. S. 45, 49. See, to the same effect, *Rashdall v. Ford*, L. R. 2 Eq. 750; *Starr v. Bennett*, 5 Hill 303; *Lewis v. Jones*, 4 B. & C. 506; *Steam-*

***Fraudulent Promises.** If deceit, in order to be actionable, must relate to existing or past facts, it is evident that the fact that a promise, made in the course of negotiations, is never performed, is not of itself either a fraud, or the evidence of a fraud.⁷³ Nevertheless, a promise is some-

boat Belfast *v.* Boon Co., 41 Ala. 50; Cowles *v.* Townsend, 37 Ala. 77; Townsend *v.* Cowles, 31 Ala. 428; Clem *v.* Newcastle, &c., R. R. Co., 9 Ind. 488; Russell *v.* Brantham, 8 Blackf. 277; People *v.* Supervisors of San Francisco, 27 Cal. 655; Rogers *v.* Place, 29 Ind. 577; Gormeley *v.* Gym. Ass., 55 Wis. 350; Burt *v.* Bowles, 69 Ind. 1; Lexow *v.* Julian, 21 Hun. 577; Ins. Co. *v.* Reed, 33 Ohio St. 283; Jaggar *v.* Winslow, 30 Minn. 263. A representation of what the law will or will not permit to be done is one upon which the party to whom it is made has no right to rely; and if he does so, it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such. Fish *v.* Cleland, 33 Ill. 238. But when the heir-at-law of a shareholder in a company, the shares in which were personal estate, being ignorant of that circumstance, and supposing himself to be liable in respect of the ancestor's shares, executed a deed of indemnity to the trustees of the company, held, that he was entitled in equity to have his execution of the deed cancelled, as having been obtained under a mistake of law and fact. Broughton *v.* Hutt, 3 De Gex & Jones, 501. So there is deceit in

both fact and law, if the holder of a note, the remedy upon which is barred by the statute, goes to the administrator of one of the two makers, and, by representing it to be unpaid, and valid, and in full force in the law, procures a bond for the payment of one-half thereof. Brown *v.* Rice's Admr., 26 Grat. 467.

So a party has been held entitled to relief who had been induced to execute bills of exchange on the misrepresentation that they were ordinary promissory notes. Ross *v.* Drinkard's Admr., 35 Ala. 434; and in the case the following citation from Townsend *v.* Cowles, 31 Ala. 428, is approved: "If the defendant was in fact ignorant of the law, and the other party, knowing him to be so and knowing the law, took advantage of such ignorance to mislead him by a false statement of the law, it would constitute a fraud."

72—Oil City Land & Imp. Co. *v.* Porter, 99 Ky. 254, 35 S. W. 643.

73—Fenwick *v.* Grimes, 5 Cranch. C. C. 439; Farrar *v.* Bridges, 3 Humph. 566; Murray *v.* Beckwith, 48 Ill. 391; Sieveking *v.* Litzler, 31 Ind. 13; Long *v.* Woodman, 58 Me. 49; Jordan *v.* Money, 5 H. L. Cas. 185; Burt *v.* Bowles, 69 Ind. 1; Lexow *v.* Julian, 21 Hun. 577; Cunyus *v.* Guenther, 96 Ala., 564, 11 So. 649; History Co. *v.* Dougherty, 3 Ariz. 387, 29 Pac. 649; Adams *v.* Schiffer, 11 Colo. 15, 17 Pac. 21, 7

[*570] times the very *device resorted to for the purpose of accomplishing the fraud, and the most apt and effectual means to that end.⁷⁴ Such is the case already mentioned of the purchase of goods with an intention not to pay for them. It is the fraudulent promise to pay that accomplishes the wrong. So if one promises to take up encumbrances on the title of another, and, by means of the promise, throws the promisee off his guard while he secures the title for himself, it would be a singular defense for him to make that he had only failed to perform his promise. The promise was merely his false token, by means of which he effected his cheat.⁷⁵ So if the beneficiary in a will,

Am. St. Rep. 202; *Farris v. Strong*, 24 Colo. 107, 48 Pac. 963; *Dickinson v. Atkins*, 100 Ill. App. 401; *Robinson v. Larson*, 112 Ia. 173, 83 N. W. 900; *First Nat. Bank v. Mattingly*, 92 Ky. 650, 18 S. W. 940; *McComb v. C. R. Brewer Lumber Co.*, 184 Mass. 276, 68 N. E. 222; *Esterly Harvesting Machine Co. v. Berg*, 52 Nev. 147, 71 N. W. 952; *A. Landreth Co. v. Schevenel*, 102 Tenn. 486, 52 S. W. 148; *Watkins v. W. W. Land & Imp. Co.* 92 Va. 1, 22 S. E. 554; *Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *Dudley v. Minor*, 100 Va. 728, 14 S. E. 870; *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583; *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179. It is held that false representations of an existing intent to do certain things which will benefit the property sold may be actionable. *Albitz v. Minneapolis, etc., Ry. Co.*, 40 Minn. 476, 42 N. W. 542. *Contra*, *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649; and many of the cases previously cited in this note. A warranty does not become a fraud by being broken. *Loupe v. Wood*, 51 Cal. 586. A lease does not become void by

reason of the lessee putting the premises to a different use from that which he represented he was about to carry on when he obtained it. *Feret v. Hill*, 15 C. B. 207. It is not a fraud in law that one obtains a release of a recognizance on a promise to pay the amount shortly, which he fails to do. *Commonwealth v. Brenne man*, 1 Rawle, 311. So if one gives a note on a purchase of land, relying on the vendor's oral promise to make a certain improvement which would increase the value of the land, he cannot make the failure to keep this promise a defense to the note. *Miller v. Howell*, 2 Ill. 499, 32 Am. Dec. 36. See, further, *Ex parte Fisher*, 18 Wend. 608.

74—See *Jones v. Jones*, 40 Misc. 360, 82 N. Y. S. 325; *Sweet v. Kimball*, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406; *Wilbur v. Prior*, 67 Vt. 508, 32 Atl. 474; *National Bank v. Mackey*, 5 Kan. App. 437, 49 Pac. 324.

75—*Wilson v. Eggleston*, 27 Mich. 257; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738. Evidence of a false promise to buy articles, which should be con-

when the maker thereof is on his deathbed, and is about to make a codicil to give a certain benefit to another, shall say to him he need not trouble himself, for he, the beneficiary, will make conveyance according to the wishes expressed, he may be held to this promise as a fraud if he did not intend to perform it.⁷⁶ And where a railroad company, in order to obtain a conveyance of right of way from the plaintiff, promised to locate and maintain a station on his land, and the promise was made with no intention of performing it, but merely to deceive the plaintiff and beguile him into making the deed, it was held a fraud and that the plaintiff might rescind.⁷⁷

Duty of Self-Protection. Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them. Therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has been placed by his own imprudent confidence.⁷⁸ It is for this reason that redress is often refused

structed, made as an inducement to the sale of an invention is admissible. *Goodwin v. Horne*, 60 N. H. 485.

76—*Dowd v. Tucker*, 41 Conn. 197. See, further, *Kinard v. Hiers*, 3 Rich. Eq. 423; *Thynn v. Thynn*, 1 Vern. 296; *Richardson v. Adams*, 10 Yerg. 273; *Gross v. McKee*, 53 Miss. 536.

77—*Chicago, etc., Ry. Co. v. Tetterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39, citing *Henderson v. Railway Co.*, 17 Tex. 560; *Dowd v. Tucker*, 41 Conn. 203; *Wilson v. Eggleston*, 27 Mich. 257; *Gross v. McKee*, 53 Miss. 536. A false and fraudulent warranty held a fraud. *Handy v. Waldron*, 18 R. I. 567, 29 Atl. 143, 49 Am. St. Rep. 794; *Hexter*

v. Bast, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874.

78—*Slaughter v. Gerson*, 13 Wall. 379; *Rockafellow v. Baker*, 41 Pa. St. 319; *Hobbs v. Parker*, 31 Me. 143; *Brown v. Leach*, 107 Mass. 364; *Schwabacker v. Ridgle*, 99 Ill. 343; *Collins v. Jackson*, 54 Mich. 186; *Terry v. Mut. Life Ins. Co.* 116 Ala. 242, 22 So. 532; *Hooper v. Whitaker*, 130 Ala. 324, 30 So. 355; *Boddy v. Henry*, 113 Ia. 462, 85 N. W. 771, 53 L. R. A. 769; *Grosjean v. Galloway*, 82 App. Div. 380, 81 N. Y. S. 871; *Williams v. Daiker*, 33 Misc. 70, 68 N. Y. S. 348; *Kaiser v. Nummedor*, 120 Wis. 234, 97 N. W. 932; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 S. C. Rep. 881, 31 L. Ed. 678.

where fraud is alleged in the sale of property which was at hand, and might have been inspected, and where the alleged [*571] defect was one which *ordinary prudence would have disclosed.⁷⁹ The case of the purchase of property at a distance involves very different considerations, for there a degree of trust is not only usual, but often unavoidable. In the leading case of *Smith v. Richards*, it was held that whenever a sale is made of property not present, but at a remote distance, which the purchaser knows the seller has never seen, but which he buys upon the representation of the seller, relying on its truth, such representation, in effect, must be deemed to amount to a warranty; at least, that the seller is legally bound to make it good.⁸⁰ The case was one of a sale made in New York of lands in Virginia, represented as containing a valuable mine, and the decision has often been followed.⁸¹ Upon similar reasons to those which support this case, it has been held that when one buys land which at the time is covered with snow, rendering an

79—*Lee v. McClelland*, 120 Cal. 37, 60 Am. St. Rep. 906; *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367; *Horton v. Lee*, 106 Wis. 439, 82 N. W. 360. It has been held that the purchaser may even be entitled to hold the seller upon his assertions as to value in such cases, if the latter persuaded the purchaser not to go and see for himself. *Harris v. McMurray*, 23 Ind. 9. And see p. 922, note 41.

80—*Smith v. Richards*, 13 Pet. 26, 42. See *Maggart v. Freeman*, 27 Ind. 531; *Lester v. Mahan*, 25 Ala. 445, 60 Am. Dec. 530; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691; *Borders v. Kattelman*, 142 Ill. 96, 31 N. E. 19; *Phelps v. James*, 79 Ia. 262, 44 N. W. 543; *Stevens v. Allen*, 51 Kan. 144, 32 Pac. 922; *Augur v. Smith*, 90 Tenn. 728, 18 S. W. 398; *Hecht v. Metzler*, 14 Utah, 408, 48 Pac. 5 Johns. Ch. 174; *Bean v. Herrick*, 12 Me. 262; *Webster v. Bailey*, 31 Mich. 36; *Nowlin v. Snow*, 40 Mich. 699; *Ladd v. Pigott*, 114 Ill. 647; *Cahn v. Reid*, 18 Mo. App. 115; *Griffin v. Farrier*, 32 Minn. 474; and cases in last note. See *Savage v. Stevens*, 126 Mass. 207, where buyer's negligence was held a question for the jury.

The above rule has been applied where the land is but a few miles away. *Nolte v. Reichel*, 96 Ill.

examination of the soil impracticable, he is entitled to rely upon the representations of the vendor respecting its productiveness.⁸² So, if the vendor uses any artifice to prevent examination by the vendee.⁸³ Some cases hold that a party may always rely upon a positive representation of fact, though the means of verification are at hand. Thus it is said in one case that "a person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth."⁸⁴ And again: "As between the original parties, one who has intentionally deceived the other to his prejudice ought not to be heard to say, in defense, that the other party ought not to have trusted him."⁸⁵

Representations Which Disarm Vigilance. Redress has often been refused to a party who claimed to have been induced by fraud to sign a contract or other paper whose contents were mis*read or misrepresented to him. The reasons [*572] for refusing relief in such cases are, *First*, that it invites perjury and subornation of perjury, if parties are allowed to set aside their contracts on parol evidence of having been misled into signing them. *Second*, it encourages negligence when relief is given against that which ordinary prudence would have protected against at the outset. Therefore, when one complains

425; *Caldwell v. Henry*, 76 Mo. 254. And to the condition of a mine. *Arbuckle v. Biederman*, 94 Ind. 168; *Fishback v. Miller*, 15 Nev. 428.

82—*Martin v. Jordan*, 60 Me. 531. So where a cursory survey was made of flooded land, and the representation was that it could be drained. *Jackson v. Armstrong*, 50 Mich. 65. See *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354, where it is said to be a question for the jury whether one buying with snow on the ground used due care in trusting representations as to amount of rocks

on the land. See *Ladner v. Balsley*, 103 Ia. 674, 72 N. W. 787, where the land was too wet for examination.

83—*Hanscom v. Druillard*, 79 Cal. 234, 21 Pac. 736; *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506; *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922.

84—*Perry v. Rogers*, 62 Neb. 898, 87 N. W. 1063; *Foley v. Holtry*, 43 Neb. 133. And see *Sears v. Hicklin*, 13 Colo. 143, 21 Pac. 1022; *Hunt v. Barker*, 22 R. I. 18, 46 Atl. 46, 84 Am. St. Rep. 812.

85—*Erickson v. Fisher*, 51 Minn. 300, 53 N. W. 638.

that he has been defrauded into signing a contract without reading it, and on the representation respecting its contents of the party whose interests were antagonistic to his own, the court is likely to say to him that what he complains of is his own folly, and against this the law cannot protect him.⁸⁶ But there is no inflexible rule to this effect, and it would be a reproach to the law if there were. The ways of fraud are infinite in their diversity, and if into any one of them all the law refuses to follow for the rescue of victims, it will be in the direction of that one that fraudulent devices will specially tend. It can never be either wise or safe to mark out specific boundaries within which deceits shall be dealt with, but beyond which they shall have impunity; but each case must be considered on its own facts, and every case will have peculiarities of its own, by which it may be judged.

When the complaint is of the nature above indicated, the question, to a large extent is one of negligence, and a man grossly negligent may sometimes be justly refused relief. Especially if that to which his signature was procured was negotiable paper, which has passed into the hands of a *bona fide* holder before maturity, so that if he escapes responsibility a perfectly innocent party must suffer, it may be reasonable and just to refuse to give him relief. It is entirely reasonable, that if the situation is such that one of two innocent parties must suffer from a fraud, and the negligence of one has enabled the fraud to be committed, he who is chargeable with the negligence shall bear the loss.

In *Douglass v. Matting*, decided in Iowa, it was held that if one, "through his own culpable carelessness, while dealing with a stranger," allows himself to be deceived into signing a [*573] negotiable note, which he believes is something entirely different, he can make no defense to it in the hands of a *bona fide* holder.⁸⁷ So in New York, it has been held that if one

86—Maine, &c., Ins. Co. *v.* 580; Taylor *v. Atchison*, 54 Ill. Hodgkins, 66 Me. 109; New Albany, &c., R. R. Co. *v. Fields*, 10 196; Elliott *v. Levins*, 54 Ill. 213. Ind. 187; Hawkins *v. Hawkins*, 50 See Cummins *v. Hurlbutt*, 92 Cal. 558; Johnston *v. Covenant* 87—Douglass *v. Matting*, 29 Mut. Life Ins. Co., 93 Mo. App. Penn. St. 165. Iowa, 498, 4 Am. Rep. 238.

is defrauded into signing negotiable paper, which he is made to believe is something else, he has no defense as against a *bona fide* holder, provided he was chargeable with negligence in not ascertaining the character of the paper.⁸⁸ On the other hand, it is held, in Michigan, that if the party whose signature was procured under such circumstances was guilty of no negligence, the paper is void for all purposes;⁸⁹ and the same conclusion is reached in several other States.⁹⁰ These cases are not antagonistic, as they have sometimes been assumed to be, and they may all be said to recognize the maxim regarding the responsibility for negligence which is given above.⁹¹ There can be no doubt, we suppose, that contracts in general are void as to all parties, and even negotiable paper is void as to all but *bona fide* holders, where the signature is obtained by trick or artifice, and the party supposes he is signing something different.⁹² It is difficult to understand how, except upon the ground of such negligence as should estop the party from making the defense of invalidity, such contracts could have any more force than if the party's

88—*Chapman v. Rose*, 56 N. Y. Mead *v. Munson*, 60 Ill. 49; *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206; *Brahan v. Ragland*, 3 Stew. 247. As to when the alteration of a note, by filling a blank carelessly left therein, will avoid it in the hand of a *bona fide* holder, see *Ivory v. Michall*, 33 Mo. 398; *Washington Savings Bank v. Ecky*, 51 Mo. 272; *Rainbolt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152, and cases cited.

89—*Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675.

90—*Briggs v. Ewart*, 51 Mo. 245, 11 Am. Rep. 445; *Walker v. Ebert*, 29 Wis. 194; *Kellogg v. Steiner*, 29 Wis. 626; *Butler v. Carns*, 37 Wis. 61; *Taylor v. Atchison*, 54 Ill. 196, 5 Am. Rep. 118. See *Foster v. McKinnon*, L. R. 4 C. P. 704.

91—See, further, as to this rule, *Craig v. Hobbs*, 44 Ind. 363; *McDonald v. Muscatine Bank*, 27 Iowa, 319; *Holmes v. Trumper*, 22 Mich. 427; *Shirts v. Overjohn*, 70 Mo. 305; *Clarke v. Johnson*, 54 Ill. 296; *Leach v. Nichols*, 55 Ill. 273;

92—See *Foster v. McKinnon*, L. R. 4 C. P. 704; *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675; *Anderson v. Walter*, 34 Mich. 113; *Sims v. Bice*, 67 Ill. 88; *Munson v. Nichols*, 62 Ill. 111; *Byers v. Daugherty*, 40 Ind. 198; *Laidla v. Loveless*, 40 Ind. 211; *Lonchheim v. Gill*, 17 Ind. 139; *Martin v. Smylee*, 55 Mo. 577; *Corby v. Weddle*, 57 Mo. 452; *Jones v. Austin*, 17 Ark. 498; *Wilder v. Beele*,

signature, written in blank, had been taken without authority, and a contract written over it.⁹³ But negligence is always an important consideration, even when the question arises as between the parties to the contract; for no doubt that rule is safest, as a general fact, which refuses relief to parties who have seen fit not to protect themselves by observing ordinary prudence. But ordinary prudence does not always protect, even against the simplest devices, when strong and plausible protestations have captured confidence, especially as the very facility of detection will of itself do something to disarm vigilance by making it seem incredible that one would attempt fraud under the circumstances. And even where property is sold which is present and may be examined, if false assertions are made to prevent examination, and which are calculated to have that effect, and do have it, the purchaser has a right to rely upon them, and to hold the seller responsible if they turn out to be false and fraudulent.⁹⁴ The very strong assertion has been made in one case that "every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."⁹⁵ In the case then

119 Cal. 646, 51 Pac. 1083; *Kingman v. Shawley*, 61 Mo. App. 55.

93—*Nance v. Lary*, 5 Ala. 370; *Stacy v. Ross*. 27 Tex. 3, 84 Am. Dec. 604.

94—*Chamberlain v. Rankin*, 49 Vt. 133, a sale of wool rolled in fleeces, and represented to be ordinary fleece wool, when in fact there was pulled wool, taglocks, &c., rolled inside. See *Arthur v. Wheeler, &c., Co.*, 12 Mo. App. 335.

It is no defense to paper which a bank has been induced to discount as business paper, when it was not, that the officers might,

by careful and minute inquiries, have ascertained the real facts.

Bank of North America v. Sturdy, 7 R. I. 109, citing *Brown v. Castles*, 11 Cush. 348. And, see *Roberts v. Plaisted*, 63 Me. 335.

95—PORTER, J., in *Mead v. Bunn*, 32 N. Y. 275, 280. In *Eaton v. Winnie*, 20 Mich. 156, 166, 4 Am. Rep. 377, the same idea is expressed as follows: "Where one assumes to have knowledge upon a subject of which another may well be ignorant, and knowingly makes false statements regarding it, upon which the other relies, to his

under consideration the parties seeking relief had [*575] entered into a compromise of an unfounded claim, induced thereto by the fraudulent assertion that papers previously executed by themselves contained a certain provision, which they did not. The want of vigilance here was very manifest and very gross, but it would be still more so if a blind person, or one who could not read, were to sign a paper presented for the purpose by the party having an antagonistic interest, without calling in a disinterested party to read it for him. Yet relief has often been given where illiterate persons have been deceived into signing contracts which were misread or misrepresented to them by the other contracting party.⁹⁶ Like any other case involving a

injury, we do not think it lies with him to say that the party who took his word and relied upon it as that of an honest and truthful man, was guilty of negligence in so doing, so as to be precluded from recovering compensation for the injury which was inflicted upon him under cover of the falsehood. If a party's own wrongful act has brought another into peril, he is not at liberty to impute the consequences of his act to a want of vigilance in the injured party, when his own conduct and untruthful assertions have deprived the other of that quality and produced a false sense of security." Citing Penn. R. R. Co. v. Ogier, 35 Pa. St. 72, 78 Am. Dec. 322; Gordon v. Grand St. R. R. Co., 40 Barb. 550; Ernst v. Hudson Riv. R. R. Co., 35 N. Y. 28, 90 Am. Dec. 761. To same effect, see McBeth v. Craddock, 28 Mo. App. 380. "Where the statements are material facts, essentially connected with the substance of the transaction and not merely general commendations or expressions of opinion, and are concerning matters which from

their nature or situation are peculiarly within the knowledge of the vendor, the purchaser is justified in relying on them; and in the absence of any knowledge of his own, or of any facts which should excite suspicion, he is not bound to make inquiries and examine for himself. Under such circumstances it does not lie in the mouth of the vendor to complain that the vendee took him at his word." Stewart v. Stearns, 63 N. H. 99, 56 Am. Rep. 496. See, also, Walsh v. Hall, 66 N. C. 233; Oswald v. McGehee, 28 Miss. 340; McClellan v. Scott, 24 Wis. 81; Starkweather v. Benjamin, 32 Mich. 305; Caldwell v. Henry, 76 Mo. 254; Alexander v. Church, 53 Conn. 561; Porter v. Fletcher, 25 Minn. 493; Olson v. Orton, 28 Minn. 36.

96—Selden v. Myers, 20 How. 506; Sims v. Bice, 67 Ill. 88; Keller v. Equitable Ins. Co., 28 Ind. 170; Rockford, &c., R. R. Co. v. Shunick, 65 Ill. 223; Richardson v. Schirtz, 59 Ill. 313; Jones v. Austin, 17 Ark. 498; Stacy v. Ross, 27 Tex. 3, 84 Am. Dec. 604; Hobbs v. Solis, 37 Mich. 357; Davis v. Snider, 70 Ala. 315; Winfield Nat.

question of negligence, such a case is to be considered on all its facts; it cannot be disposed of on a consideration of one fact alone, and very great apparent negligence may be excused where prudence has been overcome by new, peculiar, or very gross frauds.

Representations as to Title. In *Monell v. Colden* it [*576] was *decided that one who had been induced to make a purchase of land on a false representation by the vendor, that if he bought it he would be entitled to obtain from the State certain adjoining lands under water, the vendor knowing that the State had previously conveyed them, might maintain an action for the fraud. "If," said the court, "no representation had been made on the subject by the defendant, both parties would have been equally chargeable with a knowledge of the law and the public records of the State. But according to the declaration the defendant knowingly and falsely misrepresented the fact with respect to the situation of the land under the water, and if so, he is chargeable with all the damages resulting from such false representation."⁹⁷ The obvious answer to any such action is suggested by this decision, namely, that the records are open to public inspection and are notice of what the real title is; and it is the party's own folly if instead of inspecting them he chooses to accept and rely upon the word of the vendor. But where that answer was made in a recent case, in which a vendor had asserted that the title to the lands he was selling had been looked up by him and found to be all right, and the purchaser

Bank v. Croco, 46 Kan. 620, 26 Pac. 939; *Adolph v. Minneapolis, etc.*, Ry. Co. 58 Minn. 178, 59 N. W. 959; *Gortz v. Flanders*, 118 Mo. 342, 22 S. W. 945; *Hutkoff v. Moje*, 20 Misc. 633, 46 N. Y. S. 905; *McKeldin v. McKeldin*, 104 Ky. 345, 47 S. W. 246. The evidence of fraud should be very clear. *Estes v. Furlong*, 59 Ill. 298. As to what is sufficient proof of, see *Taylor v. Atchison*, 54 Ill. 196; *Woods v. Hynes*, 2 Ill. 103; *Mul-*

ford v. Shepard, 2 Ill. 583, 33 Am. Dec. 432.

In *Selden v. Myers*, 20 How. 506, 508, it is said by TANEY, Ch. J., that a person relying upon papers which he has procured to be executed by one who cannot read, is bound to show, "past doubt, that he fully understood the object and import of the writings."

97—*Monell v. Colden*, 18 Johns. 395, 402, 7 Am. Dec. 390, per THOMPSON, J.

had said he would take the vendor's word for it, the court declared that, under such a state of facts, there was a relation of trust and confidence between the parties, and the seller was bound to exhibit the truth of the case as it stood.⁹⁸ It is to be noted that here were positive and distinct assertions of matters of fact as within his own knowledge, made by the one who of all persons should know what the real facts were, and relied upon by the other as undoubtedly correct. It has been said elsewhere that where one seeks authority that should be the best upon the particular subject, to ascertain the real facts, and is there misled, the person misleading him is not to be allowed to support rights by insisting that his assertions ought to have been verified from other sources.⁹⁹ False representations of the sort are very different from mere silence respecting defects known to *the vendor, and which it is very properly held he is under no obligation to disclose.¹

The doctrine of *Monell v. Colden*, has been followed in other cases noted in the margin.² And these authorities hold that an action will lie for the fraud notwithstanding the deed of conveyance contains covenants of title.³

The later cases almost uniformly hold that a false representation as to title is actionable, though an examination of the rec-

98—THOMPSON, Ch. J., in Babcock v. Case, 61 Penn. St. 427, 430, 100 Am. Dec. 654. Compare Hume v. Pocock, L. R. 1 Ch. App. 379, 385.

99—Converse v. Blumrich, 14 Mich. 109, 121, 90 Am. Dec. 230. See Eaton v. Winnie, 20 Mich. 156, 166, 4 Am. Rep. 377.

1—Kerr v. Kitchen, 7 Pa. St. 486; Kintzing v. McElrath, 5 Pa. St. 467.

2—Wardell v. Fosdick, 13 Johns. 325, 7 Am. Dec. 381; Culver v. Avery, 7 Wend. 380; Ward v. Wiman, 17 Wend. 193; Updike v. Abel, 60 Barb. 15; Eames v. Morgan, 37 Ill. 260; Watson v. Atwood, 25 Conn. 313; Claggett v. Crall, 12 Kan. 319; Bristol v.

Braidwood, 28 Mich. 191; Wade v. Thurman, 2 Bibb, 583; Upshaw v. Debow, 7 Bush, 442; Hays v. Bonner, 14 Tex. 629; Rhode v. Alley, 27 Tex. 443; Moreland v. Atchison, 19 Tex. 303; Holland v. Anderson, 38 Mo. 55; Bailey v. Smock, 61 Mo. 213; Kiefer v. Rogers, 19 Minn. 32; Parham v. Randolph, 5 Miss. 435, 35 Am. Dec. 403; Gilpin v. Smith, 19 Miss. 109; West v. Wright, 98 Ind. 335. See also Porter v. Fletcher, 25 Minn. 493; Olson v. Orton, 28 Minn. 36.

3—To represent that there are no incumbrances, so far as the party knows, is no fraud, if he really knows of none. Bristol v. Braidwood, 28 Mich. 191.

ords would disclose the falsity.⁴ Thus actions were sustained where the lot sold was falsely represented to be free and clear,⁵ and where a second mortgage was represented to be a first mortgage.⁶ So where the defendant procured a conveyance of the plaintiff's land for a nominal sum by representing that he had a tax title thereon, when he had none and no claim whatever.⁷ So where the defendant represented that he owned a certain house and thereby induced the plaintiff to furnish the heating apparatus therefor, the title being in the defendant's wife. The court held that the plaintiff was not bound, at his peril, to examine the records and says: "Where the representation is a statement amounting to the positive assertion of an existing fact, the person to whom it is made has a right to rely upon its truth, and, having the right to rely upon it, is not put to his inquiry; and, therefore, if the representation be untrue and he is deceived thereby to his injury, negligence which will preclude his recovery cannot be predicated on his failure to make inquiry."⁸

Who May Rely Upon the Misrepresentations. No one has a right to accept and rely upon the representations of others but those to influence whose action they were made.⁹ If everyone might take up and act upon any assertion he heard made or saw in print as one made for him to act upon, and the truth of which was warranted by the assertor, the ordinary conversation of

4—*Kimball v. Saguin*, 86 Ia. 186, 93 N. W. 58; *Nash v. Minn. Title Ins. & T. Co.*, 159 Mass. 437, 34 120 Ia. 670, 94 N. W. 1126; *Nairn v. Ewalt*, 51 Kan. 355, 32 Pac. 1110; 7—*Mattock v. Shaffer*, 51 Kan. Burns *v. Dockray*, 156 Mass. 135, 208, 32 Pac. 890, 37 Am. St. Rep. 30 N. E. 551; *Woolenslagle v. Runals*, 76 Mich. 545, 43 N. W. 454; *Davis v. Davis*, 100 Mich. 162, 58 N. W. 651; *Porter v. Fletcher*, 25 Minn. 493; *Olson v. Orton*, 28 Minn. 36; *Tretheway v. Hulett*, 52 Minn. 448, 54 N. W. 486. *Contra*, *Bianconi v. Smith*, 3 Ariz. 320, 28 Pac. 880.

5—*Carpenter v. Wright*, 52 Kan. 221, 34 Pac. 798.

6—*Faust v. Hosford*, 119 Ia. 97,

49 Atl. 58, 85 Am. St. Rep. 365; *Ashuelot Savings Bank v. Albee*,

63 N. H. 152, 56 Am. St. Rep. 501;

Darling v. Klock, 33 App. Div. 270, 53 N. Y. S. 593; *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623.

8—*Hunt v. Barker*, 22 R. I. 18, 46 Atl. 46, 84 Am. St. Rep. 812.

9—*Henry v. Dennis*, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365;

Ashuelot Savings Bank v. Albee, 63 N. H. 152, 56 Am. St. Rep. 501;

Darling v. Klock, 33 App. Div. 270, 53 N. Y. S. 593; *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623.

business and of society would become unsafe, and the customary publication of current news, or supposed news, would only be made under the most serious pecuniary responsibility. When statements are made for the express purpose of influencing the action of another, it is to be assumed they are made deliberately and after due inquiry, and it is no hardship to hold the party making them to their truth. But he is morally accountable to no person whomsoever but the very person he seeks to influence, and whoever may overhear the statements and go away and act upon them can reasonably set up no claim to having been defrauded if they prove false. Fraud implies a wrongful actor and one wrongfully acted upon; but in the case supposed there is no privity whatever. Therefore, one may even be the person to whom the false representations are made, and yet be entitled to no remedy, if they were made to him **as agent* [*578] for another and to affect the action of the other, and were not intended to influence his own action.¹⁰

But some representations are made for the express purpose of influencing the mind of the public, and of inducing individuals of the public to act upon them; and whoever, in fact, does receive, rely and act upon these in the manner intended, has a right to regard them as made to him, and to treat them as frauds upon him if in fact he was deceived to his damage.¹¹ Cases of the sort are those in which the projectors of corporate undertakings publish prospectuses containing misrepresentations calculated to influence others to invest moneys in their project. The

10—*Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436. In this case an agent bought for his principal some diseased sheep under false representations by the vendor that they were sound. He afterward purchased them of his principal and suffered damage in consequence of the spread of the disease. *Held*, entitled to no redress against the first vendor. See *Longmeid v. Holliday*, 6 Exch. 761. If a letter of recommendation is addressed to one person,

but presented to and relied upon by another, the latter has no redress against the writer. *McCracken v. West*, 17 Ohio 16.

11—*Carvill v. Jacks*, 43 Ark. 454. If the representations are made to one with the intent that he repeat them to another, the latter acting upon them may hold the person making them. *Watson v. Crandall*, 78 Mo. 583. Otherwise if the repetition is unauthorized, *Rawlings v. Bean*, 80 Mo. 614.

cases are numerous in which the courts—sometimes of equity and sometimes of law—have given relief to parties defrauded by such misrepresentations.¹² So, if after a corporation is formed the managers make false reports, declare fictitious dividends, or resort to any fraudulent devices whatever, whereby [*579] *they induce individuals to take stock in the corporation, they are liable to the parties thus defrauded in an [*580] action for the deceit.¹³ *So the officer of an insurance company who issued a false prospectus whereby one was

12—See *Johnson v. Goslett*, 3 C. dy, 62 N. Y. 319; *Cross v. Sackett*, B. (N. S.) 569; *Clarke v. Dickson*, 6 C. B. (N. S.) 453; *Gerhard v. Bates*, 2 El. & Bl. 476; *Taylor v. Ashton*, 11 M. & W. 401; *Hender- son's Case*, L. R. 5 Eq. 249; *Kent v. Freehold, &c., Co.*, L. R. 4 Eq. 588; reversed, L. R. 3 Ch. Ap. 493; *Reese River, &c., Co. v. Smith*, L. R. 4 E. & I. App. 64; *Central R. Co. v. Kisch*, L. R. 2 E. & I. App. 99; *Oakes v. Turquand*, L. R. 2 E. & I. App. 325; *Peek v. Gurney*, L. R. 13 Eq. Cas. 79; S. C. 1 Moak, 567; L. R. 2 Ch. App. 412; *Terwilliger v. Gt. West Tel. Co.*, 59 Ill. 249; *Booth ads. Wonderley*, 36 N. J. 250; *Edgington v. Fitzmaurice*, L. R. 29 Ch. D. 459. One who is induced by false and fraudulent representations made by the promoters of a proposed corporation to pay money for shares, may recover damages for the deceit against the persons by whom it was practiced, notwithstanding they did not convert the money to their own use. *Paddock v. Fletcher*, 42 Vt. 389. Persons may be liable for acting as officers of a corporation and issuing stock, knowing that the corporation has no legal existence. *Fenn v. Curtis*, 23 Hun, 384.

13—*Huntingford v. Massey*, 1 Fost. & Fin. 600; *Morgan v. Skid-*

dy, 62 N. Y. 319; *Cross v. Sackett*, 6 Abb. Pr. 247; *Clarke v. Dickson*, 6 C. B. (N. S.) 453; *Un. Nat. Bank v. Hunt*, 76 Mo. 439; *Keeler v. Seaman*, 47 Misc. 292; *Prewitt v. Trimble*, 92 Ky. 176, 17 S. W. 356, 36 Am. St. Rep. 586; *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 867; *Trimble v. Ward*, 97 Ky. 748, 31 S. W. 364; *Ward v. Trimble*, 103 Ky. 153, 44 S. W. 450. It is sufficient that the false statement was one of the inducements to investing money in the concern; it need not be the sole inducement. *Morgan v. Skiddy*, 62 N. Y. 319. Cases where subscribers recovered back in equity money they were deceived into paying in for stock. *Colt v. Woollaston*, 2 P. Wms. 153; *Green v. Barrett*, 1 Sim. 45. The president and cashier of a bank, in making and publishing the quarterly report of resources and liabilities, made false statements under oath, knowing them to be false. Plaintiff, relying upon the statements, purchased shares of the stock of the bank at par value, when, in fact, the capital of the bank was impaired and the stock worth thirty per cent. only. The officers held personally liable to the plaintiff. *Morse v. Swits*, 19 How. Pr. 275.

The company may, also, in

induced to take out insurance in the company has been held liable for this fraud to the person so insuring.¹⁴ So the president of a corporation who pretends to assist a shareholder in proper cases, be held liable for the fraudulent reports of its officers. Thus, where one was led by the false reports of the managers, showing the company to be in a flourishing condition, when, in fact, it was insolvent, to borrow money from the company and invest it in buying shares of its stock, the fraud was held a defense to a suit for the money loaned. *Nat. Ex. Co. v. Drew*, 32 Eng. L. & Eq. 1. So where there is a fraudulent overissue of stock by a corporation officer, to whom the business of issuing certificates of stock is entrusted by the corporation, the parties defrauded by purchasing it have their remedy against the corporation. *N. Y. &c., R. R. Co. v. Schuyler*, 34 N. Y. 30; *Bruff v. Mali*, 36 N. Y. 200; *Cazeaux v. Mali*, 25 Barb. 578; *Shotwell v. Mali*, 38 Barb. 445. Their assignees, however, have no such remedy. *Seizer v. Mali*, 32 Barb. 76. If without express instructions, for his own benefit and not for that of the company, an officer makes a false report, the company is not liable. *Brit. Mut. B'k'g Co. v. Charnwood*, L. R. 18 Q. B. D. 714. To an action by a company against a shareholder for calls, the defendant pleaded that he was induced to become a shareholder by the fraud of plaintiffs; that he had never recognized, since notice of the fraud, any rights or liabilities as shareholder, nor received any benefits from shares, and had repudiated the shares and given plaintiffs notice. *Held*, a good plea. *Bwlch-y-Plwm Lead Mining Co. v. Baynes*, L. R. 2 Exch. 324; *McCreight v. Stevens*, 1 H. & C. 454. See, also, *Bell's Case*, 22 Beav. 35; *Duranty's Case*, 26 Beav. 268; *Ayre's Case*, 25 Beav. 513. The rule of Stock Exchange required that not less than two-thirds of the scrip of a company should be paid up and the subscription list be full, except special reservations, before the company could be inserted in the official list. Defendant, a director, and others of a mining company fraudulently caused representations to be made to a committee of Stock Exchange, so that the shares were quoted. Plaintiff knowing the rules and seeing the company in the list, bought shares. The shares turned out to be valueless and the defendant was held liable for the fraud. *Bedford v. Bagshaw*, 4 H. & N. 538. See *Bagshaw v. Seymour*, 4 C. B. (N. s.) 873.

A director in a corporation is not so far chargeable with notice of the condition of its affairs as to be precluded from complaining of a fraud practiced upon him by one of the officers in selling him its shares. *Lefever v. Lefever*, 30 N. Y. 27.

But a *bona fide* sale of stock that has a speculative value cannot be set aside, because the officers had been guilty of a fraudulent deception which affected the price, the seller being in no way privy to it. *Moffat v. Winslow*, 7 Paige, 124.

14—*Pontifex v. Bignold*, 3 M. & G. 63.

selling his shares, and advises a particular sale at a certain price, which is in fact a sale made to a third person for himself, commits a fraud on the shareholder for which an action on the case will lie.¹⁵

Representations made to a commercial agency as to one's pecuniary responsibility fall under the head of representations made to the public, and, if false, anyone to whom they are communicated and who relies thereon to his injury, may have an action for the fraud.¹⁶ But if the defendant's representations are true and he is misquoted by the commercial agency he is not responsible.¹⁷ So if the representations are true when made but the report of the agency is made and relied on at a date long afterwards, when they have become untrue by reason of changes in the defendant's financial condition.¹⁸ In the case referred to some fifteen to eighteen months had elapsed before the credit was given and to the contention that such a representation was to be deemed a continuing one for a reasonable time to be determined by the jury, the court says: "The contention is that, as the defendant corporation made this statement for the purpose

15—*Fisher v. Budlong*, 10 R. I. 525. And see *Weaver v. Cone*, 174 Pa. St. 104, 34 Atl. 551.

16—*Triplett v. Rugby Distilling Co.* 66 Ark. 219, 45 S. W. 975; *Cox Shoe Co. v. Adams*, 105 Ia. 402, 75 N. W. 316; *Staver & Abbott Mfg. Co. v. Coe*, 49 Ill. App. 426; *Salisbury v. Barton*, 63 Kan. 552, 66 Pac. 618; *Courtney v. Knable & Co. Mfg. Co.* 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456; *Genesee, etc., Bank v. Mich. Barge Co.*, 52 Mich. 164; *Eaton, etc., Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389; *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822; *Bradley v. Seaboard Nat. Bank*, 46 App. Div. 550, 62 N. Y. S. 51; *Mills v. Brill*, 105 App. Div. 389, 94 N. Y. S. 163; *Wilmot v. Lyon*, 11 Ohio C. C. 238; *Gaines-*

ville Nat. Bank v. Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738. But the statement must be made as the basis of credit. *Macullar v. McKinley*, 99 N. Y. 353. If credit is not given till six months after the statement no action lies. *Id.* The statement of the person and not the report of the agency apart from it must have formed a material inducement to the sale. *Holmes v. Harrington*, 20 Mo. App. 661. See also *Lindauer v. Hay*, 61 Ia. 663.

17—*Wachsmuth v. Martini*, 154 Ill. 515, 39 N. E. 129.

18—*Reid, Murdock & Co. v. Kempe*, 74 Minn. 474, 77 N. W. 413. Compare *Cox Shoe Co. v. Adams*, 105 Ia. 402, 75 N. W. 316; *Macullar v. McKinley*, 99 N. Y. 353.

of having it communicated to the wholesale dealers, it must be taken and deemed, as a continuing representation for a reasonable time after it is put out, which reasonable time is a question for a jury; that, although the statement be true when made, if it becomes untrue prior to the purchase of goods, made within a reasonable time, and is known by the purchaser to be untrue, it becomes a false representation, made as of the time of the purchase. Some of the authorities support this view of the law, but we cannot coincide with it. It is altogether too stringent a rule to be serviceable. A rule which requires traders to report to mercantile agencies variations in their circumstances imposes too high a degree of duty and care upon the business man who buys upon credit, and wholly relieves the wholesaler from exercising due care and caution when selling his goods.” Where a man refers to an agency, knowing what its ratings of him are and that they are not true, he is guilty of a fraud, though he did not give the information upon which the ratings were founded.¹⁹

Where the president of a company signed corporate bonds containing a false representation, he was held liable to one who took them as collateral security, relying upon the representation.²⁰ And where the defendant delivered to his agent a deed of land with the grantee in blank and a forged abstract showing title in himself, he was held liable to a purchaser from the agent for the fraud.²¹ The false representations contained in the deed and abstract were held to be made to anyone who should become the purchaser. So where the representations were contained in fictitious deeds put upon record.²² One W. S. Henry, Jr., had a business of his own under the name of W. S. Henry, Jr., & Co. He was also a member of a firm engaged in the same line of business under the name of Henry and Parsons. Under the name of W. S. Henry, Jr. & Co. he wrote to the defendants as to the credit of a certain company. The defendants replied to W. S. Henry, Jr. & Co., giving false representations whereby both W.

19—*Cox Shoe Co. v. Adams*, 105 Ia. 43, 75 N. W. 316. 21—*Baker v. Hallam*, 103 Ia. 43, 72 N. W. 419.

20—*Stickel v. Atwood*, 25 R. I. 456, 56 Atl. 687. 22—*Leonard v. Springer*, 197 Ill. 532, 64 N. E. 299.

S. Henry, Jr. & Co. and Henry & Parsons were induced to extend credit to the company and in consequence sustained a loss. The defendants were held liable to both concerns, the liability to Henry & Parsons being put on the ground that the defendants contemplated that the representations would be communicated to a firm of which W. S. Henry, Jr., was a member, and that it was immaterial that defendants did not know the name of the firm or of the partner.^{22a}

A certificate filed with a State commissioner of corporations or other officer by the officers of a foreign corporation, for the purpose of obtaining a license to do business in the State, is not such a statement or representation as those doing business with the corporation or dealing in its stock or securities may rely upon.²³ So of a statement or report made by the directors of a bank to the secretary of state, as to the financial condition of the bank.²⁴ But where the law required insurance companies to file a report with the auditor of state, showing their financial condition, and provided for giving publicity to such report, it was

22a—*Henry v. Dennis*, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365.

23—*Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623; *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733. In the latter case the court says: “In the case at bar, the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the state a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes. It is not such a representation made by one to another with intent to deceive, as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him.” p. 290.

24—*Utley v. Hill*, 155 Mo. 232, 55 S. W. 1091, 78 Am. St. Rep. 569, 49 L. R. A. 323. Also *Ashuelot Savings Bank v. Albee*, 63 N. H. 152, 56 Am. St. Rep. 501. But held otherwise if a report made by the officers of a national bank to the comptroller of the currency. *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

held that one buying stock of a company relying upon such report could recover in an action of deceit against the officer making the same, if the report was intentionally false.²⁵

Materiality of Representations. "If false and fraudulent representation be alleged as the groundwork for avoiding a bargain, it must be shown that, like poison, it entered into it, tainted and destroyed it. That must be proved by a just inference from what took place at or about the time of contracting, and is not to be supplied by surmises or things so equivocal in themselves as to be proof or not, as the fancy might dictate."²⁶ The representations must be of a decided and apparently reliable character, holding out inducements to make the contract calculated to mislead the purchaser and induce him to buy on the faith and confidence of such representations, and in the absence of the means of information to be derived from his own observation and inspection, and from which he could draw conclusions to guide him in making the contract, independent of the representations.²⁷ * "Fraud does not consist in mere intention carried out by hurtful acts. It

25—*Warfield v. Clark*, 118 Ia. 69, 91 N. W. 833.

26—*THOMPSON*, J., in *Clark v. Everhart*, 63 Pa. St. 347, 349.

27—*Yeates v. Pryor*, 11 Ark. 58; *Hill v. Rush*, 19 Ark. 522. The representations must be material. *Jordan v. Pickett*, 78 Ala. 331; *Hull v. Johnson*, 41 Mich. 286; *Schwabacker v. Riddle*, 99 Ill. 343. A false statement by a director to a proposed purchaser that corporate bonds were as good as government bonds is a material misrepresentation, where the purchaser relies on it. *Drake v. Grant*, 36 Hun, 464. So a statement that all purchasers of stock had paid par when in fact they had paid but one-third of that amount. *Coolidge v. Goddard*, 77 Me. 578. Representation that

horse is not afraid of the cars may be material. *Allen v. Truesdell*, 135 Mass. 75. For further illustrations see *Watson v. Reed*, 129 Ala. 388, 29 So. 837; *Lahay v. City Nat. Bank*, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407; *Williams v. McFadden*, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345; *James v. Crosthwait*, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631; *Teachout v. Van Hoesen*, 76 Ia. 113, 40 N. W. 96, 14 Am. St. Rep. 206, 1 L. R. A. 664; *Boddy v. Henry*, 113 Ia. 462, 85 N. W. 771, 53 L. R. A. 769; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402; *Herman v. Hall*, 140 Mo. 270, 41 S. W. 733; *Dietz v. Yetter*, 34 App. Div. 453, 54 N. Y.

consists of conduct that operates prejudicially on the rights of others.''²⁸

To determine whether the representations were material, every case is to be examined on its own facts. A slight difference in the circumstances may arrange cases apparently alike under different principles. Thus, though a false assertion of an opinion is no fraud, yet to assert that a certain piece of land, bordering on or near a river, when a certain levee was repaired would be free from overflow, except that in very high and long continued floods a few acres of the lowest land would be overflowed, may be a fraud, if made to a stranger by one whose familiarity with the lands in former seasons must have convinced him that the opinion he was expressing was baseless.²⁹ So to misrepresent the crops raised the previous year on a farm which is sold,³⁰ or the amount of business done at a certain stand,³¹ is material, as these facts have a bearing on the question of value. Whether a false representation is material is a question of law for the court.³²

Deceiving Third Persons. An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it.³³ But if the third person was induced to

S. 258; *Barcus v. Dorries*, 64 App. Div. 109, 71 N. Y. S. 695; *Childs v. Merrill*, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264; *Tacoma v. Tacoma Lt. & W. Co.*, 16 Wash. 288, 47 Pac. 738; *Tacoma v. Tacoma Lt. & W. Co.*, 17 Wash. 458, 50 Pac. 55.

28—*WILLIAMS*, J., in *Williams v. Davis*, 69 Pa. St. 21, 28, citing *Bunn v. Ahl*, 29 Pa. St. 390. And, see *Fuller v. Hodgdon*, 25 Me. 243; *Sieveking v. Litzler*, 31 Ind. 13; *Halls v. Thompson*, 10 Miss. 443; *Arys v. Mitchell*, 11 Miss. 683; *Coon v. Atwell*, 46 N. H. 510.

29—*Estell v. Myers*, 54 Miss. 174; a valuable case.

30—*Martin v. Jordan*, 60 Me. 531. So misrepresentations as to quantity of crops, quality of hay, number of rocks, amount of pasture. *Messer v. Smyth*, 59 N. H. 41; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354.

31—*Taylor v. Green*, 8 C. & P. 316.

32—*Caswell v. Hunton*, 87 Me. 277, 32 Atl. 899; *Greenleaf v. Gerald*, 94 Me. 91, 46 Atl. 799, 80 Am. St. Rep. 377, 50 L. R. A. 542.

33—*Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 34 Am. St. Rep. 165, 11 L. R. A. 545. To induce one to break a

break his contract by deception, it may be different. If, for example, one were to personate a vendee of goods, and receive and pay for them as on a sale to himself, the vendee would have his action ^{*against} the vendor; but he might also [^{*582}] pursue the party who, by deceiving one, had defrauded both.³⁴ And where the performance of a contract is prevented by deceiving the party about to make it, it is immaterial that the contract was not binding under the Statute of Frauds, because not in writing; the defect being one the party had a right to waive.³⁵

Knowledge by the Wrong-doer of the Falsity. It is often said that, in order to render false representations fraudulent in law, it must be made to appear that the party making them knew at the time that they were untrue. But this rule has so many exceptions that it is difficult to affirm, with any confidence, that it is a general rule at all.^{35a} It is certain that courts of equity do not limit their action to it in giving relief, when representations prove to be untrue in fact. Says Mr. Justice STORY: "Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false; and even if the party innocently misrepresents a material fact by mistake, it is equally

contract if there is neither malice nor fraud, is not actionable. *McCann v. Wolff*, 28 Mo. App. 447.

34—Where one was induced to break his contract for the delivery of certain property to the plaintiff, by the false and malicious setting up by defendant of an unfounded lien thereon, an action was sustained for this deception. *Green v. Button*, 2 C. M. & R. 707. But for merely setting up a false claim against the plaintiff's debtor, or making a fraudulent levy on his property,

no action will lie. *Smith v. Blake*, 1 Dav. 258; *Green v. Kimble*, 6 Blackf. 552.

35—*Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30. This case distinguishes *Dung v. Parker*, 52 N. Y. 494, in which it was held that no action would lie against one who, falsely pretending authority as agent, induced another to accept a void lease from him.

35a—See *Goodale v. Middaugh*, 8 Colo. App. 223, 46 Pac. 11.

conclusive, for it operates as a surprise and imposition upon the other party.'³⁶ Accordingly, where either of the two parties to a negotiation for the purchase of property makes material representations of matters which he avers or assumes to be within his own knowledge, with intent that the other party shall act upon them, and these representations are actually relied upon by the other party in completing the negotiation, and they prove

[*583] *to be false, to his injury, a court of equity will treat the case as one of fraud, and give the proper relief, although the party making the representations was not aware at the time of their falsity.³⁷

No doubt, however, there is some difference in the aspect which

36—Story Eq. Juris. § 193.

37—Thompson *v.* Lee, 31 Ala. 292; Indianapolis, &c., R. R. Co. *v.* Tyng, 63 N. Y. 653; Foard *v.* McComb, 12 Bush, 723; Elder *v.* Allison, 45 Ga. 13; Bankhead *v.* Alloway, 6 Cold. 56; Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Bristol *v.* Braidwood, 28 Mich. 191; Wilcox *v.* Iowa Wes. Univ., 32 Iowa, 367; Twitchell *v.* Bridge, 42 Vt. 68; Frenzel *v.* Miller, 37 Ind. 1, 10 Am. Rep. 62; Borders *v.* Kattleman, 142 Ill. 96, 31 N. E. 19. See Hubbard *v.* Weare, 79 Ia. 678, 44 N. W. 915; Kountz *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360.

Where the representations relate to facts which must be supposed within defendant's knowledge, proof of their falsity is a sufficient showing of his knowledge that they were false. Morse *v.* Dearborn, 109 Mass. 593; Morgan *v.* Skiddy, 62 N. Y. 319.

Any misrepresentation not an expression of opinion, by a person confided in, in relation to a material matter constituting an inducement or motive to the act

of another, by which an undue advantage is taken of him, though innocently made, and in belief of its truth, is regarded as a fraud, relievable in equity. Davis *v.* Heard, 44 Miss. 50; Rimer *v.* Dugan, 39 Miss. 477, 77 Am. Dec. 687.

A party selling property is presumed to know whether the representation he makes of it is true or false; if he knew it to be false, it is a positive fraud. If he does not know it to be true, it is culpable negligence, which in equity amounts to fraud. Miner *v.* Medbury, 6 Wis. 295; Smith *v.* Richards, 13 Peters, 26; McFerran *v.* Taylor, 3 Cranch. 270; Glasscock *v.* Minor, 11 Mo. 655.

In Hadcock *v.* Osmer, 153 N. Y. 604, 47 N. E. 923, it is said: "Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not and it is actually untrue, he is guilty of falsehood, even if he believes it to be true, and if the statement is thus made with the intention that it shall be acted

such a case presents in a court of equity and in a court of law, growing out of the difference in jurisdiction in the two courts and in the modes of giving relief. A court of equity gives relief from unconscionable contracts on the ground of mistake as well as of fraud, and if the facts are set out which are supposed to show fraud, it may happen that, though they do not fully establish this, they at least show that the complainant has acted to his prejudice under such a mistake of fact as shall justify the court in giving him relief. In a court of law, on the other hand, when the plaintiff counts upon a fraud, he must establish it by his evidence; and if he fails in doing so, he must go out of court, even though it is manifest that upon the facts he is entitled to substantial redress in another forum.

Where one, in selling personal property, makes positive representations of material facts, upon which the other relies, the vendor is held to the truth of these representations, in a suit at law, as much as he would have been in a suit in equity. But this is upon the ground that they constitute a warranty. It is familiar law, that no particular form of words is necessary to *charge a vendor with a warranty. The word [*584] warrant, or any equivalent expression, need not be used.

It is enough that there be a positive assertion respecting something that affects the value of that which is sold, and which is not intended as a mere expression or statement of opinion, but as an affirmation upon which the purchaser may rely, and upon which he does rely.³⁸ On the other hand, if what is asserted

upon by another, who does so act upon it to his injury, the result is actionable fraud." p. 608.

If a fact susceptible of actual knowledge is stated as of one's own knowledge and is false, it is a fraud and no other proof of intent to deceive is necessary. *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416.

38—*Carondelet Iron Works v. Moore*, 78 Ill. 65; *Wheeler v. Reed*, 36 Ill. 81; *Hawkins v. Pemberton*,

51 N. Y. 198, 10 Am. Rep. 595; *Chapman v. Murch*, 19 Johns. 290; *Duffee v. Mason*, 8 Cow. 25; *Hillman v. Wilcox*, 30 Me. 170; *Morrill v. Wallace*, 9 N. H. 111; *Beebe v. Knapp*, 28 Mich. 53; *Stone v. Covell*, 29 Mich. 359; *Richardson v. Mason*, 53 Barb. 601; *Burge v. Stroberg*, 42 Ga. 88; *Tewkesbury v. Bennett*, 31 Iowa, 83; *Henshaw v. Robins*, 9 Met. 83; *McGregor v. Penn*, 9 Yerg. 74; *McLennan v. Ohmen*, 75 Cal. 558,

be matter of opinion or fancy merely, such as the value of a horse, or the relative convenience and usefulness of competing articles of machinery, or the like, there is no warranty,³⁹ unless the vendor assumed the peculiar knowledge of an expert, which enabled him to judge of such matters when the other could not.⁴⁰ But such a warranty, although the facts prove to be different from what they were asserted to be, is not necessarily a fraud, any more than is a warranty in a conveyance of lands, which proves to be broken as soon as made. Indeed, there is no necessary assumption, when one takes a warranty for his own protection, that the facts are as the covenant or promise of warranty asserts. He takes it on the understanding merely that, if they are otherwise, the warrantor will protect him. Therefore, on a broken warranty, the action is on the contract, and does not assume a tort has been committed.

Nevertheless, a warranty may be a fraud, because it may be made with knowledge that the facts asserted are untrue, and with intent to deceive by the false statement. Therefore, if one sells a horse which he avers is sound, when it is not, there is upon these facts only a warranty; but if he knows the horse is unsound, and nevertheless sells it with the like positive assertion that it is sound, this is a false warranty, and the *scienter* makes it a fraud.⁴¹

[*585] *There is no doubt that an action on the case will lie, founded on representations made by the defendant,

17 Pac. 687; *Hexter v. Bast*, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874. 427; *Brown v. Castles*, 11 Cush. 348; *Stone v. Covell*, 29 Mich. 360.

In an action of tort on a false warranty the *scienter* need not be averred or proved. *Shippen v. Bowen*, 122 U. S. 575; *Carter v. Glass*, 44 Mich. 154; *Hexter v. Bast*, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874. Counts for deceit may be joined and recovery had on the false warranty or on the deceit. *Schuchardt v. Allens*, 1 Wall. 359; *Shippen v. Bowen*, *supra*.

39—*Reed v. Hastings*, 61 Ill. 266; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *Tuscaloosa Co. v. Foster*, 132 Ala. 392, 31 So. 587.

40—*Picard v. McCormick*, 11 Mich. 68.

41—*Cunningham v. Smith*, 10 Grat. 255, 40 Am. Dec. 333; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Stitt v. Little*, 63 N. Y.

whenever it can be made to appear that he believed or had reason to believe the representations were false, and that the plaintiff relied upon them, to his injury.⁴² But the question is, whether this remedy is confined to cases in which the defendant knew or had reason to believe he was deceiving by untruths; and it is certain, we think, that it is not. There are numerous cases in which it has been held that if a person makes a material representation in relation to a matter susceptible of knowledge, in such a manner as to import positive knowledge, but conscious that he has no knowledge of its truth or falsity, with intent that another should rely upon such representation, this is sufficient to establish against him a legal fraud, if the other does rely upon it and it proves untrue.⁴³ "An unqualified statement that a

42—*Pasley v. Freeman*, 3 T. R. 51; *Tryon v. Whitmarsh*, 1 Met. 1, 35 Am. Dec. 339; *Medbury v. Watson*, 6 Met. 246, 39 Am. Dec. 726; *Hartford Ins. Co. v. Matthews*, 102 Mass. 221; *Cross v. Peters*, 1 Me. 378, 10 Am. Dec. 78; *Oberlander v. Spiess*, 45 N. Y. 175; *Griswold v. Sabine*, 51 N. H. 167, 12 Am. Rep. 76; *Nauman v. Oberle*, 90 Mo. 666; *Hutchinson v. Gorman*, 71 Ark. 305, 73 S. W. 793; *Phelps v. James*, 79 Ia. 262, 44 N. W. 543; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Griswold v. Gebbie*, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878; *Morrison v. Adoue*, 76 Tex. 255, 13 S. W. 166. In such case the intent to deceive is conclusively presumed. *Hudnut v. Gardner*, 59 Mich. 341; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432.

43—*Monroe v. Pritchett*, 16 Ala. 785; *Hazard v. Irwin*, 18 Pick. 95; *Page v. Bent*, 2 Met. 371; *Stone v. Denny*, 4 Met. 151; *Fisher v. Mellen*, 103 Mass. 503; *Litchfield v. Hutchinson*, 117 Mass. 195; *Bennett v. Judson*, 21 N. Y. 238; *Meyer v. Amidon*, 45 N. Y. 169; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *McDonald v. Trafton*, 15 Me. 225; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *West v. Wright*, 98 Ind. 335; *Cole v. Cassidy*, 138 Mass. 437, 52 Am. Rep. 284; *Hanger v. Evins*, 38 Ark. 334; *Brown v. Freeman*, 79 Ala. 406; *Caldwell v. Henry*, 76 Mo. 254; *Anstee v. Ober*, 26 Mo. App. 665; *Nauman v. Oberle*, 90 Mo. 666; *Hutchinson v. Gorman*, 71 Ark. 305, 73 S. W. 793; *Scholfield, G. & P. Co. v. Scholfield*, 71 Conn. 1, 40 Atl. 1046; *Borders v. Kattelman*, 142 Ill. 96, 31 N. E. 19; *Kirkpatrick v. Reeves*, 121 Ind. 280, 22 N. E. 139; *Hubbard v. Weare*, 79 Ia. 678; *Riley v. Bell*, 120 Ia. 618, 95 N. W. 170; *Prewitt v. Trimble*, 92 Ky. 176, 17 S. W. 356, 36 Am. St. Rep. 586; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Cahill v. Applegate*, 98 Md. 493, 56 Atl. 794; *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149; *Knappen*

fact exists, made for the purpose of inducing another to act upon it, implies that the person who makes it knows it to exist and speaks from his own knowledge. If the fact does not exist, and the defendant states of his own knowledge that it does, and induces another to act upon his statement, the law will impute to him a fraudulent purpose.⁴⁴ The fraud here consists in the reckless assertion that that is true of which the party knows nothing, and in deceiving the other party thereby;⁴⁵ and even the actual belief of the party in the truth of what he asserts is immaterial,⁴⁶ unless he had some apparently good reason for

v. Freeman, 47 Minn. 491, 50 N. W. 533; *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516; *Peoples' Nat. Bank v. Central Trust Co.*, 179 Mo. 648, 78 S. W. 618; *Haddock v. Osmar*, 153 N. Y. 604, 47 N. E. 923; *Cawston v. Sturges*, 29 Ore. 331, 43 Pac. 656; *Martin v. Eagle Development Co.*, 41 Ore. 448, 69 Pac. 216; *Hexter v. Bast*, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874; *Griswold v. Gebbie*, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878; *Lamberton v. Dunham*, 165 Pa. St. 129, 30 Atl. 716; *Morrison v. Adoue*, 76 Tex. 255, 13 S. W. 166; *Johnson v. Cate*, 75 Vt. 100, 53 Atl. 329; *Northwestern S. S. Co. v. Horton*, 29 Wash. 565, 70 Pac. 59; *Montreal Riv. L. Co. v. Mihills*, 80 Wis. 540, 50 N. W. 507; *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406; *Lehigh Z. & I. Co. v. Bamford*, 150 U. S. 665, 14 S. C. Rep. 219, 37 L. Ed. 1215.

44—*Hamlin v. Abell*, 120 Mo. 188, 203, 25 S. W. 516; *Kirkpatrick v. Reeves*, 121 Ind. 280, 282, 22 N. E. 139. An unqualified affirmation of a fact amounts to an affirmation as of one's own knowledge. *Bullitt v. Farrar*, 42 Minn. 8, 11, 43 N. W. 566, 18 Am. St. Rep. 485, 6 L. R. A. 149; *Knappen*

v. Freeman, 47 Minn. 491, 50 N. W. 533. “A person making a false representation as true to his personal knowledge will not be heard to say that he did not have knowledge as to its truth or falsity.” *Hubbard v. Weare*, 79 Ia. 678, 44 N. W. 915.

45—*Taylor v. Ashton*, 11 M. & W. 401; *Beebe v. Knapp*, 28 Mich. 53, 76; *Indianapolis, &c., R. R. Co. v. Tyng*, 63 N. Y. 653; *Einstein v. Marshall*, 58 Ala. 153, 25 Am. Rep. 729; and cases in last two notes.

46—*Allen v. Hart*, 72 Ill. 104; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313; *Fisher v. Mellen*, 103 Mass. 503; *Litchfield v. Hutchinson*, 117 Mass. 195; *Cole v. Cassidy*, 138 Mass. 437. If one ought to have known his statement false, it is immaterial whether it is made willfully or not. *Cotzhausen v. Simon*, 47 Wis. 103. To state as a fact that as to which one has no well-founded belief, is to state falsely. *Sims v. Eiland*, 57 Miss. 607. But, see *Holdom v. Ayer*, 110 Ill. 448, citing other Illinois cases, where a promoter of a company was held not liable for his statements unless he knew them to be false.

*his belief, such, for example, as the positive statements of others in whom he confided, and was innocent of any [*586] attempt to mislead,⁴⁷ or unless his representations related to matters of opinion.⁴⁸ It would seem, therefore, that it must be sufficient in an action for the fraud to allege that the representations were not true and that the defendant made them with intent to deceive, having no knowledge respecting the facts, and no reason to believe them to be true,⁴⁹ and that the same facts would be sufficient to make out a defense when the defendant was the party defrauded.⁵⁰

It seems from the foregoing, that one who has been induced, by misrepresentations of material facts, to enter into a contract, may have redress as for a fraud—

1. When the representations were made by the other party, with knowledge of their falsity, and with intent to deceive.

47—*Haycraft v. Creasy*, 2 East, 92; *Omrod v. Hurth*, 14 M. & W. 652; *Taylor v. Ashton*, 11 M. & W. 401; *Lord v. Goddard*, 13 How. 198; *Sone v. Denny*, 4 Met. 151; *Marsh v. Falker*, 40 N. Y. 562; *Hubbard v. Briggs*, 31 N. Y. 518; *Chester v. Comstock*, 40 N. Y. 575; *Mayer v. Salazar*, 84 Cal. 646, 24 Pac. 597; *Scholfield G. & P. Co. v. Scholfield*, 71 Conn. 1, 40 Atl. 1046; *Kirkpatrick v. Reeves*, 121 Ind. 280, 22 N. E. 139; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Cahill v. Applegate*, 98 Md. 493, 56 Atl. 794; *Busch v. Wilcox*, 82 Mich. 315, 46 N. W. 940; *Morrison v. Adoue*, 76 Tex. 255, 13 S. W. 166. If one honestly states what he believes, and does not misstate the source of his information, he is not liable. *Humphrey v. Merriam*, 32 Minn. 197. See *Petrie v. Guelph, &c., Co.*, 11 Ont. App. 336. A positive representation where the defendant only had an opinion or belief is a fraud. *Johnson v. Cate*, 75 Vt. 100, 53 Atl. 329.

48—*Page v. Bent*, 2 Met. 371; *Marsh v. Falker*, 40 N. Y. 562. For representations as to another's credit one is not liable unless they are known to be false. *Avery v. Chapman*, 62 Ia. 144; *McKown v. Furguson*, 47 Ia. 636; *Endsley v. Johns*, 120 Ill. 469, 60 Am. Rep. 572. In such case it is held in a careful opinion in New Jersey, distinguishing from statement of a specific fact, that the question is wholly one of good faith. *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432. That one may be if such representations are made recklessly and without knowledge; see *Einstein v. Marshall*, 58 Ala. 153, 25 Am. Rep. 729; *Sims v. Eiland*, 57 Miss. 607.

49—*Omrod v. Hurth*, 14 M. & W. 652; *Hammett v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Weed v. Case*, 55 Barb. 534.

50—See *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50.

2. When the party making them had no knowledge and no belief on the subject, and recklessly made them with the like intent.

3. When the party supposed his representations to be true, but had no reason for any such belief, and nevertheless made [*587] them *positively as of known facts, and induced the other to act upon them.⁵¹

The ground of recovery is substantially the same in each of these cases, and consists in the impression produced on the mind of one party that certain non-existent facts do exist to the knowledge of the other.

The *scienter* on the part of the defendant may be established by showing first, actual knowledge of the falsity of the representation by defendant; second, that the defendant made the statement as of his own knowledge, or in such absolute, unqualified and positive terms as to imply his personal knowledge of the fact, when in truth defendant had no knowledge whether the statement was true or false; or third, that the party's special situation or means of knowledge were such as to make it his duty to know of the truth or falsity of the representations.^{51a}

The Supreme Court of Pennsylvania, in a late case holds that if the defendant really believes his representations are true he is not liable in an action of deceit, though they are untrue, and that the reasonableness of his belief or grounds of his belief are not open to inquiry.⁵² And the Supreme Court of Iowa, speak-

51—The matter is thus summed up by the supreme court of Maryland: "If the party does not *bona fide* believe in the truth of the statement made by him, or if he pretends to have knowledge of what he speaks, which he must have known that he did not have, or was utterly indifferent and reckless as to whether it was true, or had no reasonable ground to believe it was, or falsely asserts a material fact to be true of his own knowledge, and such representations be made for a

fraudulent purpose, and he thereby induces another to act to his prejudice, he commits a fraud which will sustain an action for deceit." *Cahill v. Applegate*, 98 Md. 493, 502, 503, 56 Atl. 794.

51a—*Watson v. Jones*, 41 Fla. 241, 25 So. 678.

52—*Lamberton v. Dunham*, 165 Pa. St. 129, 30 Atl. 716, citing, *Boyd v. Browne*, 6 Pa. St. 316; *Huber v. Wilson*, 23 Pa. St. 178; *Bokee v. Walker*, 14 Pa. St. 139; *Duff v. Williams*, 85 Pa. St. 490; *Cox v. Highley*, 100 Pa. St. 252;

ing of the action of deceit, says: "The rule uniformly recognized by this court is that the plaintiff must show by competent testimony that the representations were false and fraudulent, within the knowledge of the party making them. It is not enough that they were made through mistake, ignorance or carelessness, or without reason to believe they were true." And again: "In this action the sole question is that of deceit; that is, whether by statements which are intentionally and morally wrong, defendant has deceived the plaintiff to his injury."⁵³ And, in the case referred to, the court holds that, to make one liable for representations which he believed to be true but which were not true and which he might have known were not true, destroys the landmarks of the law. In a recent case before the New York Court of Appeals it appeared that the plaintiff purchased stock of the president of a company who gave the plaintiff a statement of the assets and liabilities of the company, upon which the latter relied in making the purchase. The defendant omitted from the statement a claim against the company, then in litigation, which the attorney of the company assured him was invalid and which the defendant believed to be so. Shortly after the purchase of the stock this claim was established and the company thereby made insolvent. In an action of deceit against the defendant the court held that, as the defendant believed his statement to be true and had no intent to defraud, he was not liable. And, speaking of the action of deceit generally, the court says: "The representation upon which it is based must be shown not only to have been false and material, but that the defendant when he made it knew that it was false, or not knowing whether it was true or false and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue. Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an

Iron Works *v.* Barber, 106 Pa. St. 462, 467, 469, 85 N. W. 771, 53 L. 125; Kern *v.* Simpson, 126 Pa. St. R. A. 769. And see Mentzer *v.* 42; Griswold *v.* Gebbie, 126 Pa. Sargeant, 115 Ia. 527, 88 N. W. St. 353. 1068.

53—Boddy *v.* Henry, 113 Ia.

essential factor in an action for deceit. The man who intentionally deceives another to his injury should be legally responsible for the consequences. But if through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the representation was honestly made, believing it to be true, whatever other liability he may incur he cannot be made liable in an action for deceit. * * * While the common law action of deceit furnishes a remedy for fraud which ought to be preserved, we think it should be kept within its ancient limits, and should not by construction be extended to embrace dealings which, however unfortunate they may have proved to one of the parties, were not induced by actual intentional fraud on the part of the other.⁵⁴

Representations Must Have Been Acted On. Unless the representations are acted on, the deception has not accomplished its purpose, and an action will not lie.⁵⁵ It is not essential, however, that they should have formed the sole inducement to a contract; it is enough that they formed a material inducement.⁵⁶

54—*Kountz v. Kennedy*, 147 N. Y. 124, 129, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360. To same effect: *Holst v Stewart*, 154 Mass. 445, 28 N. E. 574; *Derry v. Peek*, 14 L. R. H. L. 337. By statute in Georgia a false representation made by one party to be acted upon by the other and which is acted upon, is actionable, though innocently made. *Watters v. Eaves*, 105 Ga. 584, 32 S. E. 609; *Newman v. Claflin & Co.*, 107 Ga. 89, 32 S. E. 943.

55—"The representation must be the very ground on which the transaction has taken place." *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202. "When a party ignorant of the

real facts, and having no ready means of information, makes a purchase or enters into a transaction, as to the subject matter of which representations have been made which are material, the law will presume, as a matter of fact, that he relied on them." *Hicks v. Stevens*, 121 Ill. 186, 194, 11 N. E. 241.

56—*Mathews v. Bliss*, 22 Pick. 48; *Safford v. Grout*, 120 Mass. 20; *Shaw v. Stine*, 8 Bosw. 157; *Addington v. Allen*, 11 Wend. 374; *Winter v. Bandel*, 30 Ark. 362; *Clarke v. Dickson*, 6 C. B. (N. s.) 453; *Hale v. Philbrick*, 47 Ia. 217; *Lebby v. Ahrens*, 26 S. C. 275, 2 S. E. 387; *Fishback v. Miller*, 15 Nev. 428; *Union*

If, on the other hand, it appears that the defendant did not at all rely upon the representations, either because he did not believe them, or because he chose to investigate and act upon his own judgment, it is plain that no action can be maintained.⁵⁷ So, though the representations may have been trusted at first, yet if before the negotiations were completed the party ascertained their falsity, or if after they were completed he affirmed the bargain unconditionally with full knowledge of the facts, the bargain must be treated in the same manner as though it was originally made under the same state of knowledge.⁵⁸

"A mis*representation can be of no avail unless it serves [*588] to deceive the party at the time he becomes fixed by the

Mfg. & C. Co. v. East Ala. Nat. Bank, 129 Ala. 292, 29 So. 781; Spinks v. Clark, 147 Cal. 439; Marshall v. Gilman, 52 Minn. 88, 53 N. W. 811; Kirkendall v. Hartsock, 58 Mo. App. 234; Lebby v. Ahrens, 26 S. C. 275, 2 S. E. 387; Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188. If a warranty as to the improvements on land is part of the contract of sale and part of the consideration, the law will imply that it was relied on. Norris v. Kipp, 74 Ia. 444, 38 N. W. 152.

57—Hagee v. Grossman, 31 Ind. 223; Nye v. Merriam, 35 Vt. 438. Humphrey v. Merriam, 32 Minn. 197; Proctor v. McCoid, 60 Ia. 153; Union Mfg. & C. Co. v. East Ala. Nat. Bank, 129 Ala. 292, 29 So. 781; Allison v. Ward, 63 Mich. 128, 29 N. W. 528; Walker v. Casgrain, 101 Mich. 604, 60 N. W. 291; Buxton v. Jones, 120 Mich. 522, 79 N. W. 980; Warren v. Ritchie, 128 Mo. 311, 30 S. W. 1023; Runge v. Brown, 23 Neb. 817, 37 N. W. 660; Stetson v. Riggs, 37 Neb. 797, 56 N. W. 628; Wimer v. Smith, 22 Ore. 469, 30 Pac. 416; Sioux Banking Co. v. Kendall, 6 S. D. 543, 62 N. W. 377; Farr v. Peterson, 91 Wis. 182, 64 N. W. 863. If the buyer acts on his own examination and the advice of a third person, no recovery. Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215. There must be both deception and damage. Ming v. Woolfolk, 116 U. S. 599; Danforth v. Cushing, 77 Me. 182; Runge v. Brown, 23 Neb. 817, 37 N. W. 660, and cases; Freeman v. McDaniel, 23 Ga. 354; Bowman v. Carithers, 40 Ind. 90; Byard v. Holmes, 34 N. J. 296; Ely v. Stewart, 2 Md. 408; Anderson v. Burnett, 6 Miss. 165; Selma, &c., R. R. Co. v. Anderson, 51 Miss. 829; Boyce v. Watson, 20 Ga. 517; Jennings v. Broughton, 5 De G., M. & G. 126; Garrow v. Davis, 15 How. 272; Fuller v. Hodgden, 25 Me. 243; Abbey v. Dewey, 25 Pa. 413.

58—Pratt v. Philbrook, 41 Me. 132. See Tuck v. Downing, 76 Ill. 71; Whiting v. Hill, 23 Mich. 399; Raffel v. Epworth, 107 Mich. 143, 64 N. W. 1052. So if he relied on the seller's guaranty and not on his false representations. Holdom v. Ayer, 110 Ill. 448.

treaty, and he cannot claim to have confided in a statement as true which at the same time he knew to be false. Hence, however fraudulent and wicked a statement may be, if the innocent party, before being tied and while in a situation to retreat without prejudice, in any manner becomes acquainted with the truth, the misrepresentation will not be a ground of defense against the contract.⁵⁹ And it can certainly be no fraud if the party, instead of believing the representations, believed directly the opposite.⁶⁰

Where a purchaser, electing not to rely upon the representations of the vendor, proceeds to an investigation in person or by agents, there is no deception even though he fails to discover important facts, provided the vendor interposes no obstacles to a full investigation, and does nothing to mislead while it is in progress.⁶¹ Even in such a case, however, he might possibly be entitled to relief, if the subject-matter of the representation respected some quality of the thing sold which was not susceptible of being accurately determined except by experts, and the investigation made was not by persons competent to develop the facts.⁶²

If the representations have brought about a contract, and a new one is substituted for this before their falsity is discovered, the second contract, as well as the first, is supposed to have been induced by them.⁶³

59—GRAVES, J., in *Whiting v. Hill*, 23 Mich. 399, 405, citing *Irvine v. Kirkpatrick*, 3 Eng. L. & Eq. 17; S. C. 17 L. T. Rep. 32; *Veerol v. Veerol*, 63 N. Y. 45; *Fulton v. Hood*, 34 Pa. St. 365, 75 Am. Dec. 664; *Halls v. Thompson*, 1 S. & M. 443; *Ely v. Stewart*, 2 Md. 408.

60—*Bowman v. Carithers*, 40 Ind. 90. And see *Stitt v. Little*, 63 N. Y. 427. A false statement of a very material fact will not overthrow a bargain unless it was the means of procuring it. *Phipps v. Buckman*, 30 Pa. St. 401.

61—*Halls v. Thompson*, 1 S. & M. 443. As to what amounts to a device to mislead, see *Roseman v. Canovan*, 43 Cal. 110; *Webster v. Bailey*, 31 Mich. 36.

62—*Perkins v. Rice*, Lit. Sel. Cas. 218, 12 Am. Dec. 298. See *Daiker v. Strelinger*, 28 App. Div. 220, 50 N. Y. S. 1074.

63—*Davis v. Henry*, 4 W. Va. 571. Acts of confirmation of a contract by the defrauded party will not bind him, unless he was fully apprised of the fraud and of his rights. *Shackelford v. Handley*, 1 A. K. Marsh. 495, 10 Am.

Where the plaintiff was induced to purchase stock in a company as an investment by means of the false and fraudulent representations of the defendant, it was held that he might continue to hold the stock in reliance upon such representations and that the defendant was liable for any loss sustained by the plaintiff in so holding the stock.^{63a} So one may act upon representations in the legal sense by refraining from action as well as by taking positive action. Thus the plaintiff gave an order to the defendant to sell certain stock which the latter had in his possession as broker. The defendant, in order to induce the plaintiff not to sell, represented that he knew that certain sales of the stock which had been reported were real and genuine and the plaintiff relying upon these representations withdrew his order. Afterwards the corporation sustained a large loss by embezzlement which rendered the stock practically worthless. The defendant was held liable in an action of deceit for the plaintiff's loss. "So far as respects the owner of property," says the court, "his change of conduct between keeping the property on the one hand and selling it on the other, is equally great, whether the first intended action be to keep or to sell; and if by reason of fraud practiced upon him the plaintiff was induced to recall his order to sell, and, being continuously under the influence of this fraud, kept his stock, when, save for such fraud, he would have sold it, then with reference to this property

Dec. 753; *Johnson v. Johnson*, 5 Ala. 90; *Crowe v. Ballard*, 1 Ves. 215. He may rescind, though he affirmed after the fraud was disclosed to him in part, if afterwards, he discovers the falsity of other material representations. *Pierce v. Wilson*, 34 Ala. 596.

63a—*Smith v. Duffy*, 57 N. J. L. 679, 32 Atl. 371. In this case the plaintiff held the stock for two years when the company failed and the defendant was held liable for the difference between what was paid for the stock and its value after the failure. *National*

Bank v. Taylor, 5 S. D. 99, 58 N. W. 297, is a similar case in which the court says: "It would seem strange law that a party may safely accept and rely upon the statements of him with whom he is dealing without investigation, and make and complete the contract solely upon the strength of his reliance upon their truth, but that, when he has so concluded the contract, he can no longer rely upon the truth of such representations, but that he must then investigate, and see if they are true. He has the same right

he acted upon the representation within the meaning of the rule applicable to cases like this."⁶⁴

[*589] ***Rescinding Contract for Fraud.** It is a general rule that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract and demand back what has been received under it, or he may affirm the bargain and sue and recover damages for the fraud.⁶⁵ If he elects the former course, he must not sleep on his rights, but must move promptly.⁶⁶ No rule is better settled than this, that equity will refuse relief where the delay in seeking redress has been so

to rely upon the statements after, an action lies for fraud. *Nauas before, the consummation of man v. Oberle*, 90 Mo. 666. Replevin pending is not a bar to an

action for damages. *Lenox v. Fuller*, 39 Mich. 268. Replevin with partial satisfaction is not a bar to a claim for the value of

the rest of the goods converted against the bankrupt estate of the tort feasor; *Benedict v. Powers*, 88 N. Y. 605. But he may prove against the estate as upon contract. *Moller v. Tuska*, 87 N. Y. 166. See *Farwell v. Myers*, 59 Mich. 179, 26 N. W. 328. *McBean v. Fox*, 1 Ill. App. 177.

66—*Masson v. Bovel*, 1 Denio. 69, 43 Am. Dec. 651; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Herrin v. Libbey*, 36 Me. 350; *Cook v. Gilman*, 34 N. H. 556; *Wright v. Peet*, 36 Mich. 213; *Hammond v. Stanton*, 4 R. I. 65; *Hanger v. Evins*, 38 Ark. 334; *Moore v. Howe*, 115 Ia. 62, 87 N. W. 750; *Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785; *Parsons v. McKinley*, 56 Minn. 464, 57 N. W. 1134; *Taylor v. Short*, 107 Mo. 384, 17 S. W. 970; *A. Landreth Co. v. Schevenel*, 102 Tenn. 486, 52 S. W. 148. But the wrong doer cannot insist on extreme promptitude. He cannot complain of a delay,

considerable that laches is fairly imputable,⁶⁷ and both at law and in equity long acquiescence with full knowledge of the fraud will be deemed a waiver of the right to rescind.⁶⁸ Even a gift presumably obtained by undue influence operating upon overweening confidence may be affirmed by great delay in rescinding *the transaction; such a delay as under the [*590] circumstances is unreasonable.⁶⁹ So, dealing with what has been acquired by the contract in a manner inconsistent with an intention to rescind will be deemed a waiver of the right; as where corporation shares which the party finds have been fraudulently sold to him, are afterward put by him upon the market.⁷⁰

The party electing to rescind must also place the other party as nearly as possible in *statu quo*.⁷¹ To do this, if he has received anything under the contract, whether it be property or securities, he must restore it.⁷² To this general rule

unaccompanied by acts of ownership, by which he has not been affected. *Pence v. Langdon*, 99 U. S. 578.

67—*Hercy v. Dinwoody*, 2 Ves. 87; *Jones v. Turberville*, 2 Ves. 11; *Lupton v. Janney*, 13 Pet. 381; *McKnight v. Taylor*, 1 How. 161; *Badger v. Badger*, 2 Wall. 87; *McLean v. Barton*, Har. Ch. 279; *Banks v. Judah*, 8 Conn. 145; *Purlard v. Martin*, 1 Smedes & M. 126; *Hawley v. Cramer*, 4 Cow. 717; *Coleman v. Lyne*, 4 Rand. 454; *Graham v. Davidson*, 2 Dev. & Bat. Eq. 155.

68—*Michoud v. Girod*, 4 How. 503; *Randall v. Errington*, 10 Ves. 423; *Spackman's Case*, 34 L. J. Ch. 329; *Stewart's Case*, L. R. 1 Ch. App. 512; *Campbell v. Fleming*, 1 Ad. & El. 40; *R. R. Co. v. Row*, 24 Wend. 74; *Sanger v. Wood*, 3 Johns. Ch. 416; *McCulloch v. Scott*, 13 B. Mon. 172; *Collier v. Thompson*, 4 T. B. Mon. 81; *Finley v. Lynch*, 2 Bibb, 566, 5 Am. Dec. 635; *Dill v. Camp*, 22 Ala. 249; *De Armand v. Phillips*, Wal. Ch. 186; *Crawley v. Timberlake*, 2 Ire. Eq. 460; *Campau v. Van Dyke*, 15 Mich. 371; *Wright v. Peet*, 36 Mich. 213; *Strong v. Lord*, 107 Ill. 25; *Cahn v. Reed*, 18 Mo. App. 115; *Sharp v. Ponce*, 76 Me. 350; *Moore v. Howe*, 115 Ia. 62, 87 N. W. 750; *Parsons v. McKinley*, 56 Minn. 464, 57 N. W. 1134.

69—*Turner v. Collins*, L. R. 7 Ch. App. 329; S. C. 2 Moak, 290. For a case in which relief was given after a great lapse of time, see *Hatch v. Hatch*, 9 Ves. 293.

70—*Ex parte Briggs*, L. R. 1 Eq. Cas. 483. And see *Moore v. Howe*, 115 Ia. 62, 87 N. W. 750; *Parsons v. McKinley*, 56 Minn. 464, 57 N. W. 1134.

71—*Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785; *A. Landreth Co. v. Schevenel*, 102 Tenn. 486, 52 S. W. 148.

72—*Byard v. Hofes*, 33 N. J.

[*591] there may be an exception of the case where that which was received was absolutely worthless; but the burden to show this would be on the party who had failed to restore it.⁷³

More conclusive than mere delay against the right to rescind

120; Babcock *v.* Case, 61 Penn. St. 427, 100 Am. Dec. 654; Thayer *v.* Turner, 8 Met. 550; Cushing *v.* Wyman, 38 Me. 589; Goelth *v.* White, 35 Barb. 76; Wheaton *v.* Baker, 14 Barb. 594; Moyer *v.* Shoemacker, 5 Barb. 319; Voorhees *v.* Earl, 2 Hill, 288, 38 Am. Dec. 583; Jewett *v.* Petit, 4 Mich. 508; Wilbur *v.* Flood, 16 Mich. 40, 93 Am. Dec. 203; Coghill *v.* Boring, 15 Cal. 213; Downer *v.* Smith, 32 Vt. 1, 76 Am. Dec. 148; Currier *v.* Poor, 84 Hun, 45, 32 N. Y. S. 74. In equity it would not be necessary to make restoration before bringing suit. Martin *v.* Martin, 35 Ala. 560; Abbott *v.* Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554. And at law, if what he received was only the other party's obligations, or worthless notes, which he has not disposed of, it will be sufficient to tender them back at the trial. Coghill *v.* Boring, 15 Cal. 213; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700; Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Fraschieris *v.* Henriques, 36 Barb. 276; Pequeno *v.* Taylor, 38 Barb. 375; Dayton *v.* Monroe, 47 Mich. 193; Green *v.* Smith, 29 Hun, 166; Wood *v.* Garland, 58 N. H. 154. As against a third person, to whom a fraudulent vendee has transferred the property, it would not be essential to make an offer to return the vendee's paper received on the sale, provided the vendor makes no claim under it. Kinney *v.* Kiernan, 49 N. Y. 164.

If before delivery possession is obtained by fraud, replevin will lie without tender back of earnest money. Bush *v.* Bender, 113 Pa. St. 94. If an illiterate is fraudulently induced to sign a release for a claim, believing it to be of some other purport, he may sue on the claim without returning the money received by him at the time of signing. Mullen *v.* Old Colony R. R. Co., 127 Mass. 86, 34 Am. Rep. 349. So if buyer has absconded one may attach without tender. Johnson *v.* Frew, 33 Hun, 193.

Where one has received money under a compromise which he claims was fraudulent, he cannot bring suit on this basis without returning the money. Potter *v.* Monmouth Ins. Co., 63 Me. 440. The reception of money and of a note with warranty being independent contracts as to the same subject matter, if the warranty fails the receiver may return the note alone and sue for the part of the price represented by it. Gilman *v.* Berry, 59 N. H. 62. If one sues for the fraud without rescission there need be no tender. Walsh *v.* Sisson, 49 Mich. 423; Carter *v.* Glass, 44 Mich. 154, 38 Am. Rep. 240; Krumm *v.* Beach, 25 Hun, 293. See Cain *v.* Dickenson, 60 N. H. 371.

73—Gillett *v.* Knowles, 108 Mich. 602, 66 N. W. 497; Babcock *v.* Case, 61 Pa. St. 427, 100 Am. Dec. 654; Smith *v.* Smith, 30 Vt. 139.

is the fact that the defrauded party has so dealt with the subject-matter of the contract that it has become impossible to put the other in *statu quo*. Except in very peculiar cases, a suit at law for damages will then be found to be the sole remedy.⁷⁴

Affirming the Contract. The fraud may also be waived by an express affirmance of the contract. Where an affirmance is relied upon it should appear that the party having a right to complain of the fraud had freely, and with full knowledge of his rights, in some form, clearly manifested his intention to abide by the contract, and waive any remedy he might have had for the deception.⁷⁵

If the contract is rescinded and the party guilty of the fraud refuses to restore on demand what he has fraudulently obtained, the other, at his option, may treat the detention as a conversion.

Indirect Suppression of Fraud. One method of suppressing fraud is by denying relief to one of two culpable parties when the other has defrauded him. If they are *in pari delicto* the court will not listen to their complaints. Therefore, if in attempting *a fraud on a third person one of them [*592] obtains an advantage, relief will be refused.⁷⁶ But this

74—*Downer v. Smith*, 32 Vt. 1, 76 Am. Dec. 148; *Poor v. Woodburn*, 25 Vt. 234; *Kinney v. Kiernan*, 2 Lans. 492; *McCormick v. Malin*, 5 Blackf. 509; *Buchenau v. Horney*, 12 Ill. 336; *Blen v. Bear River Co.*, 20 Cal. 602, 81 Am. Dec. 132; *Jemison v. Woodruff*, 34 Ala. 143; *Pierce v. Wilson*, 34 Ala. 596; *Shaw v. Barnhart*, 17 Ind. 183; *Clarke v. Dickson*, El. Bl. & El. 148. See *Miller v. Barber*, 66 N. Y. 558; *Freeman v. Reagan*, 26 Ark. 373.

75—*Bradley v. Chase*, 22 Me. 511; *Kinney v. Kierman*, 2 Lans. 492; *Parson v. Hughes*, 9 Paige, 591; *Roberts v. Barrow*, 53 Ga. 315; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Negley v. Lindsay*, 67 Pa. St. 217, 5 Am. Rep. 427; *Cumberland Coal Co. v. Sherman*, 20 Md. 117; *Hoffman Steam Coal Co. v. Cumberland Coal Co.*, 16 Md. 456; *Butler v. Haskell*, 4 Dessaus. 651; *Lyon v. Waldo*, 36 Mich. 345; *Williams v. Reed*, 3 Mason, 405; *Edwards v. Roberts*, 7 Sm. & Mar. 544; *Cherry v. Newson*, 3 Yerg. 369; *Broddus v. Call*, 3 McCall, 472; *Boyd v. Hawkins*, 2 Dev. Eq. 195; *Cann v. Cann*, 1 P. Wms. 723; *Cole v. Gibbons*, 3 P. Wms. 290; *Moxon v. Payne*, 7 Moak, 442; *Lindsay Petroleum Co. v. Hurd*, 8 Moak, 180; *Ex parte Briggs*, L. R. 1 Eq. Cas. 483. See *St. John v. Hendrickson*, 81 Ind. 350; *Thompson v. Libby*, 36 Minn. 287.

76—*Nellis v. Clark*, 4 Hill, 424; *Roman v. Mali*, 42 Md. 513.

rule will not be enforced against a party actually or presumably under the influence of the other, and who was induced to engage in the illegal or dishonest transaction by means of this influence. Thus, if an attorney leads his client into a fraud, in order to make use of it for his own purposes, the court will take notice where the blame properly rests and give relief against the attorney as the party chiefly responsible.⁷⁷

Duress is a species of fraud in which compulsion, in some form, takes the place of deception in accomplishing the injury.

Duress is either of the person or of the goods of the party, and the former is either by imprisonment, by threats, or by an exhibition of force that apparently cannot be resisted.⁷⁸

If one is arrested, though for a just cause, if it be without lawful authority, the arrest constitutes duress, and whatever is obtained by means of it is obtained wrongfully.⁷⁹ But it is equally duress if the arrest is by lawful authority, but with the purpose to make use of it to compel the defendant to surrender

77—*Ford v. Harrington*, 16 N. Y. 285; *Freelove v. Cole*, 41 Barb. 318; *Barnes v. Brown*, 32 Mich. 146. act. *Kraemer v. Deustermann*, 37 Minn. 469, 35 N. W. 276. A contract procured by duress is voidable. *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. 967; *Kennedy v. Roberts*, 105 Ia. 521, 75 N. W. 363. One entitled to repudiate a contract for duress must act promptly. *Oregon Pac. R. R. Co. v. Forrest*, 128 N. Y. 83, 28 N. E. 137.

If the parties have mutually defrauded each other, the trade will be left to stand. *Price v. Polluck*, 37 N. J. 44.

If one is defrauded in a trade illegal because made on Sunday, an action will not lie. *Plaisted v. Palmer*, 63 Me. 576; *Robeson v. French*, 12 Met. 24, 45 Am. Dec. 236; *Cardoze v. Swift*, 113 Mass. 250.

78—To constitute duress the act must have been done under pressure of actual or threatened personal restraint or harm, or of an actual or threatened seizure or interference with property of serious import to the person and it must have appeared to him that he could escape from or prevent the injury only by doing the

79—*Thompson v. Lockwood*, 15 Johns. 256; *Foshay v. Ferguson*, 5 Hill, 154; *Richards v. Vanderpoel*, 1 Daly, 71; *Strong v. Graninis*, 26 Barb. 122; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Osborn v. Robbins*, 36 N. Y. 365; *Bane v. Detrick*, 52 Ill. 19; *Belote v. Henderson*, 5 Cold. 471; *Durr v. Howard*, 6 Ark. 461; *Bassett v. Bassett*, 9 Bush, 696; *Houtz v. Uinta County*, 11 Wyo. 152, 70 Pac. 840.

to the plaintiff something to which the writ does not lawfully entitle him.⁸⁰ Threats constitute duress where they cause reasonable apprehension of loss of life, or of some [*593] great bodily harm,⁸¹ or of imprisonment.⁸² And the order of a military commander, where martial law prevails, requiring an act to be performed by the citizen which is contrary to his inclination, establishes a condition of duress, though no demonstrations of violence or threats are employed; the command itself being an exhibition of force apparently irresistible.⁸³ Where a deed, mortgage, or notes are obtained from the wife

80—Richardson *v.* Duncan, 3 N. H. 508; Severance *v.* Kimball, 8 N. H. 386; Breck *v.* Blanchard, 22 N. H. 303, 51 Am. Dec. 222; Watkins *v.* Baird, 6 Mass. 506; Fisher *v.* Shattuck, 17 Pick. 252; Whitefield *v.* Longfellow, 13 Me. 146; Eddy *v.* Herrin, 17 Me. 338, 35 Am. Dec. 261; Bowker *v.* Lowell, 49 Me. 429; Phelps *v.* Zuschlag, 34 Tex. 371; Thurman *v.* Burt, 53 Ill. 129; Stouffer *v.* Latshaw, 2 Watts, 165, 27 Am. Dec. 297; Meek *v.* Atkinson, 1 Bailey, 84, 19 Am. Dec. 659; Taylor *v.* Blake, 11 Minn. 255; Work's Appeal, 59 Pa. St. 444; Thorn *v.* Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; Sanford *v.* Sornberger, 26 Neb. 295, 41 N. W. 1102; Hensinger *v.* Dyer, 147 Mo. 219, 48 S. W. 912; Fillman *v.* Ryan, 168 Pa. St. 484, 32 Atl. 89; Behl *v.* Schuett, 104 Wis. 76, 80 N. W. 73; Houtz *v.* Uinita County, 11 Wyo. 152, 70 Pac. 840. A release executed to get out of prison is void. Guilleaume *v.* Rowe, 94 N. Y. 268, 46 Am. Rep. 141. But not a free and voluntary settlement executed in prison followed by discharge. Prichard *v.* Sharp, 51 Mich. 432; Clark *v.* Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157.

81—Baker *v.* Morton, 12 Wall.

150. See Bosley *v.* Shanner, 26 Ark. 280; Bogle *v.* Hammons, 2 Heisk. 136. See also, Reynolds *v.* Copeland, 71 Ind. 422; Hildebrand *v.* McCrum, 101 Ind. 61.

82—Clinton *v.* Strong, 9 Johns. 370; Harmon *v.* Harmon, 61 Me. 227, 14 Am. Rep. 556; Feller *v.* Green, 26 Mich. 70; Bane *v.* Detrich, 52 Ill. 19; Winfield Nat. Bank *v.* Croco, 46 Kan. 620, 26 Pac. 939; Hensinger *v.* Dyer, 147 Mo. 219, 48 S. W. 912; Landa *v.* Obert, 78 Tex. 33, 14 S. W. 297. Mere threat of prosecution is not duress. Buchanan *v.* Sahlein, 9 Mo. App. 552; Higgins *v.* Brown, 78 Me. 473; Loan & Protective Ass. *v.* Holland, 63 Ill. App. 58. Threats against a weak-minded person may constitute duress which would not against a man of ordinarily firm mind. Parmenier *v.* Pater, 13 Ore. 121; Goodrich *v.* Shaw, 72 Mich. 109, 40 N. W. 187. If the threats fail to cause apprehension of harm there is no duress. Harmon *v.* Harmon, 61 Me. 227, 14 Am. Rep. 556; State *v.* Sluder, 70 N. C. 55; Feller *v.* Green, 26 Mich. 70; Flanagan *v.* Minneapolis, 36 Minn. 406.

83—Olivari *v.* Menger, 39 Tex. 76.

upon a threat to prosecute, arrest or imprison her husband the instruments are void.⁸⁴ So where securities are obtained from parents by threat to prosecute their son.⁸⁵ But a threat to kill the defendant's son, who was then in a distant State, was held not to be duress.⁸⁶ A note or security given for money embezzled cannot be avoided, though obtained by threat of prosecution.⁸⁷ Where police officers threatened to close the plaintiff's place of business, unless he paid a demand founded on a void ordinance, it was held that the money was obtained by duress.⁸⁸ A threat to employ the ordinary civil remedies is not duress, as to bring a civil suit,⁸⁹ to foreclose⁹⁰ or attach,⁹¹ or to levy an execution, if a judgment is not paid.⁹² So of a threat to discharge a party,

84—*Woodham v. Allen*, 130 Cal. 101, 24 Atl. 718, 30 Am. St. Rep. 194, 62 Pac. 398; *Merchant v. Cook*, 21 D. C. Rep. 145; *First Nat. Bank v. Bryan*, 62 Ia. 42; *Winfield Nat. Bank v. Croco*, 46 Kan. 620, 26 Pac. 939; *State v. Hutchinson*, 62 Kan. 9, 61 Pac. 443; *Heaton v. Norton County State Bank*, 5 Kan. App. 498, 47 Pac. 576; *Benedict v. Roome*, 106 Mich. 378, 64 N. W. 193; *Bentley v. Robson*, 117 Mich. 691, 76 N. W. 146; *Allen v. Leflore County*, 78 Miss. 671, 29 So. 161; *Hensing-er v. Dyer*, 147 Mo. 219, 48 S. W. 912; *Turner v. Overall*, 172 Mo. 271, 72 S. W. 644; *Hargreaves v. Korcek*, 44 Neb. 660, 62 N. W. 1086; *Lomerson v. Johnson*, 44 N. J. Eq. 193, 13 Atl. 8.

85—*Green v. Moss*, 65 Ill. App. 594; *Bryant v. Peck & W. Co.*, 154 Mass. 460, 28 N. E. 678; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Beindorff v. Kaufman*, 41 Neb. 824, 60 N. W. 101; *Williams v. Bayley*, L. R. 2 H. L. Cas. 200.

86—*Barrett v. Mahuken*, 6 Wyo. 541, 48 Pac. 202, 71 Am. St. Rep. 953.

87—*Thorn v. Pinkham*, 84 Me.

335; *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589; *Sanford v. Sornborger*, 26 Neb. 295, 41 N. W. 1102. In the last case the court says: "It is those contracts only which are made under fear of unlawful imprisonment, and not those made under fear of imprisonment, which would be legally justifiable, that can be avoided for duress." pp. 305-6.

88—*Chicago v. Waukesha Imperial Spring Brewing Co.*, 97 Ill. App. 583.

89—*McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502; *Hilborn v. Bucknam*, 78 Me. 482, 57 Am. Rep. 816; *Parker v. Lancaster*, 84 Me. 512, 24 Atl. 952; *Kreider v. Fanning*, 74 Ill. App. 230; *Dunham v. Griswold*, 100 N. Y. 224. But see *Haynes v. Budd*, 30 Hun, 237.

90—*Savannah Sav. Bank v. Logan*, 99 Ga. 291, 25 S. E. 692.

91—*Shelby v. Bowman*, 64 Kan. 879, 68 Pac. 1131.

92—*Cohen v. Troy*, etc., Mfg. Co., 99 Ga. 289, 25 S. E. 689.

unless he pays a certain demand.⁹³ Where the plaintiff's son had stolen from the defendant, his employer, and the plaintiff's husband was suffering from melancholia and insomnia and she feared that a knowledge of the crime would make him insane and so told the defendant and the defendant threatened to tell her husband, unless she turned over certain property, which she did, it was held there was evidence to go to the jury on the question of duress. "If a contract," says the court, "is extorted by brutal and wicked means, and a means which owes its immunity, if it have immunity, solely to the laws' distrust of its own powers of investigation, in our opinion the contract may be avoided by the party to whom the undue influence has been applied."⁹⁴

In *Galusha v. Sherman* the Supreme Court of Wisconsin traces the history of the doctrine of duress and holds that it is not a question of the means used but of the effect produced, and that it is not a question whether the means were sufficient to coerce the will of an ordinary man but whether they did in fact overcome the will of the person in question. The conclusions of the court are further stated as follows: "From the foregoing it will be seen that the true doctrine of duress, at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary for a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remediable by appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage; and no longer gauges the acts which shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have

93—*Day v. Studebaker Bros.* 94—*Silsbee v. Webber*, 171 Mfg. Co., 13 Misc. 320, 34 N. Y. Mass. 378, 381, 50 N. E. 555. S. 463.

produced in him a state of mental incompetency to contract and then take advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him.⁹⁵

Duress of goods consists in seizing by force or withholding from the party entitled to it the possession of personal property, and extorting something as the condition for its release,⁹⁶ or in demanding and taking personal property under color of legal authority, which, in fact, is either void or for some other reason does not justify the demand.⁹⁷

[*594] *Extortion, or the exaction of illegal or excessive fees for legal services, is also a species of fraud; and the

95—*Galusha v. Sherman*, 105 Wis. 263, 280, 281, 81 N. W. 495, 47 L. R. A. 417. See also, *Landa v. Obert*, 78 Tex. 33, 14 S. W. 297, where money and notes were obtained from the plaintiff by the defendant by threats of prosecution for embezzlement, of which the plaintiff claimed to be innocent. “In such a case,” says the court, “we can see no use of discussing or considering what a man of ordinary firmness and intelligence would have done under the same circumstances. The question to be decided is, was Obert innocent of the charge, and did he on account of fear of imprisonment, produced by the conduct or representations of Landa and his attorneys, surrender his property? We can see no reason for discriminating under such circumstances against a weak or timid man.” pp. 51, 52.

96—*Crawford v. Cato*, 22 Ga. 594; *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Tutt v. Ide*, 3 Blatch. 249; *Sasportas v. Jen-*

nings, 1 Bay, 470; *Collins v. Westbury*, 2 Bay, 211, 1 Am. Dec. 643; *Nelson v. Suddarth*, 1 H. & M. 350; *White v. Heylman*, 34 Pa. St. 142; *Radick v. Hutchins*, 95 U. S. 210; *Chandler v. Sanger*, 114 Mass. 346, 19 Am. Rep. 367; *Shaw v. Woodcock*, 7 B. & C. 73; *Wilkerson v. Hood*, 65 Mo. App. 491. Refusing to honor checks till an act is done is duress. *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. 21. What is and what is not duress of goods fully discussed. *Hackley v. Headley*, 45 Mich. 569.

97—*First Nat. Bank v. Watkins*, 21 Mich. 483; *Beckwith v. Frisbie*, 32 Vt. 559; *Adams v. Reeves*, 68 N. C. 134, 12 Am. Rep. 627; *Fuller v. Roberts*, 35 Fla. 110, 17 So. 359; *Van Dusen v. King*, 106 Mich. 133, 64 N. W. 9. A threat to attach property for a demand not yet due is not duress. *Latham v. Shackleford*, 50 Ala. 437. So of a threat to seize property under a chattel mortgage unless note paid in full. *Slover v. Rock*, 96 Mo. App. 335.

party from whom the exaction is made is entitled to the same remedies as in other cases where his property has been taken from him wrongfully.⁹⁸

98—If by the process the party might lie for any distinct wrong—only obtains what he is lawfully ful act under the process. Skeate entitled to, an action will not lie *v. Beale*, 11 Ad. & El. 983. to recover it back, though it

*CHAPTER XVII.

[#595]

WRONGS IN CONFIDENTIAL RELATIONS.

By confidential relations are here meant those relations formed by convention or by acquiescence, in which one party trusts his pecuniary or other interests to the fidelity and integrity of another, by whom, either alone, or in conjunction with himself, he expects them to be guarded and protected. Such relations exist between agent and principal, between partner and partner, between corporator and officer of the corporation, and between *cestui que trust* and trustee. They may also exist between parent and child, where circumstances raise an implication of trust or agency, and between husband and wife in the same way, and sometimes by contract. In case of the domestic relations there is likely to be, in addition to the confidence springing from intimate business trust, a further trust, born of affection and great personal intimacy, that may easily grow into or pave the way for undue influence. This is the chief coadjutor of fraud in all these relations.

By undue influence is meant that control which one obtains over another, whereby the other is made to do in important affairs what of his free will he would not do. It differs wholly from persuasion in which falsehood does not mingle, for that merely leads the will, while undue influence coerces it.¹ The manner in which the control is obtained is not important.

Husband and Wife. The most confidential of all the relations of life is that of husband and wife. For reasons which are interwoven with the whole framework of civilized society, the law is specially careful and vigilant in guarding and protecting the confidence which this relation invites and inspires. It will not

1—"It must be a control intentionally exercised by one mind over the will of another, so as to deprive the latter of the free agency of option." BUTLER, J., in *Martin v. Teague*, 2 Speers, 260.

suffer this confidence to be invaded or exposed, even *though the facts which might thereby be brought to [*596] light should be supposed important to the interests of others. In general, where the statute law has cut away all barriers to the giving of evidence, and allowed even the party accused of crime to testify in his own behalf, it has not gone so far as to permit either husband or wife to testify against the other, except by mutual consent, deeming it better that justice should sometimes fail for want of evidence, than that the family confidences should be laid bare to the public, or the conscience of the spouse be exposed to the temptation to conceal or prevaricate where the truth might be damaging. Nevertheless, the law does not undertake to enforce the observance of the marital confidence as between the parties themselves, but trusts it to their own sense of what is decent and proper. If this does not in all cases afford protection against the exposure to public gaze and derision of those confidences which should be held sacred, no legal redress is possible that would not introduce greater evils than it could cure.

The common law supposed the wife to be largely under the coercion of the husband; and though this, so far as her property interests are concerned, is no longer a legal presumption, still the existence of some degree of marital influence may always be supposed; and if the husband is inclined to deal unfairly with his wife, this influence, and the confidence begotten of the relation, will give him special facilities for the purpose. This relation is consequently of high importance when fraud or unfair dealing by the husband with the wife's interests is alleged, and may justly call upon the courts to criticize closely their negotiations.²

"The law certainly does not prevent persons in this confidential

2—"They will not be upheld N. Y. 498, 29 Am. Rep. 197. Contract set aside for abuse of confidence: *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Jackson v. Jackson*, 94 Cal. 446, 29 Pac. 957; *Basye v. Basye*, 152 Ind. 172, 52 N. E. 797; *Paulus v. Reed*, 121 Ia. 224, 96 N. W. 757. Where there is even slight evidence of fraud or undue influence." *Reagan's Admr. v. Holliman*, 34 Tex. 403, 410. Same effect, *Hon v. Hon*, 70 Ind. 135; *Darlington's Appeal*, 86 Pa. St. 512; *Boyd v. De La Montagnie*, 73

relation from doing, without urgency, of their own accord, and under the natural impulses of kindness and affection, such generous acts as are the results of mutual confidence and good will. But the same principle which encourages confidence protects it by preventing any profit to be gained from abusing it. The law recognizes the fact that a married woman is easily subjected to a species of coercion, very much more effectual than any ordinary

operation of fear or fraud from strangers. It has always [*597] *been found necessary to examine jealously into all

transactions whereby the husband gets an advantage over his wife, not plainly spontaneous on her part. Any undue advantage gained by the use of the marital relation is a legal fraud on the wife which courts of equity will not allow to stand to her prejudice.³ And where the statutes permit the wife to bring suit at law against the husband, she may seek a remedy in that forum when the facts will justify it. But as the remedy in equity would commonly be more complete and suitable, we need say only, what has been said in another connection, that when the wife sues her husband for an injury to her property, she makes out her right of action on the principles which would support one against any other person, and the relation is important only as it has furnished the facilities for accomplishing the wrong complained of.⁴ It often happens that the husband, by the acquiescence, rather than by the express employment, of the wife, becomes her agent for the management of her property, and he acquires a knowledge of its condition, circumstances and value greater than she is likely to possess, and which in many cases he might easily use for his own advantage if dishonestly

See *Finlayson v. Finlayson*, 17 Ore. 347, 21 Pac. 57, 11 Am. St. Rep. 836, 3 L. R. A. 801.

3—*Witbeck v. Witbeck*, 25 Mich. 439, 442. In *Tapley v. Tapley*, 10 Minn. 448, 88 Am. Dec. 70, it was held that threats by the husband to separate from his wife, accompanied by general abusive treatment, constitute such duress as will avoid a deed executed by

her under an apprehension that they will be carried into effect. On the other hand a transfer by the husband of all his property to his adulterous wife has been set aside in favor of his heirs. *Warlick v. White*, 86 N. C. 139, 41 Am. Rep. 453.

4—*Schoul, Dom. Rel.* 286; 2 *Bishop, Law of Married Women*, Ch. 35.

inclined. Such a case is one where he may justly be held under strictest obligation not to abuse the confidence reposed.⁵

Parties Engaged to Marry. The contract of marriage establishes a confidential relation between the parties but little less intimate than that of marriage itself, and almost equally susceptible of being taken advantage of for the purpose of fraud. The most serious fraud accomplished in this relation is that of seduction. In *Morton v. Fenn* it was urged, before LORD MANSFIELD, that the woman was entitled to no redress for this wrong, because the parties were *in pari delicto*; but he very justly said that if the woman's consent was obtained by means of the promise *of marriage, which the man did not intend to [*598] fulfill, "this was a cheat on the part of the man."⁶ So it was in an early case by Chief Justice PARSONS, that "damages are recoverable for breach of a promise of marriage, and if seduction has been practiced under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages."⁷ The same doctrine has since been more authoritatively declared in that State, and also in several others.⁸

Says CAMPBELL, J.: "The seduction which is allowed to be

5—In such case gifts by the wife to the husband are closely scrutinized. *Farmer v. Farmer*, 39 N. J. Eq. 211.

6—*Morton v. Fenn*, 3 Doug. 211. There was no decision of the case by the court in bank.

7—*Paul v. Frazier*, 3 Mass. 71, 73, 3 Am. Dec. 95. See *Boynton v. Kellogg*, 3 Mass. 189; *Sherman v. Rawson*, 102 Mass. 395.

8—*Kelly v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; *Conn v. Wilson*, 2 Overton, 233, 5 Am. Dec. 663; *Goodall v. Thurman*, 1 Head, 209; *Williams v. Hollingsworth*, 6 Bax. 12; *Whalen v. Layman*, 2 Blackf. 194, 18 Am. Dec. 157; *King v. Kersey*, 2 Ind. 402; *Wilds v. Bogan*, 57 Ind. 483; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Green v. Spencer*, 3 Mo. 225, 26 Am. Dec. 672; *Matthews v. Cribbett*, 11 Ohio St. 330; *Wells v. Padgett*, 8 Barb. 323; *Sheahan v. Barry*, 27 Mich. 217; *Bennett v. Beam*, 42 Mich. 346, 36 Am. Rep. 442; *Giese v. Schultz*, 53 Wis. 462. An infant is not liable for breach of promise though the woman is seduced under it. *Leichtweiss v. Treskow*, 21 Hun, 487. The action will lie, though the defendant, the plaintiff not knowing the fact, was married at the time. *Kelly v. Riley*, *supra*. An action for fraud will lie against a married man for engaging himself as unmarried although there is no seduction. *Pollock v. Sullivan*, 53 Vt. 507, 38 Am. Rep. 702.

proven in these cases is brought about in reliance upon the contract, and is itself in no very indirect way a breach of its implied conditions. Such an engagement brings the parties necessarily into very intimate and confidential relations, and the advantage taken of those relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee or guardian or confidential adviser, who cheats a confiding ward or beneficiary or client into a losing bargain. It only differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has been thus deceived cannot fail to be aggravated in fact by the seduction. The contract is twice broken. The result of an ordinary breach of promise is the loss of the alliance and the mortification and pain consequent on the rejection. But in the case of seduction there is added to this the loss of character and social position, and not only a deeper shame and sorrow, but a darkened future. All of these spring directly and naturally [*599] from the bro*ken obligation. The contract involves protection and respect, as well as affection, and is violated by the seduction, as it is by the refusal to marry. A subsequent marriage condones the first wrong, but a refusal to marry makes the seduction a very grievous element of injury that cannot be lost sight of in any view of justice.⁹

In Kentucky and Pennsylvania this doctrine has not found favor, and the woman's complaint of the seduction is put aside on the ground that she was *in pari delicto*.¹⁰ "Illicit intercourse," it is said, "is an act of mutual imprudence, and the law makes no distinction between the sexes as to the comparative infirmity of their common nature. A woman is not seduced

9—Sheahan *v.* Barry, 27 Mich. 217, 220. The following additional cases of seduction are referred to: Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451; McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93; Hawn *v.* Banghart, 76 Ia. 683, 39 N. W. 251, 14 Am. St. Rep. 261; Baird *v.* Boehner, 77 Ia. 622; Egan *v.* Murray, 80 Ia. 180, 45 N. W. 563; Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696; Rabeke *v.* Baer, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567; Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655.

10—Burk *v.* Shain, 2 Bibb, 341, 5 Am. Dec. 616; Weaver *v.* Bachert, 2 Pa. St. 80.

against her consent, however basely it is obtained, and the maxim *volenti non fit injuria* is as applicable to her as to a husband, whose consent to his own dishonor bars his action for criminal conversation.¹¹ But between the case of a husband consenting to the dishonor of his bed and that of a woman cheated by a deceptive engagement to marry into a surrender of her chastity there does not seem to be any such analogy as to make the legal rules which should govern the one throw light upon the other. The one instinctively excites disgust, and the other compassion. One party assents from motives that can only be low and vile, the other is the victim of perfidy. It is true there is consent, but so there is in other cases of fraud; for it is by obtaining consent that frauds are accomplished.¹²

*The confidence of this relation may also be abused [*600] through such secret conveyances of one of the parties as would materially diminish the rights in property which the other had reason to expect he or she would acquire by the marriage. While neither of the parties has any claim to have all the business transactions of the other made known, they are both entitled to a fair disclosure of such dealings as are expressly designed to affect their own interests. The rule of law on the subject may be stated as follows: Where either party to the con-

11—GIBSON, Ch. J., in *Weaver v. Bachert*, 2 Pa. St. 80. And, see *Baldy v. Stratton*, 11 Pa. St. 316. McKinney, 48 Ind. 562, 17 Am. Rep. 768; *Perkins v. Hersey*, 1 R. I. 493.

If the promise is to marry if the woman yields she cannot recover for seduction. *Hanks v. Naglee*, 54 Cal. 51, 35 Am. Rep. 67.

12—The bad character of the plaintiff, following the seduction in such a case, is no defense, either total or partial. *Boynton v. Kellogg*, 3 Mass. 189; *Conn v. Wilson*, 2 Overt. 233.

Where the statute gives the woman an action for the seduction, she cannot give this in evidence in an action for breach of promise to marry, unless it is set up in the declaration. *Cates v. Bishop v. Redmond*, 83 Ind. 157. Where a woman marries her seducer and is then divorced, she cannot, after the divorce,

If the seduction preceded the promise of marriage instead of following it, it cannot be given in

evidence by way of aggravation. *Espy v. Jones*, 37 Ala. 379. If after seducing a woman one fraudulently conveys his property, marries and deserts her, she is entitled in divorce proceedings to have the conveyance set aside as a fraudulent attempt to prevent recovery for the seduction. *Redmond*, 83 Ind. 157. Where a woman marries her seducer and is then divorced, she cannot, after the divorce,

tract of marriage secretly conveys away his or her property, or any considerable portion thereof, with intent to defraud the other of such rights therein as, but for the conveyance, would be acquired by the marriage, this, if not discovered until after the marriage takes place, will be treated in equity as a fraud upon the other, and such relief will be given as the circumstances of the case will admit of, and as may be found suitable.¹³ The suitable relief will be that which gives to the party defrauded an equivalent for that which is lost,¹⁴ but this must vary as the cases differ. If, however, the intended deceit is discovered before the marriage takes place, the party is put to an election, either to withdraw from the engagement because of the fraudulent change in circumstances, or to consummate the marriage, thereby waiving the objection.¹⁵ There can, of course, be no fraud if the facts are discovered in season to withdraw from the contemplated relation.¹⁶

have an action for the seduction. *Henneger v. Lomas*, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848.

13—*England v. Downs*, 2 Beav. 522; *Strathmore v. Bowes*, 1 Ves. 22; *Linker v. Smith*, 4 Wash. C. C. 224; *Tucker v. Andrews*, 13 Me. 124; *Logan v. Simmonds*, 3 Ired. Eq. 487; *Johnson v. Peter-son*, 6 Jones' Eq. 12; *Poston v. Gillespie*, 5 Jones' Eq. 258, 75 Am. Dec. 437; *Spencer v. Spencer*, 3 Jones' Eq. 404; *Duncan's Appeal*, 43 Pa. St. 67; *Robinson v. Buck*, 71 Pa. St. 386; *Ramsay v. Joyce*, 1 McMUL. Eq. 236, 37 Am. Dec. 550; *Manes v. Durant*, 2 Rich. Eq. 404, 46 Am. Dec. 65; *Waller v. Armistead*, 2 Leigh. 11, 21 Am. Dec. 594; *Hobbs v. Blandford*, 7 T. B. Mon. 469; *Leach v. Duvall*, 8 Bush. 201; *Williams v. Carle*, 2 Stoc. Ch. 543; *McAfee v. Ferguson*, 9 B. Mon. 475; *Green v. Green*, 34 Kan. 740; *Arnegaard v. Arnegaard*, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

14—See *Smith v. Hines*, 10 Fla. 258. In *Stratton v. Stratton*, 58 N. H. 473, it was held that the wife's grantee could not eject the husband where the arrangement was that the husband was to have a share of the produce for his life and he had improved the farm.

15—*St. George v. Wake*, 1 Myl. & K. 610.

16—*St. George v. Wake*, 1 Myl. & K. 610; *Fletcher v. Ashley*, 6 Grat. 332; *Cheshire v. Payne*, 16 B. Mon. 618; *McClure v. Miller*, Bailey Eq. 104, 21 Am. Dec. 522; *Terry v. Hopkins*, Hill Eq. 1; *Jordan v. Black*, Meigs 142. If the conveyance had been made before the engagement to marry, though then unknown, it would be no fraud. *Strathmore v. Bowes*, 1 Ves. 22. Nor would it be a fraud in any case if what was conveyed was property in which, by the marriage, the other party would have acquired no in-

This confidence may be abused in the matter of ante-nuptial agreements. "Contracts of this character are not looked upon with disfavor by the law, but the parties to them stand in a confidential relation, and the utmost good faith is required. Confidence is reposed by each in the other, and if that confidence is abused equity will grant relief against the contract. The parties to such a contract are not like buyer and seller dealing at arms length, and while it may not be necessary to show affirmatively that there was a full disclosure of the property and circumstances of each, yet if the provision secured by the wife is unreasonably disproportionate to the means of the intended husband it raises the presumption of designed concealment and throws upon the representatives of the husband the burden of disproof."¹¹⁷

*Another fraud, by no means so uncommon as to make [*601] its mention unnecessary, is where one of the parties makes use of the confidence and affection of the relation to obtain the other's property, employing some plausible but fraudulent pretense for the purpose. What has been said regarding the facility for fraud which the marriage relation affords will apply with great force here, with this difference: that whereas, after marriage, the woman's interest needs specially to be guarded, before marriage one party is perhaps as liable to be betrayed by overconfidence as the other.¹⁸

terest, present or contingent. Nor if what was conveyed away was only a reasonable provision for the children of a former marriage, or for others having a claim upon the party for a support. See *Tucker v. Andrews*, 13 Me. 124; *Green v. Goodall*, 1 Coldw. 404; *Blanchett v. Foster*, 2 Ves. Sr. 264. Every case must stand on its own facts. *Richards v. Lewis*, 11 C. B. 1035; *Terry v. Hopkins*, 1 Hill, Ch. (S. C.) 1; *Taylor v. Pugh*, 1 Hare, 608.

17—Manks' Estate, 19 Pa. Supr. Ct. 338. See also *Graham v. Gra-*

ham, 143 N. Y. 573, 38 N. E. 722; Warner's Estate, 207 Pa. St. 580, 57 Atl. 35, 99 Am. St. Rep. 840; Kessler's Estate, 7 Pa. Co. Ct. 598; Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868; Warner's Estate, 210 Pa. St. 431.

18—If goods are obtained fraudulently by a man under promise to marry, the woman may have an action against the man's estate. *Frazer v. Boss*, 66 Ind. 1. If the provision secured to the wife in an ante-nuptial contract is unreasonable and disproportionate to the man's means, it

It is a strong, if not conclusive, badge of fraud if, after a conveyance of property has been obtained as a gift or for an inadequate consideration, the donee or grantee refuses to complete the marriage.¹⁹

Parent and Child. This relation is peculiarly exposed to undue influence at first on the part of the parent over the child, and afterwards, possibly, on the part of the child over the parent. During the period of minority the parent is the natural guardian of the child's person, with authority to require and enforce obedience, and this authority, coupled with the natural affection, may be expected, in a great degree, to subordinate the child's will to the parent's while the period of minority continues. Moreover, if the child has an independent estate, it often happens that its management is allowed to be taken charge of by the parent, and though this is irregular, unless he is [*602] legally appointed guardian *of the estate, it may, nevertheless, answer all purposes when no one raises questions. Where this irregular or *quasi* guardianship exists, it is likely still further to increase the parental influence.²⁰

If the parent is disposed to take any undue advantage of this influence, he will be likely to do so soon after the child comes of age, while the influence is still unimpaired, and before the child has become accustomed to independent management. There is no legal impediment to an adult child making gifts to his parent at that or any other period, but all dealings which then take place are justly looked upon with some degree of jealousy, and if they are gifts the donee would be required to show that they were spontaneous acts of the child, made with full understanding of what, in respect to the property, were his position and rights.²¹ But family arrangements, not unfairly brought about,

raises a presumption of concealment, and throws on him the burden of proof. Bierer's Appeal, 92 Pa. St. 265. & S. 502; Findley *v.* Patterson, 2 B. Mon. 76; Sears *v.* Shafer, 1 Barb. 408; S. C. 6 N. Y. 268.

21—Turner *v.* Collins, 7 L. R.

19—Coulson *v.* Allison, 2 De Ch. App. 329; S. C. 2 Moak, 290; G., F. & J. 521; Rockafellow *v.* Savery *v.* King, 5 H. L. Cas. 626; Newcomb, 57 Ill. 186. Wright *v.* Vanderplank, 2 Kay

20—Revett *v.* Hawvey, 1 Sim. & J. 1; S. C. 8 De G. M. & G. 133;

and which from their nature do not suggest undue influence, will not be disturbed.²²

There is no occasion for any corresponding jealousy for the protection of the parent's interests against the overreaching of the child, unless the parent, from the imbecility of extreme old age, or other cause, has come to be dependent, in some degree at least, upon the child, for guidance and direction. So long as he is in the full possession of his mental powers, a gift to his child suggests nothing but the ordinary promptings of affection.²³ But when the child's becomes the guiding mind, and the parent is the dependent, all dealings which are specially to the advantage of the child he may justly be required to support by satis-

Cunningham *v.* Anstruther, 2 seventy years old and mentally Scotch App. 223; S. C. 3 Moak, 169; Taylor *v.* Taylor, 8 How. 183; Baldock *v.* Johnson, 14 Ore. 546. The doctrine is not confined to parents strictly. Thus, where the uncle of a young man who was estranged from his father, and greatly pressed by debts, took from him, for £7,000, a conveyance which he had first ascertained was worth £20,000, the conveyance was set aside on the same reasons above given. Tate *v.* Williamson, L. R. 2 Ch. App. 56. In Studybaker *v.* Cofield, 159 Mo. 596, 61 S. W. 246, it was held that there was no presumption of undue influence in a case where a bachelor of 84 deeded his property to a niece, who was the only relative who visited him or paid him any attention. There is no presumption of fraud in transactions between brother and brother or brother and sister. Albrecht *v.* Hunecke, 196 Ill. 127, 63 N. E. 616. But where one obtained from his brother a deed without consideration and the latter was

and physically weak, the deed was set aside. Tomlinson *v.* Tomlinson, 103 Ia. 740, 72 N. W. 664. And see Irwin *v.* Sample, 213 Ill. 160., 72 N. E. 687; Schneider *v.* Schneider, 125 Ia. 1, 98 N. W. 159.

22—Taylor *v.* Taylor, 8 How. 183. In Gregory *v.* Bowlsby, 115 Ia. 327, 88 N. W. 822, it is said: "A father bears no such confidential or fiduciary relation to his adult children as to bring transactions between them relating to the land of either under suspicion. He may deal with them as with strangers, and no presumption of fraud or undue influence obtains." p. 330.

23—Millican *v.* Millican, 24 Tex. 426; Beanland *v.* Bradley, 3 Sm. & G. 339; Chidester *v.* Turnbull, 117 Ia. 168, 90 N. W. 583; Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643; Doherty *v.* Noble, 138 Mo. 25, 39 S. W. 458; Hatcher *v.* Hatcher, 139 Mo. 614, 39 S. W. 479. See State *v.* True, 20 Mo. App. 176.

factory evidence that his own conduct in the transaction was above reproach.²⁴

[*603] ***Illegal Sexual Relations.** Where a transaction is brought about while the parties are living in illegal sexual relations, it is always open to suspicion of fraud or undue influence; and if it is a gift, or a sale for an inadequate consideration, or if it is specially beneficial to one party rather than to the other, the party benefited by it will be under the necessity of showing that no advantage was taken, and that it was the result of free volition.²⁵

Persons of Weak Intellect. While the contracts of persons not idiotic and not mentally diseased are not void because of weakness of understanding, yet when one undertakes to deal with such a person, he is very justly held to be under more than the usual obligation to abstain from deception. What might not be deception if practiced on a person of average intellect, may be fraud in such a case, because it is calculated to accomplish a fraudulent purpose.²⁶ It has been said of gifts by such persons,

24—*Soberanes v. Soberanes*, 97 side from superior knowledge derived from a fiduciary relation or Cal. 140, 31 Pac. 910; *Snyder v. Snyder*, 131 Mich. 658, 92 N. W. 353; *Pinger v. Pinger*, 40 Minn. 417, 42 N. W. 289; *Parker v. Parker*, 45 N. J. Eq. 224, 16 Atl. 537; *Green v. Roworth*, 113 N. Y. 462, 21 N. E. 165; *Brummond v. Krause*, 8 N. D. 573, 80 N. W. 686; *Doyle v. Welch*, 100 Wis. 24, 75 N. W. 400; *Shawvan v. Shawvan*, 110 Wis. 590, 86 N. W. 165. Especially where the wish of the child has become the will of the parent. *Highberger v. Stiffler*, 21 Md. 338, 353, 83 Am. Dec. 593; *White v. Smith*, 51 Ala. 405. The doctrine applied to the case of a niece. *Gore v. Somersall*, 5 T. B. Mon. 504; *Griffiths v. Robins*, 3 Madd. 191. In *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428, it is said that where the parties do not stand on an equality but “either on the one

or the other from weakness, dependence, or trust unjustifiably reposed,” unfair advantage is rendered probable, fraud in dealings is presumed. In that case a gift by an old man to his grandson who was his agent was sustained as the facts were held not to raise this presumption.

25—*Dean v. Negley*, 41 Pa. St. 312, 80 Am. Dec. 620; *Coulson v. Allison*, 2 De G., F. & J. 521; *Hargreave v. Everard*, 6 Ir. Ch. 278. See, also, *Farmer v. Farmer*, 1 H. L. Cas. 724; *Bayliss v. Williams*, 6 Cold. 440. In *Smith v. Smith*, 119 N. C. 314, 25 S. E. 878 it is held that a conveyance will not be set aside for undue influence of grantor's mistress.

26—*Baker v. Monk*, 4 De G., J. & S. 388; *Selden v. Myers*, 20

that "when a gift is disproportionate to the means of the giver, and the giver is a person of weak mind, of easy temper, yielding disposition, liable to be imposed upon, the court will look upon such a gift with a jealous eye, and strictly examine the conduct and behavior of the person in whose favor it is made; and if it can discover that any acts or strategems, or any undue means have been used to procure such gifts, if it can *see the least speck of imposition, or that the donor is in [*604] such a situation in respect to the donee as may naturally give him an undue influence over him; in a word, if there be the least scintilla of fraud, a court of equity will interpose."²⁷

The court would be less strict in requiring satisfactory showing if a consideration had been paid, because the presumption of fraud would weaken in proportion as the transaction was found to be equal.²⁸

Whoever takes advantage of a state of intoxication to deal with another, must do so with a presumption against his good faith proportioned to the depth of mental obscurity caused by the condition.²⁹ And the presumption is greatly strengthened if he himself brought about or encouraged the intoxication.³⁰

Corporate Officers. The officer of a corporation is its agent

How. 506; Sprague *v.* Duel, Clark's Ch. 90; Wiest *v.* Garman, 4 Houst. 119; Seeley *v.* Price, 14 Mich. 541; Wartemberg *v.* Spiegel, 31 Mich. 400; Perkins *v.* Scott, 23 Iowa, 237; Ellis *v.* Mathews, 19 Tex. 390, 70 Am. Dec. 353; Tally *v.* Smith, 1 Cold. 290; Cadwallader *v.* West, 48 Mo. 483; Henderson *v.* McGregor, 30 Wis. 78; Dashiel *v.* Harshman, 113 Ia. 283, 85 N. W. 85; Horsley *v.* Asher's Heirs, 94 Ky. 314, 22 S. W. 434; Smith *v.* Firth, 53 App. Div. 369, 65 N. Y. S. 1096.

27—Sears *v.* Shafer, 1 Barb. 408, 413, per BARCULO, J. See Gartside *v.* Isherwood, 1 Bro. C. C. 558; Bennett *v.* Wade, 2 Atk. 324; Lewis *v.* Pead, 1 Ves. 19;

Harding *v.* Handy, 11 Wheat. 103, 125; Brooke *v.* Berry, 2 Gill, 83; Baker *v.* Monk, 4 DeG., J. & S. 388.

28—Brooke *v.* Berry, 2 Gill, 83; Freelo *v.* Cole, 41 Barb. 318.

29—Peck *v.* Cary, 27 N. Y. 9, 84 Am. Dec. 220; Hutchinson *v.* Brown, Clarke, Ch. 408; Burns *v.* O'Rourke, 5 Rob. 649; Freeman *v.* Dwiggins, 2 Jones' Eq. 162; Mansfield *v.* Watson, 2 Iowa, 111.

30—Johnson *v.* Meddlicott, 3 P. Wms. 130, note *a*; Say *v.* Barwick, 1 Ves. & B. 195; Cooke *v.* Clayworth, 18 Ves. 12; Curtis *v.* Hall, 4 N. J. 361; Whitesides *v.* Greenlee, 2 Dev. Eq. 152; Dunn *v.* Amos, 14 Wis. 106; Mansfield *v.* Watson, 2 Iowa, 111.

within the scope of the powers conferred upon him, and the rules of liability which are applicable to agents he also comes under. As such agent he stands in confidential relations to all the stockholders; he holds a place of trust, and by accepting it, obligates himself to execute it with fidelity, not for his own benefit, but for the common benefit of his associates.³¹ The following may be said to be the duties he assumes:

[*605] *1. In his own action to confine his operations within the limits of the corporate authority.

2. To furnish to the associates truthfully such information as it may belong to his position to give, and to afford them such facilities as are proper for obtaining information by their own investigations.

3. To take no advantage of his own position to the prejudice of his associates.

4. To give no advantage to one associate over another; and

5. To employ his efforts faithfully in advancing the common interest.

Of the wrongs which may result from a disregard of any of these obligations, it is to be said generally that where they affect the body of the corporators alike they cannot be treated as wrongs to the members severally. Thus, if the managing officers are guilty of an intentional abuse of corporate powers, by exercising powers not within the scope of their charter, this is such a violation of good faith to their associates as in a proper case might charge the officers personally with all the consequences. It is to be observed, however, that as the management of the

31—Charitable Corporations *v.* 45 N. Y. 22; European, &c., R. R. Sutton, 2 Atk. 400; Great Luxembourg R. Co. *v.* Magney, 25 Beav. 586; Koehler *v.* Black River, &c., Co., 2 Black, 715; Jackson *v.* Ludeling, 21 Wall. 616; Bedford Railroad Co. *v.* Bowser, 48 Penn. St. 29; Austin *v.* Daniels, 4 Denio, 299; Hoffman Steam Coal Co. *v.* Cumberland Coal &c., Co., 16 Md. 456; March *v.* Eastern R. R. Co., 43 N. H. 515; Bliss *v.* Matteson, 708.

corporate business is intrusted to their judgment, a mere error in deciding upon their powers could not justly be made the ground of legal liability. As was forcibly stated in one case, "While directors are personally liable to stockholders for any losses resulting from fraud, embezzlement, or willful misconduct or breach of trust, for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers or co-directors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest and provided they are fairly within the scope of the powers and discretion confided to the managing body."³² This is only applying to these officers the rules generally applied where discretionary powers are to be exercised.

*The wrong committed by the officer of a corporation [*606] which affects the stockholders generally, through their interests in the corporation, is not a wrong to them as individuals, but to the corporate entity. To illustrate this, the case may be instanced of the treasurer of a corporation embezzling its funds. Here every shareholder may suffer, but one of them individually cannot sue, for the money was not his; it belonged to the corporation. The interest the shareholder had which was affected was not in the money itself, but it consisted in a right to an accounting by the corporation in respect to it, and nothing could come to him from it except through the corporation, and as divi-

32—Sperings Appeal, 71 Pa. St. 11, 20; Watt's Appeal, 78 Pa. St. 370; Flagg *v.* Manhattan Ry. Co., 20 Blatchf. 142; Park *v.* Grant &c. Works, 40 N. J. Eq. 114. An act within the scope of the director's authority will not be enjoined at the suit of the holder of a majority of the stock unless it is clear that the directors were controlled by a dishonest purpose, and that complaint is injured. Elkins *v.* Camden &c., R. R. Co., 36 N. J.

Eq., 241. As to duties and liabilities of corporate officers and directors generally, see, Fisher *v.* Parr, 92 Md. 245, 48 Atl. 621; Swentzel *v.* Penn Bank, 147 Pa. St. 140, 23 Atl. 405, 30 Am. St. Rep. 718, 15 L. R. A. 305; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Warren *v.* Robison, 19 Utah, 289, 57 Pac. 287, 75 Am. St. Rep. 734; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592.

dends, or by division on the final winding up of the corporate concerns. The case mentioned in the note was an action in case by a stockholder in a printing and publishing corporation against persons who were alleged to have conspired with two of its directors to suspend and destroy the business and franchises of the company, and to have induced such directors to suspend the publication of their daily and weekly newspapers for the benefit of a rival establishment, thereby rendering the plaintiff's interest in the corporation valueless. The conclusive answer to this claim was that the wrong alleged was a corporate wrong, in which all the stockholders were proportionately interested; and the corporation should represent all for the purposes of legal remedy.³³ There is a want of legal privity between the stockholder and the directors whose action is complained of; the latter are not his agents and bailees, but the agents and bailees of the body politic, whose officers they are.³⁴ It is true that this principle may sometimes prove embarrassing, when the officers charged with wrong are the governing board of the corporation, and the very parties who should represent its interests in the redress of its wrongs; but the remedies in equity are ample for such a case, and a single shareholder may there bring to account the delinquent or fraudulent officer, or obtain redress *from others who have wronged the corporation, but against whom the directors refuse to proceed.³⁵ Such a suit, however, is

[*607] 33—*Talbot v. Scripps*, 31 Mich. Dec. 624; 3 R. I. 9; *Brown v. Paige*, 222, 24 Am. Dec. 212; *Hodges v. N. E. Screw Co.*, 1 R. I. 312. The point is forcibly and clearly discussed and presented in the leading case of *Smith v. Hurd*, 12 Met. 371. And see *Craig v. Gregg*, 83 Pa. St. 19.

34—*Smith v. Hurd*, 12 Met. 371, 46 Am. Dec. 690; *Gorham v. Gilson*, 28 Cal. 479; *Butts v. Wood*, 37 N. Y. 317; *Abbott v. Merriam*, 8 Cushing. 588.

35—*Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. 169, 98 Am. Dec. 95; *Dodge v.*

Van Dyke, 4 Halst. Ch. 795; *Ior v. Miami, &c., Co.*, 5 Ohio 162, 22 Am. Dec. 785; *Pratt v. Pratt*, 33 Conn. 446; *Butts v. Wood*, 37 N. Y. 317; *March v. Eastern R. R. Co.*, 43 N. H. 515; *Rogers v. Lafayette Ag. Works*, 52 Ind. 296; *Watts' Appeal*, 78 Pa. St. 370; *Peabody v. Flint*, 6 Allen. 52; *Brewer v. Boston Theater*, 104 Mass. 378; *Allen v. Curtis*, 26 Conn. 456; *Wright, v. Oroville &c., Co.*, 40 Cal. 20; *Goodin v.*

instituted not on behalf of the complainant alone, but of all other stockholders, and stands as a substitute for a suit by the corporation itself.³⁶

Recurring to the duties which it has been said above, the officers owe to the stockholders, some illustrations may be given of the acts which constitute breaches thereof:

1. If the managers of a corporation knowingly exceed the corporate powers, this is a species of fraud upon the corporators for which the latter may have the appropriate relief in equity. No doubt they might be enjoined from persistence in such action, on the application of individual corporators, and be called to account for what had already been done. So an individual corporator might perhaps obtain relief from his obligations to the company, and permission to withdraw, where powers were exercised which when he came in he had no reason to understand the corporation was to assume.³⁷

2. The obligation to furnish accurate information is particularly forcible, as it applies to the regular reports which are required of the managing board and perhaps of other

Woolsey, 18 How. 331; Bronson *v.* LaCrosse R. Co., 2 Wall. 283; Memphis *v.* Dean, 8 Wall. 64; Barr *v.* New York, &c. Co., 96 N. Y. 444; Memphis, etc., R. R. Co. *v.* Wood, 88 Ala. 630, 7 So. 108; Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320, 30 N. E. 667. See LaGrange *v.* State Treasurer, 24 Mich. 468; Blain *v.* Agar, 1 Sim. 37; Hichens *v.* Congreve, 4 Russ. 562; Dupont *v.* Nor. Pac. R. Co., 18 Fed. Rep. 467; Shaw *v.* Davis, 78 Md. 308, 28 Atl. 619; Atchison, etc., R. R. Co. *v.* Sumner County, 51 Kan. 617, 33 Pac. 312; Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867. The question as to what circumstances will warrant the bringing of such action is fully considered and the rule laid down in Hawes *v.* Oak-

land, 104 U. S. 450, followed in Dimpfell *v.* Ohio &c. Co. Ry. Co. 110 U. S. 209. The stockholder must have exhausted all means within his reach to obtain redress within the corporation. But it is said that he need not demand corporate action before suit, if all the officers are committing a wrong upon him. Kelsev *v.* Sargent, 40 Hun, 150.

36—Ibid.; Robinson *v.* Smith, 3 Paige, 222, 24 Am. Dec. 212; Dodge *v.* Woolsey, 18 How. 331; Heath *v.* Erie R. R. Co., 8 Blatch. 347; Mason *v.* Harris, L. R. 11 Ch. D. 97.

37—Ship' Case, 2 De G., J. & S. 544. If the stockholder has assented to the illegal act, he cannot be heard to complain. Weed *v.* Little Falls &c. Co., 31 Minn. 154.

[*608] principal *officers. These are supposed to state facts upon which not only may the associates act in their corporate meetings but also in individual transactions; and a statement of important facts, purposely made untrue, is a fraud when acted upon.³⁸ But the cases must be so peculiar that would give rise to an action to charge the directors personally that it can hardly be useful to undertake to suggest what facts might suffice to render them liable.

Where the directors of a bank, by means of false statements and representations, induce persons to make deposits therein, when the bank is, in fact, insolvent or in a failing condition, whereby loss is sustained, they will be liable for such loss.³⁹ So where they negligently permit the bank to be held out as solvent when it is not.⁴⁰ "Directors of banking corporations occupy one of the most responsible and important of all business relations to the general public. By accepting the position and holding themselves out to the public as such they will assume that they will supervise and give direction to the affairs of the corporation, and, impliedly, contract with those who deal with it, that its affairs shall be conducted with prudence and good faith. They have important duties to perform toward its creditors, customers and stockholders, all of whom have the right to expect that these duties will be performed with diligence and fidelity, and that the capital of the corporation will thus be protected against misappropriation and diversion from the legitimate purposes of the corporation. Customers are invited to business relations and are induced to accept and act upon such invitation by the representations that the institution is solvent and owns a certain

38—When false reports of the financial condition of the corporation are published it will not be presumed for the purpose of charging a director with fraud that he had knowledge of all the affairs of the company, but there must be evidence that he knew the report was false or had reason to believe it was. Wakeman v. Dalley, 51 N. Y. 27.

39—Stuart v. Staplehurst, 57 Neb. 569, 78 N. W. 298; Tate v. Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719; Seale v. Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. 592; Giddings v. Baker, 80 Tex. 308, 16 S. W. 33.

40—Delano v. Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81.

amount of capital, and that this capital is under the supervision and control of certain directors. It is the duty of the directors to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which it is their duty to know, and which they have the means of knowing.⁴¹

A corporator at all reasonable times is entitled to an inspection of the books of the corporation, and if this is denied him, he may, by mandamus, obtain it. But as this proceeding might not be speedy enough to make the inspection accomplish the intended purpose, the incorporator should also be entitled to redress in a special action on the case against the custodian of the books, or, if the refusal was under corporate orders, against the corporation itself. And here the right which is denied is plainly an individual right, and does not in a legal sense concern other corporators.

3. Under the third head of duties above stated, the general principle is that whatever a corporate officer does officially it is his duty to do with judicial fairness as regards his own interests and those of his associates, and whatever advantage he takes of his own position for his individual benefit to the prejudice of the others is a fraud. Therefore where directors of a corporation instructed their treasurer to purchase of a certain ferry company a steamboat owned by it, at the cost of the boat and repairs, and it turned out that the directors constituted the ferry company, and that the price that company demanded and received for the steamboat was a sum much above the cost of the boat and repairs, this was adjudged a fraud for which the purchasing company might hold them responsible.⁴² So if the directors of an embarrassed railroad company proceed under proper authority to sell the road, but do so in a way calculated not to produce its value, and become purchasers them-

41—*Seale v. Baker*, 70 Tex. *v. Doherty*, 74 Conn. 468, 51 Atl. 283, 289, 290, 7 S. W. 742, 8 Am. 130; *Stone v. Rottman*, 183 Mo. St. Rep. 592. See *New Haven* 552, 82 S. W. 76.
Trust Co. v. Doherty, 75 Conn. 42—*Parker v. Nickerson*, 112 555, 54 Atl. 209, 96 Am. St. Rep. Mass. 195.
239; *S. C. New Haven Trust Co.*

[*609] selves, the *sale is a fraud upon their trust, and may be vacated on that ground.⁴³ So where shares in a corporation are placed in the hands of directors to sell for the company, and they are enabled to sell at a premium, this premium belongs to the corporation, and it is a fraud in them to appropriate it.⁴⁴ So if a director of a railway company contract in his own name for iron for the road, any pecuniary advantage derived from the contract belongs to the company.⁴⁵ So it is not competent for a director in a railway company to become contractor with the company for constructing the road; the two positions he would occupy as member of the board of directors letting the contract, and as contractor taking it, being inconsistent.⁴⁶ Nor does it make any difference that no actual fraud was intended in the transaction, or that it can be shown that the corporation suffered no loss; the policy of the law will not permit

43—*Jackson v. Ludeling*, 21 Wall. 616. See the general subject fully and carefully examined in *Hoffman, &c., Co. v. Cumberland, &c., Co.*, 16 Md. 456, where a like conclusion is reached. An officer may not sell to himself property of the corporation. *First Nat. Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646. But if there is no bad faith a corporation may give its whole capital stock in exchange for property of one of its trustees. *Knowles v. Duffy*, 40 Hun, 485.

44—*York, &c., R. Co. v. Hudson*, 16 Beav. 485. Where a director has loaned the bank's money with an agreement to share in the profits of the enterprise for which it was borrowed, the share belongs to the bank. *Farmers' &c., Bank v. Downey*, 53 Cal. 466. A promoter is liable for secret profits from the sale to the company of a mine. *Emma Silver Min. Co. v. Lewis*, L. R. 4 C. P. D. 396. See *in re West Jewell, &c., Co.*, L. R. 10 Ch. D. 579; *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951; *Limited Investment Ass. v. Glendale Investment Ass.*, 99 Wis. 54, 74 N. W. 633. Directors may not vote themselves additional pay after receiving pay for the time covered. *State v. People's, &c., Ass.*, 42 Ohio St. 579; *Bennett v. St. Louis, &c., Co.*, 19 Mo. App. 349.

45—See *Benson v. Heathorn*, 1 Y. & Coll. 326.

46—*Flint, &c., R. R. Co. v. Dewey*, 14 Mich. 477; *European, &c., R. Co. v. Poor*, 59 Me. 277; *Thomas v. Brownville, &c., R. R. Co.* 110 U. S. 522. An assignment to him of an interest in such a contract is voidable at the election of the corporation. *Barnes v. Brown*, 80 N. Y. 527. So railroad directors may not buy up land for station grounds. *Cook v. Sherman*, 20 Fed. Rep. 167. See *Blair Town, &c., Co. v. Walker*, 50 Ia. 376. Nor become interested in a company formed to mine coal to be sold to the railroad com-

the integrity of the trustee to be put to the trial of transactions where duty to his *cestuis que trust* would stand opposed to interest.⁴⁷ So direct*ors will not be permitted to avail [*610] themselves of a mortgage which they cause to be made by the corporation to themselves, and by which they obtain an undue advantage.⁴⁸ So directors who fraudulently issue and negotiate notes of the corporation, whereby it becomes obligated to pay them, are liable in tort to the corporation.⁴⁹ So payments made by the directors to the company, in property at more than its value, will not be suffered to stand.⁵⁰ These cases illustrate the general principle.⁵¹

Nevertheless there is nothing in the relation of managing officer and stockholder that shall preclude the former dealing with the latter in respect to his shares and becoming purchaser thereof, provided that in their negotiations there is no decep-

pany. *Wardell v. Railroad Co.*,
103 U. S. 651.

47—*Flint, &c., R. R. Co. v. Dewey*, 14 Mich. 477. A member of a board of directors who presents a bill on his own behalf for extra compensation cannot act as director on the question of its allowance. *Butts v. Wood*, 37 N. Y. 317. See *Gilman R. R. Co. v. Kelly*, 77 Ill. 426.

48—*Koehler v. Black River Falls Iron Co.*, 2 Black, 715. See *Davis v. Rock Creek, &c., Co.*, 55 Cal. 359; *Chouteau v. Allen*, 70 Mo. 290. But a director may become a creditor of and enforce a mortgage against the corporation if the transaction is fair. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Hallam v. Ind. Hotel Co.*, 56 Ia. 178. If to secure an honest debt a director takes bonds the company cannot repudiate the transaction without restoring what it has received. *Duncomb v. New York, &c., Co.*, 84 N. Y. 190; 88 N. Y. 1.

49—*Metropolitan El. Ry. Co. v. Kneeland*, 120 N. Y. 134, 24 N. E. 381, 17 Am. St. Rep. 619, 8 L. R. A. 253; *Wilson v. Metropolitan El. Ry. Co.*, 120 N. Y. 145, 24 N. E. 384.

50—*Osgood v. King*, 42 Iowa, 478.

51—See, also, for other illustrations, *Bartholomew v. Bentley*, 15 Ohio, 659, 45 Am. Dec. 596; *S. C. 1 Ohio*, St. 37, and cases in notes to *Duncomb v. Housatonic, &c., R. R. Co.*, 4 A. & E. R. R. Cas. 306; *Cook v. Sherman*, 20 Fed. 175; *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 131, 23 Atl. 708; *Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; *Hicks v. Steel*, 126 Mich. 408, 85 N. W. 1121; *Richardson's Executor v. Green*, 133 U. S. 30, 10 S. C. Rep. 280, 33 L. Ed. 516. Every contract entered into by a director with his corporation may be avoided by the latter within a reasonable time and so of a con-

tion and no concealment of facts which the seller has a right to know. Nor would the officer be under obligation, in such dealings, too put before the stockholder the facts within his knowledge which might influence the negotiation, any further than would be required of his position by his duty to the stockholders generally, irrespective of the negotiation. His duty may require of him regular reports, but further information which a stockholder may desire he will be expected to call for. No doubt a director has the same right as other persons to buy

and sell stock in market, and in New York it has been
[*611] *decided that a director may buy of a stockholder his

shares without any such obligation to disclose important facts as would rest upon an agent dealing with his principal. The director, it was said, was not trustee for the sale of the shareholder's stock. This stock was not the subject of trust between them, nor had the trust relation between them any connection with the vendor's stock, except so far as the good or bad management of the general affairs of the corporation by its directors indirectly affects the value of its stock.⁵² A like decision has been made in Indiana.⁵³

4. Where directors or managing officers perpetrate frauds on the associates by allowing advantages to one or more over the rest, the proper remedy is usually found in compelling the favored stockholder to surrender what he has thereby fraudulently gained. Thus, where under a secret arrangement made prior to his subscription a stockholder is permitted by the directors to

tract between two corporations, some of the directors holding that office in each. *Metrop. &c. Co. v. Manhattan, &c., Co.*, 11 Daly, 373, where VAN BRUNT, J., discusses these questions elaborately with full citation of authorities. A contract between a corporation and its directors is only voidable and the right to avoid may be waived by acquiescence. *Kelly v. Newburyport, &c., Co.*, 141 Mass. 496. See, further, as to dealings

between corporations when the same persons act as directors of each. *Pearson v. Concord R. R. Co.*, 62 N. H. 537, 13 A. & E. R. R. Cas. 102; *Rolling Stock Co. v. Railroad Co.*, 34 Ohio St. 465; *Munson v. Syracuse, &c., Co.*, 103 N. Y. 58.

52—*Carpenter v. Danforth*, 52 Barb. 581.

53—*Tippecanoe Co. v. Reynolds*, 44 Ind. 509. So in Tenn. *Deaderick v. Wilson*, 8 Bax. 108.

surrender his stock and withdraw what he has paid upon it, this being in fraud of the other stockholders, they or any of them may, by bill in equity, have the money thus withdrawn refunded.⁵⁴ So an agreement by which a subscription is to be colorable merely, to induce others to subscribe, is fraudulent and void, and the subscription may be enforced.⁵⁵

5. It has been decided in Alabama that if the managers of a bank allow the stockholders to withdraw its funds to the amount of their subscriptions, and to use them without security, such conduct is a fraud upon the creditors of the bank and renders the directors liable in equity for the amount withdrawn.⁵⁶ It would no doubt also be a fraud on any stockholder not privy to the unlawful arrangement. So, where the president of a bank makes loans of the bank funds to irresponsible persons without security, having a private interest of his own to advance thereby, the bank may charge him personally with the loans and recover *the amount in a suit at law.⁵⁷ So, for any fraudulent sale of the corporate property by the directors, they may be called to account by stockholders.⁵⁸ [*612]

Trustees. The case of a trustee is the representative illustration of those in which the law demands the utmost good faith because of confidential relations. However the trustee may be appointed—whether by the party himself, by some donor for his benefit, or by judicial action—he is chosen because of the confidence felt and the trust reposed; and while the office continues the beneficiary has usually no choice but to leave his interests where they have been confided, unless such dishonesty or unfit-

54—*Melvin v. Lamar Ins. Co.*, Bldg. Ass. v. Barnes, 39 Neb. 834, 80 Ill. 446, 22 Am. Rep. 199. A secret arrangement with one subscriber, that in certain contingencies he need not pay his subscription, being in fraud of the others, is void and cannot constitute a defense to the subscription. *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246. See *New London Inst. v. Prescott*, 40 N. H. 330.

55—*New Albany, &c., R. R. Co. v. Fields*, 10 Ind. 187; *York Park*

v. Barnes, 39 Neb. 834, 58 N. W. 440.

56—*Bank of St. Mary's v. St. John*, 25 Ala. 566.

57—*First Nat. Bk. of Sturgis v. Reed*, 36 Mich. 263, citing *Austin v. Daniels*, 4 Denio, 299; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305.

58—*Gray v. Steamship Co.*, 3 Hun, 383; *Crook v. Jewett*, 12 How. Pr. 19; *Talbot v. Scripps*, 31 Mich. 268. See Attorney General

ness is disclosed as will justify proceedings to have the trustee removed. Under these circumstances the law imposes upon the trustee the obligation of perfect fidelity to the trust and integrity in its performance; and he must discharge the trust without suffering his own interest in any manner to distract his attention.

It is a fundamental rule that a trustee shall not deal in the trust fund for his own interest. The *cestui que trust* may or may not be a person in law *sui juris*; if he is, there is no absolute impediment to dealings between himself and the trustee in respect to the trust property, or to the trustee's duties; and if for the time being, by fair understanding between them, the character of trustee is laid aside, and they deal with each other as strangers might, it is not impossible for their bargains to be upheld. But in all such cases the trustee will be likely to be possessed of decided advantages in the negotiations, not only because he will most probably have more complete information than the other will possess, but also because it will be difficult, if not impossible, for the *cestui que trust* to relieve himself entirely from the influence of the trustee, so as to deal with him on an equal footing. Such cases, therefore, must always afford unusual facilities for deception and fraud.

It has been said that to sustain a purchase by trustee from *cestui que trust* "the trustee must have acted in entire [*613] good faith. He must show that he made to the **cestui que trust* the fullest disclosure of all he knew in regard to the subject-matter, and that the price he paid was adequate."⁵⁹ Presumptions are against such dealings, and if the trustee ventures upon them, he takes upon himself the burden of showing that he dealt fairly, and after putting the other party on a footing of equality in respect to the property.⁶⁰ But where the trus-

v. Fishmonger's Co., 1 Cr. & Ph. 234; McCants *v.* Bee, 1 McCord 1. Eq. 383; Pugh *v.* Bell, 1 J. J. Marsh. 399; Richardson *v.* Spencer, 18 B. Mon. 450; Schwarz *v.* Wendell, Wal. Ch. 267; Farnam *v.* Brooks, 9 Pick. 212; Brown *v.* Cowell, 116 Mass. 461; Jones *v.* Smith, 33 Miss. 215; Sallee *v.*

59—Spencer and Newbold's Appeal, 80 Pa. St. 317. See Gibson *v.* Jeyes, 6 Ves. 266, where a rule nearly the same is laid down; Todd *v.* Grove, 33 Md. 188.

60—Coles *v.* Trecothick, 9 Ves.

tee himself makes sale of the trust property under the authority vested in him as such—whether the sale be made under judicial direction or otherwise—if he becomes the purchaser himself, either directly or through a third person, the purchase is by construction of law fraudulent, and no showing of good faith or of the payment of a full consideration can sustain it, against the objection of the *cestui que trust*, so long as the property remains in his hands or in the hands of any one who takes it with knowledge or notice of the facts.⁶¹ The rule in such cases is, *that the *cestui que trust*, when the facts come [*614] to his knowledge, may either affirm the sale or repudiate

Chandler, 26 Mo. 124; Marshall *v.* Stephens, 8 Humph. 159, 47 Am. Dec. 601; Graves *v.* Waterman, 63 N. Y. 657; Parshall's Appeal, 65 Pa. St. 224; Lathrop *v.* Pollard, 6 Cal. 424; Potter's Appeal, 56 Conn. 1, 12 Atl. 513, 7 Am. St. Rep. 272; Stewart *v.* Harris, 69 Kan. 498, 77 Pac. 277; Avery's Trustee *v.* Avery, 90 Ky. 613, 14 S. W. 593. All contracts made by the trustee in which he is personally interested are voidable at the election of the beneficiary. Munson *v.* Syracuse, &c., R. R. Co., 103 N. Y. 58.

61—Lowther *v.* Lowther, 13 Ves. 95; Morse *v.* Royal, 12 Ves. 355; Whelpdale *v.* Cookson, 1 Ves. Sr. 9; Campbell *v.* Walker, 5 Ves. 678; *Ex parte* Lace, 6 Ves. 625; *Ex parte* Hughes, 6 Ves. 617; *Ex parte* James, 8 Ves. 337; Coles *v.* Trecothick, 9 Ves. 234; *Ex parte* Bennett, 10 Ves. 381; Fox *v.* Mackrath, 2 Bro. C. C. 400; Downes *v.* Grazebrook, 3 Meriv. 200; Michaud *v.* Girod, 4 How. 503; Campbell *v.* Penn. L. Ins. Co., 2 Whart. 53; Boyd *v.* Hawkins, 2 Dev. Eq. 329; Davis *v.* Simpson, 5 Harr. & J. 147, 9 Am. Dec. 500; Perry *v.* Dixon, 4 Dessaus. Eq. 504 n.;

Butlers *v.* Haskill, 2 Dessaus. Eq. 651; Brackenridge *v.* Holland, 2 Blackf. 377; Wade *v.* Pettibone, 11 Ohio, 57, 37 Am. Dec. 408; Mills *v.* Goodsell, 5 Conn. 475, 13 Am. Dec. 90; Lovell *v.* Briggs, 2 N. H. 218; Currier *v.* Green, 2 N. H. 225; Farnam *v.* Brooks, 9 Pick. 212; Saeger *v.* Wilson, 4 Watts & S. 501; Davoue *v.* Fanning, 2 Johns. Ch. 252; Rogers *v.* Rogers, 3 Wend. 503; Torrey *v.* Bank of Orleans, 9 Paige, 649; Terwilliger *v.* Brown, 44 N. Y. 237; Beaubien *v.* Poupard, Har. Ch. 206; Dwight *v.* Blackmar, 2 Mich. 330, 57 Am. Dec. 180; Moore *v.* Mandlebaum, 8 Mich. 433; Sheldon *v.* Rice, 30 Mich. 296, 18 Am. Rep. 136; Nor. Balt. Ass'n *v.* Caldwell, 25 Md. 420, 90 Am. Dec. 67; Brothers *v.* Brothers, 7 Ired. Eq. 150; Freeman *v.* Hardwood, 49 Me. 195; Ogden *v.* Larabee, 57 Ill. 389; Hammond *v.* Stanton, 4 R. I. 65; Harraway *v.* Harraway, 136 Ala. 499, 34 So. 836; Bland *v.* Freeman, 58 Ark. 84, 233 S. W. 4; Borders *v.* Murphy, 125 Ill. 577, 18 N. E. 739; Lagger *v.* Mut. Union L. & B. Ass., 146 Ill. 283, 33 N. E. 946. See Carson *v.* Marshall, 37 N. J. Eq. 213.

it, and if he chooses the latter course, he may call upon the trustee to restore the property, or if that has become impossible, to account for whatever benefit he has received from the purchase. Long acquiescence in the sale, however, with full knowledge of the facts, may of itself amount to an affirmation.⁶²

If a trustee has occasion to make purchases for the purposes of the trust, he can no more buy of himself than he could sell to himself. The same reasons apply to both cases.⁶³

The above rules apply to executors and administrators, guardians, assignees in bankruptcy or insolvency, partners, agents for the sale of property, and all other persons occupying similar relations. Wherever the reason of the rule applies, there the rule is in full force.^{63a} It therefore applies to the case of an agent empowered to sell property for his principal; he cannot become purchaser directly,⁶⁴ nor by indirection through another.⁶⁵ "This is a rule of public policy, necessary to preserve honesty and fidelity in the administration of trusts, and is too well settled to be departed from."⁶⁶ So a trustee is liable as for a fraud

62—*Marsh v. Whitmore*, 21 Wall. 178; *Miles v. Wheeler*, 43 Ill. 124. See *Campau v. Van Dyke*, 15 Mich. 371.

63—If a partner sells his own goods to the partnership without the knowledge of his associates, he must account to them for the profits. *Bentley v. Craven*, 18 Beav. 75. See *Kimber v. Barber*, L. R. 8 Ch. App. 56.

63a—See *Gatje v. Armstrong*, 145 Cal. 370, 78 Pac. 872.

64—*Brooks v. Berry*, 2 Gill, 83; *Dobson v. Racey*, 8 N. Y. 216; *Ames v. Port Huron, &c., Co.*, 11 Mich. 139, 83 Am. Dec. 731; *Kerfoot v. Hyman*, 52 Ill. 512. At least, without the principal's knowledge and assent. *Ruckman v. Bergholz*, 37 N. J. L. 437; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Adams v. Sayre*, 70 Ala. 318. And a mere formal surren-

der of the agency before buying is not enough. *Fountain, &c., Co. v. Phelps*, 95 Ind. 271.

65—Story on Agency, §§ 210, 211; *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130; *Porter v. Woodruff*, 36 N. J. Eq. 174. A trustee in a mortgage cannot indirectly buy in the property for the benefit of one bondholder, a bank of which he is cashier. *People v. Merch. Bank*, 35 Hun, 97. See *Toole v. McKiernan*, 48 N. Y. Sup. Ct. 163.

66—*Fisher's Appeal*, 34 Penn. St. 29, 31; *Moseley's Admr. v. Buck*, 3 Munf. 232; *Farnam v. Brooks*, 9 Pick. 212; *Casey v. Casey*, 14 Ill. 112; *Moore v. Mandlebaum*, 8 Mich. 433; *Hunter v. Hunter*, 50 Mo. 445; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Norris v. Taylor*, 49 Ill. 18.

if he knowingly sells trust property for less than it would bring in the market, even though such a sale is within a minimum fixed by his instructions.⁶⁷

*Where the influence of a confidential relation has [*615] once existed, it will not be presumed that it passes away immediately on the relation terminating; and dealings within a short time thereafter will be scrutinized closely, and may be set aside as fraudulent, especially if no independent advice was taken before entering into them.⁶⁸

Principal and Agent. In pointing out what may be wrongs by trustees, the ground of agency has to a certain extent been covered. The agent owes to his principal the like fidelity which the trustee owes to the *cestui que trust*. There is this important difference in the cases: that as the supervision of trusts belongs to equity, wrongs by trustees must generally be redressed in that court, while wrongs by agents will be redressed at law, unless the case is such that some peculiar relief which only equity can give is required. Thus, if an agent employed to investigate a title by one proposing to buy, should take advantage of the information thereby acquired to purchase for himself, the principal might doubtless call him to account, either by suit in equity to take the benefit of the purchase, or by suit at law for recovery of damages.⁶⁹ An agent employed to purchase for his principal

67—Price *v.* Keyes, 62 N. Y. 378; Merryman *v.* David, 31 Ill. 404; Greenfield Sav. Bank *v.* Simons, 133 Mass. 415. He cannot derive a profit from the estate for himself. Coltrane *v.* Worrell, 30 Gratt. 434; Baugh *v.* Walker, 77 Va. 99. The *cestui que trust* cannot maintain trover for securities wrongfully disposed of by the trustee. Smith *v.* Am. Nat. Bank, 89 Fed. 832, 32 C. C. A. 368.

68—Revett *v.* Harvey, 1 Sim. & Stu. 502; Hatch *v.* Hatch, 9 Ves. 292.

A guardian will not be suffered to acquire advantages for himself

in dealings with the ward soon after the relation has terminated. Schoul. Dom. Rel. 515, 516; 3 Redf. on Wills, 2d Ed. 443; Story Eq. Juris. §§ 316-320. Nor to procure from the ward conveyances for third persons; his influence being supposed still too great for equal dealing. Ranken *v.* Patton, 65 Mo. 378, 413.

69—Boswell *v.* Cunningham, 32 Fla. 277, 13 So. 354, 21 L. R. A. 54. See Reid *v.* Stanley, 6 Watts & S. 369; Kimber *v.* Barber, L. R. 8 Ch. App. 56; McMahon *v.* McGraw, 26 Wis. 614; Ely *v.* Hanford, 65 Ill. 267; Moore *v.* Man-

cannot purchase from himself.⁷⁰ And if an agent to purchase property represents the purchase price to be \$500 more than he pays and he appropriates the difference to his own use, he will be compelled to refund.⁷¹ An agent to sell cannot purchase for himself,⁷² or otherwise make a secret profit.⁷³ Where an agent authorized to sell and retain all over a certain sum for his compensation, learns of a fact that adds greatly to the value of the property, he is bound to communicate it to his principal, and a sale without doing so is fraudulent on his part.⁷⁴ And generally an agent is bound to the utmost good faith in all transactions for his principal and will not be permitted to use the agency for his personal benefit.⁷⁵

The principal and agent also assume towards each other cer-

dlebaum, 8 Mich. 433. He cannot buy for himself a tax title on the principal's property. *Bowman v. Officer*, 53 Ia. 640. Nor, knowing that the principal desires to renew a lease, can he lease the property himself. *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541. Nor can he appropriate any of his principal's property. *Weaver v. Fisher*, 110 Ill. 146. Nor deal in the business of the agency for his own benefit. *Whitesides v. Cook*, 20 Ill. App. 574.

70—*Disbrow v. Secor*, 58 Conn. 35, 18 Atl. 981.

71—*Rathbun v. McLay*, 76 Conn. 308, 56 Atl. 511. "His acceptance of the agency imposed upon him the duty of honesty in his intercourse with his principals and fidelity to their interests. By no indirection or circumvention, by no adroit scheming or concealed stratagem, could he profit at their expense. He had entered into a confidential relation and he was bound to keep to the straight line of good faith and fair dealing." p. 309.

72—*Burke v. Bouris*, 92 Cal. 108, 28 Pac. 57; *Fisher v. Seymour*, 23 Colo. 542, 49 Pac. 30; *Smitz v. Leopold*, 51 Minn. 455, 53 N. W. 719. Where an attorney in fact made a deed of his principal's property to a third party who, on the same day, deeded it back to the attorney in fact, the deeds were held void and the principal was allowed to recover the land in ejectment. *McKay v. Williams*, 67 Mich. 547, 35 N. W. 159, 11 Am. St. Rep. 597.

73—*Helberg v. Nichol*, 149 Ill. 249, 37 N. E. 63; *Rogers v. French*, 122 Ia. 18, 96 N. W. 767; *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126; *Kramer v. Winslow*, 130 Pa. St. 484, 18 Atl. 923, 17 Am. St. Rep. 782.

74—*Hegenmeyer v. Marks*, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808.

75—*Calman v. Sarraille*, 142 Cal. 638, 76 Pac. 486; *Tyler v. Sanborn*, 128 Ill. 136, 21 N. E. 193, 15 Am. St. Rep. 97, 4 L. R. A. 218; *Faust v. Hosford*, 119 Ia. 97, 93 N. W. 58.

tain duties of due care. The agent must not be negligent in the performance of his trust, and the principal must not negligently *lead the agent into danger. As an example, [*616] the principal no doubt assumes the obligation to warn the agent of any risks in his business of which the agent would not be likely to be aware, and which would not be open to observation; such as dangerous defects in buildings or machinery, peculiar exposure to disease, etc. For a consideration of such cases we must refer to the discussion of negligence in another place, only remarking that as the relation imposes the obligation, conduct may sometimes be negligence in the case of a principal which would not be in the case of a third party not charged with any similar duty.⁷⁶ Duty is the measure of the required care, as is stated elsewhere.

Partners are agents for each other within the scope of the partnership business, and are charged with all the obligations of good faith which rest upon other agents. They are also in a certain sense trustees for each other, and will not be suffered to make secret gains at the expense of the copartnership.⁷⁷ Their duty embraces a full disclosure to each other of all facts relating to their joint dealings; and it is a fraud for one to withhold this, even when they are proceeding to close up their affairs by arbitration.⁷⁸ So where one induces another to enter with him

76—As to the right of the agent to indemnity for liabilities incurred in the principal's service, see *Adamson v. Jarvis*, 4 Bing. 66; *D'Arcy v. Lyle*, 5 Binn. 441; *Yeatman v. Corder*, 38 Mo. 337; ante, 255-6. If an agent is negligent in ascertaining the credit of a party whereby the principal sustains a loss, the agent will be liable. *Frick v. Larned*, 50 Kan. 776, 32 Pac. 383.

77—*Getty v. Devlin*, 54 N. Y. 403. In general a partner is entitled to no pay for his services in the business beyond his share in the profits. *Mann v. Flanagan*, 9

Oreg. 425; *Frazier v. Frazier*, 77 Va. 775; *Heath v. Waters*, 40 Mich. 457; *Godfrey v. White*, 43 Mich. 171. Otherwise, if by a course of dealing an agreement to that effect is fairly implied. *Emerson v. Durand*, 64 Wis. 111. See *Belcher v. Whittemore*, 134 Mass. 330; *Hamper's Appeal*, 51 Mich. 71. By purchasing a firm note he cannot become the owner of it against the firm. *Easton v. Strother*, 57 Ia. 506.

78—*Beam v. Macomber*, 33 Mich. 127; See *Maddeford v. Austwick*, 1 Sim. 89; *King v. Wise*, 43 Cal. 629. Upon like principle a

upon a joint enterprise, he is bound to a full disclosure of all the facts and must account for any secret profit or advantage.⁷⁹

Attorney and Client. Elsewhere the obligation the attorney, solicitor, proctor or counsel assumes towards his client is spoken of, and his liability for negligence in performing it is stated. It has been held that if the attorney by unwarrantable acts shall render himself liable to third persons, and shall exact and obtain

from his client indemnity therefor, the indemnity will [*617] be set aside for the presumed undue influence. "It is

the policy of the law to scrutinize gifts, conveyances, and securities, given by a client to his attorney pending the relation, more especially when they are connected with the subject matter of litigation; as then the necessities of the client, and the confidence reposed, place the client most in the power of his attorney. The relation and the confidence it implies, which confidence is absolutely necessary, in some cases, to promote the prosecution or defense of a suit, are frequently not so much matter of choice with the client, as of necessity. Hence the reason and justice of the rule of law, that will not permit them to be turned to the profit of the attorney at the expense of the client."⁸⁰ So close

fraud by an executor upon his female co-executor who confides in him, is remediable in equity. *Tompkins v. Hollister*, 60 Mich. 470.

79—*King v. White*, 119 Ala. 429, 24 So. 710; *Bunn v. Schnellbacher*, 163 Ill. 328, 45 N. E. 227; *Johnson v. Gavitt*, 114 Ia. 183, 86 N. W. 256; *Bergeron v. Niles*, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911.

80—*Gray v. Emmons*, 7 Mich. 533. "Where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solici-

tor must necessarily possess; and that the solicitor has done as much to protect his client's interest as he would have done in the case of a client dealing with a stranger." *LORD CRANWORTH* in *Savery v. King*, 5 H. L. Cas. 655. And see *Pisani v. Attorney General*, L. R. 5 P. C. Cas. 516; *S. C. 10 Moak*, 78; *Yeamans v. James*, 27 Kan. 195; *Merryman v. Euler*, 59 Md. 588; *Whipple v. Barton*, 63 N. H. 613; *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Ross v. Payson*, 160 Ill. 349, 43 N. E. 399; *Henry v. Vance*, 111 Ky. 72, 63, S. W. 273; *Burnham v. Heseltine*, 82 Me. 495, 20 Atl. 80, 9 L. R. A. 90; *Barrett v. Ball*, 101 Mo. App. 288, 73 S. W. 865; *Finlay v. Leary*, 87 Hun, 8, 33 N. Y. S. 864;

is the confidence which this relation demands⁸¹ that the client is expected and invited by the law to lay open to his adviser all that he may know, believe or suspect—all, in fact, that may be in his mind which it can possibly be important for the adviser to know in order to prepare him to render valuable services; and the confidence thus invited the law protects, and it will not permit the adviser to disclose what has been communicated to him, not even as a witness in judicial proceedings, without his employer's consent.⁸² Still less will the law justify

Marden v. Dorthy, 12 App. Div. 176, 42 N. Y. S. 834; *Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483. *State v. Hazleton*, 15 La. Ann. 72; *Higbee v. Dresser*, 103 Mass. 523; *Orton v. McCord*, 33 Wis. 205; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 327; *Kaut v. Kessler*, 114 Penn. St. 603; see *Root v. Wright*, 84 N. Y. 72, 38 Am. Rep. 495; *Brigham v. McDowell*, 19 Neb. 407, 27 N. W. 384. The privilege extends to communication by other means than words. *State v. Dawson*, 90 Mo. 149. But the party may call his attorney as his witness. *French v. Hall*, 119 U. S. 152. The privilege does not cover communications made by or to the attorney where acting for both parties. *Goodwin, &c., Co.'s. App.* 117 Pa. St. 514, 12 Atl. 736; *Gulick v. Gulick*, 39 N. J. Eq. 516; *Hanlon v. Doherty*, 109 Ind. 37. Nor to communications made in the presence of a third person. *Moffatt v. Hardin*, 22 S. C. 9, or of the other party. *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805. Nor to communications to a lawyer if he acts as a mere scrivener and is asked for no advice. *Smith v. Long*, 106 Ill. 485; *Todd v. Munson*, 53 Conn. 579. See, further, *Hebbard v. Haughian*, 70 N. Y. 54; *Althouse v. Wells*, 40 Hun, 336; *Plano Mfg. Co. v. Frawley*,

If while acting as an attorney, one buys property sold in the course of litigation he holds as trustee for the client. *Taylor v. Young*, 56 Mich. 285; *Pearce v. Gamble*, 72 Ala. 341; *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130; *Olson v. Lamb*, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; *Carson v. Fogg*, 34 Wash. 448, 76 Pac. 112. See *Byington v. Moore*, 62 Ia. 470. See *Cameron v. Lewis*, 56 Miss. 601; *Bowers v. Virden*, Id. 595 as to his rights under a tax title upon his client's land.

81—The attorney cannot act professionally for the other party even in procuring a compromise, and demand compensation therefor. *Herrick v. Catley*, 1 Daly, 512.

82—1 *Greenl. Ev.* § 237; *Whart. Ev.* § 576; *Cromack v. Heathcote*, 2 B. & B. 4; *Chant v. Brown*, 9 *Hare*, 790; *Greenough v. Gaskell*, 1 *Myl. & K.* 98; *Jenkinson v. State*, 5 *Blackf.* 465; *Scranton v. Stewart*, 52 Ind. 68; *Maxham v. Place*, 46 *Vt.* 434; *Williams v. Fitch*, 18 N. Y. 546; *Britton v. Lorenz*, 45 N. Y. 51; *Chahoon v. Commonwealth*, 21 *Grat.* 822; *Sargeant v. Hampden*, 38 Me. 581;

[*618] *him in a voluntary disclosure. It was said by Lord Chief Justice TINDALL in one case, that a member of the legal profession was "to consider his lips sealed with a sacred silence";⁸³ and it is said in Comyn that "if a man, being intrusted in his profession, deceive him who intrusted him, * * or discover [disclose] the evidence or secrets of the cause," he is liable in an action on the case.⁸⁴ This is good sense and should be good law. The courts have the power, and no doubt would exercise it, to deal with such a case summarily when it should arise, but this would not preclude private actions. The courts may also take notice even without their attention being specially called to it by parties concerned, of the failure to observe professional faith when it concerns proceedings before them. Thus, if an attorney, while employed by one party, contracts to render assistance to the other, for a consideration to be paid him, the courts, when the contract is brought to their attention, will treat it as a nullity.⁸⁵

[*619] *The rules above stated are applicable to one who assumes to be legal adviser, even though not a licensed attorney. What is guarded against is not so much the abuse of an attorney's privilege as the abuse of a confidence which has been bestowed upon him.⁸⁶

68 Wis. 577; *Johnson v. Patter-* Howell *v. Ransom*, 11 Paige, 538; son, 13 Lea, 626; *Henderson v.* Poillon *v. Martin*, 1 Sandf. Ch. Terry, 62 Tex. 281; *House v.* 569; *Edwards v. Meyrick*, 2 Hare, House, 61 Mich. 69, 27 N. W. 858; 60; *Newman v. Payne*, 2 Ves. 199; *Chapman v. Peebles*, 84 Ala. 283, *Gresley v. Mousley*, 4 DeG. & J. 4 So. 273. 78; *Lyddon v. Moss*, 4 DeG. & J. 83—*Taylor v. Blacklow*, 3 Bing. 104; *Holman v. Loynes*, 4 DeG., (N. C.) 235. M. & G. 270; *Carter v. Palmer*, 8 Cl. & Fin. 657; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Gibson v. Jeyes*, 6 Ves. 266; *Pisani v. Attorney General*, L. R. 5 P. C. 516; S. C. 10 Moak, 78.

84—Com. Dig. Action upon the case for a Deceit, 5.

85—*Valentine v. Stewart*, 15 Cal. 387. As to frauds by attorneys upon clients, by means of which property is obtained or sold, see *Matter of Wool*, 36 Mich. 299; *Ford v. Harrington*, 16 N. Y. 285; *Evans v. Ellis*, 5 Denio, 640; *Ellis v. Messervie*, 11 Paige, 467;

Howell v. Ransom, 11 Paige, 538; *Poillon v. Martin*, 1 Sandf. Ch. 569; *Edwards v. Meyrick*, 2 Hare, 60; *Newman v. Payne*, 2 Ves. 199; *Gresley v. Mousley*, 4 DeG. & J. 78; *Lyddon v. Moss*, 4 DeG. & J. 104; *Holman v. Loynes*, 4 DeG., M. & G. 270; *Carter v. Palmer*, 8 Cl. & Fin. 657; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Gibson v. Jeyes*, 6 Ves. 266; *Pisani v. Attorney General*, L. R. 5 P. C. 516; S. C. 10 Moak, 78.

86—Story Eq. Juris. §§ 307-309; *Freelove v. Cole*, 41 Barb. 318; *Sears v. Shafer*, 1 Barb. 408; S. C. 6 N. Y. 268; *Ladd v. Rice*, 57 N. H. 374.

Scriveners. When one trusts another with the drawing of contracts between them—as is sometimes done when attorneys have dealings of bargain and sale with other persons—the draftsman accepts obligations which are even more strict than those which spring from the ordinary professional relations. Here the draftsman undertakes to act with entire impartiality for two parties,⁸⁷ one of whom is himself; and he is bound not simply for good faith, but to make sure that his interest does not mislead his judgment to the prejudice of the other party. This principle is applicable to insurance agents who draw contracts of indemnity. It is a familiar rule of law that their principal shall not take advantage of their errors or mistakes to the prejudice of those they have undertaken to insure. The doctrine of estoppel is often applied to those cases where the insurers undertake to claim the advantage of something omitted from the contract, but which should have been inserted.⁸⁸

Physicians and Clergymen. The common law did not extend to the confidence which one might bestow upon his physician or his spiritual adviser the same protection which it gives in the case of the legal counsellor.⁸⁹ Yet the reasons in support of it *are largely the same, and ought to have been recognized as sufficient. The disclosure made to any of the three may in a measure be compulsory, and what is extorted can never rightfully be made use of except for the very purpose for which it is obtained. The competent physician does not under-

87—One who drafts a will under which he is to be a beneficiary does so under suspicions which he must remove by proof of entire fairness, and that the testator fully understood the instrument prepared for him. *Breed v. Pratt*, 18 Pick. 115; *Downey v. Murphy*, 1 Dev. & Bat. 82; *Dufield v. Robeson*, 2 Harr. 375; *Hill v. Baye*, 12 Ala. 687; *Adair v. Adair*, 30 Geo. 102.

88—*Bidwell v. Northwestern Ins. Co.*, 24 N. Y. 302; *Clark v. Union, &c., Ins. Co.*, 40 N. H. 333,

77 Am. Dec. 721; *Howard Fire Ins. Co. v. Bruner*, 23 Penn. 50; *Hartford, &c., Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Peoria, &c., Ins. Co. v. Hall*, 12 Mich. 202.

89—*Duchess of Kingston's Case*, 20 State Trials, 573; *Rex v. Gibbons*, 1 C. & P. 97; *Wilson v. Rastall*, 4 T. R. 753; *Anonymous, 2 Skin.* 404; *Rex v. Gilham, Ry. & M.* 165; *State v. Bostick*, 4 Harr. 564; *Simon v. Gratz*, 2 Pen. & Watts, 412, 23 Am. Dec. 33; *Commonwealth v. Drake*, 15 Mass. 161.

take to make cures where he knows nothing of causes; and he may need to know the history of an ailment before he is able to determine the family to which it belongs, or the remedies likely to be available for its cure. He demands this; and in the mind of the patient the alternative to disclosure may be that he will be wrongfully and prejudicially treated. But the disclosure that may be useful for treatment may be damaging otherwise if placed before the public, and if the lips of the physician are not sealed, the patient may elect to deceive him rather than to have his body cured at the expense of his liberty or his reputation. Nor in the case of spiritual advisers is it believed that any public interest would be prejudiced by the adoption of a rule which should render strictly confidential in all cases, whatever a man might communicate in order to obtain spiritual assistance and counsel. Especially if the usages and discipline of a church require or even counsel full confidence in this relation, it should be regarded as a part of the religious freedom of its members to be at liberty to indulge it with safety and under legal protection. In some of the States the legislature has recognized the propriety of such protection, not only in the case of religious advisers, but of physicians also.⁹⁰

The law takes notice of the influence likely to be acquired by the physician over his patient, and scrutinizes with [*621] jealousy *their dealings while the relation continues.⁹¹

As the control of spiritual advisers is likely to be even

90—Cases under such statutes as to physicians. *Pierson v. People*, 79 N. Y. 424; *Grattan v. Metr. Life Ins. Co.*, 80 N. Y. 281; *Renihan v. Dennin*, 103 N. Y. 573; *McKinney v. Grand St. R. R. Co.*, 104 N. Y. 352; *Scripps v. Foster*, 41 Mich. 742; *Fraser v. Jennison*, 42 Mich. 206; *Guptill v. Verback*, 58 Ia. 98; *Excelsior, &c., Ass. v. Ridgle*, 91 Ind. 84; *Masonic, &c., Ass. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Penn. Mut. &c., Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Heuston v. Simpson*, 115 Ind. 62,

17 N. E. 261; *Gartside v. Conn. Mut., &c., Co.*, 76 Mo. 446, 43 Am. Rep. 765. If the examination is made upon the order of a prosecuting attorney, there is no privilege as no confidential relation exists. *People v. Glover*, 71 Mich. 303, 38 N. W. 874. As to clergymen in Indiana, the communication must be penitential or made in obedience to religious duty. *Knight v. Lee*, 80 Ind. 201.

91—See *Ashwell v. Lomi*, L. R. 2 P. & D. 477; *S. C. 4 Moak*, 700; *Billage v. Southee*, 9 Hare, 534.

greater and more controlling, especially in the last illness, the reasons for such jealousy are powerful in proportion, and they should be able to show that any advantage obtained for themselves or their church or denomination was the result of free and voluntary action, and not obtained by practicing in any manner upon the fears or the hopes, or by taking advantage of spiritual or bodily weakness.⁹²

92—See *Huguenin v. Baseley*, R. 6 Eq. Cas. 655; *Dent v. Ben-*
14 Ves. 273; *In re Welsh*, 1 Redf. nett, 4 Myl. & Cr. 269, 277.
Sur. Rep. 238; *Lyon v. Home*, L.

RESPONSIBILITY OF THE MASTER FOR THE WRONGS DONE OR
SUFFERED BY PERSONS IN HIS EMPLOYMENT.

In a previous chapter it has been shown that when several persons participate in wrongful and injurious action, they are jointly and severally responsible for all legal consequences, and the extent of their participation, or the degree of fault attributable to each, is immaterial. The rules regulating the responsibility of the husband for the torts of the wife have also been given, and it has been seen that the law supposes her to be under his control, and does not suffer him to exonerate himself from responsibility by showing the contrary. The rule of presumption is adopted for this case, because it is believed the well-being of society is best subserved thereby. It has also been seen that while a corporation is responsible for its torts, those who act for it in committing them may, at the election of the party injured, be held to accountability, either as the principals or as joint wrong-doers.

Attention is now directed to a class of cases in which the law holds one party responsible for the wrongs done or suffered by another, often with no regard to his personal fault, and in many cases refusing to permit his actual fault to be disproved. The cases embraced in this class are those in which one person occupies toward another the relation of master to servant.

Who is a Servant. A preliminary remark is essential regarding the employment, in the law, of the words master and servant. The common understanding of the words and the legal understanding is not the same; the latter is broader, and comprehends some cases in which the parties are master and servant only in a peculiar sense, and for certain purposes; perhaps only for a single purpose. In strictness, a servant is one who, for a valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful

*business.¹ The relation is purely one of control, and [*623] the contract may contemplate or stipulate for any services and any conditions of service not absolutely unlawful. The case of an apprentice may be embraced under this head; for although he does not always bargain in respect to the services on his own behalf, some one whom the law authorizes to speak for him does so, and the relation established is strictly one resting on an agreement for services in return for a consideration of some sort which the master is to render.

But only as between the two parties to it does the contract establish their relations and determine their rights. Whatever obligations the relation might impose on either as respects third persons, could not depend on the nature of the stipulations, but must spring from the relation itself. If one is injured by the servant of another, and the injury is in any manner connected with the fact of service, it would be immaterial to the injured party what the contract of service was, how long it was to continue, what compensation was to be paid for it, or what mutual covenants the parties had for their own protection. The liability of the master, if any, cannot depend upon circumstances with which the public has no concern; it must come from the fact that one person has placed himself under another's direction and control, in a manner that should impose on the latter the obligation to protect third persons against injuries from the acts or omissions of his subordinate. It could not at all depend on whether the master was to pay anything, nor whether the service was permanent or temporary. His control of the action of the other is the important circumstance, and the particulars of his arrangement are immaterial.

Accordingly, it has been determined that when one person, for the time being, places himself in a position of subordination to another in the business of the latter, and by what he may do in that condition of subordination a third person is injured, such

1—"A servant is one who is pendent calling." *Murray v. employed to render personal ser- Dwight*, 161 N. Y. 301, 305, 55 N. vices to his employer otherwise E. 901, 48 L. R. A. 673. than in the pursuit of an inde-

third person has a right to regard him as occupying the position of a servant, and is entitled to such remedies against the superior as he would have if the contract of service in fact existed.² *For convenience, rather than because anything depends on an actual contract of service, he is called a servant, when the remedy of the third person is being pursued. Thus the plaintiff was injured at a railroad crossing by reason of the negligence of the flagman stationed there. There were two sets of tracks at the crossing, one belonging to the defendant and one to another company. The latter company employed and paid the flagman. But the flagman had been employed at this crossing for ten years, and during all that time had regularly flagged the defendant's trains. The court held the facts justified a finding that the flagman was a servant of the defendant company and stated the rule of law to be that "when one knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his service, he is liable, as a master, for the negligence of such servant when the act or failure constituting the negligence comes within the apparent scope of

2—*Hill v. Morey*, 26 Vt. 178; *Potter v. Faulkner*, 1 B. & Smith, 800. In *Althorff v. Wolfe*, 22 N. Y. 355, where one has directed his servant to remove snow and ice from the roof of his house, and another person went up with the servant as a volunteer to assist him, and, by the carelessness of the latter in throwing the snow and ice into the street, a passer-by was injured, the master was held responsible. See, also, *Booth v. Mistr*, 7 C. & P. 66.

The relation of superintendent and inmate of a hospital does not make the latter the servant of the former. *Schrubbe v. Connell*, 69 Wis. 476, 34 N. W. 503. But if a penitentiary keeper puts a convict in charge of his premises, he makes him his servant. *Ward v.*

Young, 42 Ark. 542. If a railroad has its trains made up in the depot of another company by the latter's servants, it is liable to its passengers for the negligence of the servants. *Hannibal, &c., R. R. Co. v. Martin*, 11 Ill. App. 386.

Where one lets his team and driver to another, who asks for the particular driver, if in the course of the hirer's business, the servant injures a third person by a collision, the master is liable. *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 45 Am. Rep. 54, and cases; *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645. See *Ames v. Jordan*, 71 Me. 540, 36 Am. Rep. 352; *Hofer v. Hodge*, 52 Mich. 372, 50 Am. Rep. 256; *DeVoin v. Mich. Lumber Co.*, 64 Wis. 616.

the servant's employment, even though the person for whom the service is rendered has not employed or paid the servant."³

One who voluntarily assists a servant at the latter's request does not, as a general rule, become a servant of the master, so as to impose upon the latter the duties and liabilities of a master towards such volunteer, or so as to render the master liable to third persons injured by such volunteer's acts or negligence, while rendering such assistance.⁴ Such a volunteer assumes all the risks of the service upon which he enters and is only entitled to the protection due a trespasser.⁵ But if the servant has authority, express or implied, to employ assistance, the rule is otherwise.⁶ Such implied authority might arise in case of some unforeseen emergency, which created a necessity for such assistance.⁷ And when a passenger is injured by the negligence of a volunteer the master is liable, though the volunteer was called in by a servant without the knowledge or authority of the master, and the reason is that "when the master obligates himself to

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3—*Denver, etc. R. R. Co. v. Gustafson*, 21 Colo. 393, 41 Pac. 505. And see *Brow v. Boston, etc. R. R. Co.*, 157 Mass. 399, 32 N. E. 362.

4—*Georgia Pac. R. R. Co. v. Propst*, 85 Ga. 203, 4 So. 711; *Atlanta, etc. R. R. Co. v. West*, 121 Ga. 641, 49 S. E. 711, 104 Am. St. Rep. 179, 67 L. R. A. 701; *Church v. Chicago, etc. Ry. Co.*, 50 Minn. 218, 52 N. W. 647; *Evarts v. St. Paul, etc. Ry. Co.*, 56 Minn. 141, 57 N. W. 459, 45 Am. St. Rep. 460, 22 L. R. A. 663; *Longa v. Stanley Hod Elevator Co.*, 69 N. J. L. 31, 54 Atl. 251; *Wischam v. Rickard*, 136 Pa. St. 109; 20 Atl. 532, 20 Am. St. Rep. 900, 10 L. R. A. 97; *Langan v. Tyler*, 114 Fed. 716, 51 C. C. A. 503; *Cincinnati, etc. Ry. Co. v. Finnell*, 108 Ky. 135, 55 S. W. 902, 57 L. R. A. 266.

5—Ibid.

6—*Haluptzok v. Great Northern Ry. Co.*, 55 Minn. 446, 57 N. W.

144, 26 L. R. A. 739. See *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243.

7—A policeman being of opinion that the driver of defendant's omnibus was drunk ordered him off. The driver and conductor then called in a passer-by to drive and the latter by his negligent driving injured the plaintiff. The Queen's Bench held the defendant liable, on the ground that the emergency gave the defendant's servants implied authority to call in assistance. *Gwilliam v. Twist*, (1895) 1 Q. B. 557. On appeal the case was reversed on the ground that there was no implied authority unless there was a necessity and that, as the defendant's office was only a quarter of a mile away, no necessity existed. *Gwilliam v. Twist*, (1895) 2 Q. B. 84.

transport a person from one place to another safely and properly, and to protect him from injury from any source that human judgment and foresight are capable of providing against, and the master entrusts the performance of the duty he has so undertaken to discharge to his employes, he becomes responsible for their acts, whether negligent or malicious, and they continue in the line of their employment until their relation with the master is dissolved. The specified duty of the employe in such case may be very limited, but the scope of the employment is as broad as the obligations the master has assumed.¹⁸

If the servants of a master are sent to do work upon the property or premises of another, they will become the servants of the latter, if they work under his direction and control,⁹ otherwise not.¹⁰ And where the servants of one person are hired or loaned to another, they become the servants of the latter for the time being.¹¹ Where the defendant sent his son with a team to render gratuitous assistance to his neighbor in harvesting wheat and the son negligently drove over the plaintiff's child, it was held to be a question for the jury whether the son, at the time, remained the servant of his father, or became the servant of the neighbor, whom he was assisting.¹² As a child is by the law placed under the dominion of the parent, he is, while employed by the latter about his affairs, to be regarded as a servant; and so is a mere volunteer.¹³ And it follows, from what has been

8—*Lakin v. Oregon Pac. R. R.* gins *v. Western Union Tel. Co.*, 15 Ore. 220, 231, 15 Pac. 641. 156 N. Y. 75, 50 N. E. 500, 66 Am.

9—*Green v. Sansom*, 41 Fla. 94, St. Rep. 537; *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 25 So. 332; *Hastey v. Sears*, 157 691, 17 Am. St. Rep. 925.

Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267; *Atlantic Transport Co. v. Coneys*, 82 Fed. 177, 28 C. C. A. 388.

10—*Connelly v. Faith*, 190 Pa. St. 553, 42 Atl. 1024.

11—*Cotten v. Lindgren*, 106 Cal. 602, 39 Pac. 939, 46 Am. St. Rep. 255; *Brown v. Smith*, 86 Ga. 274, 12 S. E. 411, 22 Am. St. Rep. 456; *Delaware, etc. Co. v. Hardy*, 59 N. J. L. 35, 34 Atl. 986; *Hig-* 12—*Sacker v. Waddell*, 98 Md. 43, 56 Atl. 399, 103 Am. St. Rep. 374.

13—*Schouler, Dom. Rel.* 544-5; *Shearm. and Redf. on Neg.* § 106; *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243; *Everhart v. Terre Haute, &c., R. R. Co.*, 78 Ind. 290, 41 Am. Rep. 567; *Barstow v. Old Colony R. R. Co.*, 143 Mass. 535; *Mayton*

said above, that the agent in one's business, whether general or special, is in law a servant, and so is the officer of a private corporation.¹⁴ But this rule does not apply to a purely charitable corporation, having no capital stock and whose members receive no dividends or profits from its operations, and such a corporation is not liable for the torts or neglects of its servants in the performance of their duties.^{14a} The officer of a public corpora-

v. Texas, &c., R. R. Co., 63 Tex. 77, 51 Am. Rep. 637; *Blair v. Grand Rapids, &c., Co.*, 60 Mich. 124. Compare *Eason v. S. & E. T. Ry. Co.*, 65 Tex. 577, 57 Am. Rep. 606. See *Sherman v. Hannibal, &c., R. R. Co.*, 72 Mo. 62, 37 Am. Rep. 423; *Pittsburgh, &c., Co. v. Adams*, 105 Ind. 151; *Osborn v. Knox, &c., Co.*, 68 Me. 49. A wife is not liable for an assault upon the plaintiff by her husband, committed in her hotel, on the ground that he was her servant, since she cannot control or discharge him or remove him from her premises. *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148. A father is not liable for the acts or neglects of his son merely because of the relation. *Palm v. Ivorson*, 117 Ill. App. 535; *Reynolds v. Buck*, 127 Ia. 601.

14—*Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1, 71 S. W. 1055; *Dwinelle v. New York Central, etc.*, R. R. Co., 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224; *Schwarting v. Van Wie, etc., Co.*, 69 App. Div. 282, 74 N. Y. S. 747; *Lovick v. Atlantic Coast Line R. R. Co.*, 129 N. C. 427, 40 S. E. 191; *Gulf, etc., R. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

14a—*Hearne v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *McDonald v.* Mass. Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529; *Plant System Relief & Hospital Dept. v. Dickenson*, 118 Ga. 647, 45 S. E. 483; *Pepke v. Grace Hospital*, 130 Mich. 493, 90 N. W. 278; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 24 S. W. 1065. See *Benton v. Trustees of Boston City Hosp.*, 140 Mass. 13, 54 Am. Rep. 436; *Ulrich v. St. Louis*, 112 Mo. 138, 20 S. W. 466, 34 Am. St. Rep. 372; *Dunn v. Agricultural Society*, 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95; *ante*, p. 207, note. In considering whether the rule of *respondeat superior* should be extended to charitable corporations and institutions the supreme court of Connecticut says: “We think the law does not justify such an extension of the rule of *respondeat superior*. It is perhaps immaterial whether we say the public policy, which supports the doctrine of *respondeat superior* does not justify such extension of the rule; or say that the public policy which encourages enterprises for charitable purposes requires exemption from the operation of a rule based on legal fiction, and which, as ap-

tion in the discharge of the proper duties of his office, is not, in general, to be deemed the servant of the corporation;¹⁵ neither is any person who is employed in any capacity in the execution of

plied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant—whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty—is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong.” *Hearnes v. Waterbury Hospital*, 66 Conn. 98, 126, 33 Atl. 595, 31 L. R. A. 224.

15—*Arnold v. San Jose*, 81 Cal. 618, 22 Pac. 877; *Chope v. Eureka*, 78 Cal. 588, 21 Pac. 364; *Pitkin Co. v. Ball*, 22 Colo. 125, 43 Pac. 1000, 55 Am. St. Rep. 117; *Colwell v. Waterbury*, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; *Bailey v. Fulton Co.*, 111 Ga. 313, 36 S. E. 596; *Kinnare v. Chicago*, 171 Ill. 332, 49 N. E. 536; *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949; *Rock Island L. & M. Co. v. Elliott*, 59 Kan. 42, 51 Pac. 894; *Downing v. Mason Co.*, 87 Ky. 208, 8 S. W. 246, 12 Am. St. Rep. 473; *Sherman v. Vermillion*, 51 La. Ann. 880, 25 So. 538; *Clark v. Easton*, 146 Mass. 43, 14 N. E. 795; *Curran v. Boston*, 151 Mass. 505, 24 N. E. 781, 21 Am. St. Rep. 465, 8 L. R. A. 243; *Howard v. Worcester*, 153 Mass. 426, 27 N. E. 11, 25 Am. St. Rep. 651, 12 L. R. A. 160; *McCann v. Waltham*, 163 Mass. 344, 40 N. E. 20; *Taylor v. Avon*, 73 Mich. 604, 41 N. W. 703; *Murray v. Omaha*, 66 Neb. 279, 92 N. W. 299, 103 Am. St. Rep. 702; *Lefrois v. Monroe County*, 162 N. Y. 563, 57 N. E. 185; *Reynolds v. Board of Education*, 33 App. Div. 88, 53 N. Y. S. 75; *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; *Caspany v. Portland*, 19 Ore. 496, 24 Pac. 1036, 20 Am. St. Rep. 842; *Ford v. School District*, 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607; *Horton v. Newell*, 17 R. I. 571, 23 Atl. 910; *Chick v. Newberry Co.*, 27 S. C. 419, 3 S. E. 787; *Parks v. Greenville*, 44 S. C. 168, 21 S. E. 540; *O'Rourke v. Sioux Falls*, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789; *Conelly v. Nashville*, 100 Tenn. 262, 46 S. W. 565; *Andrews v. Hamilton Co.*, 105 Tenn. 399, 58 S. W. 483; *Bates v. Rutland*, 62 Vt. 178, 20 Atl. 278, 22 Am. St. Rep. 95, 9 L. R. A. 363; *Fry v. Albemarle Co.*, 86 Va. 195, 9 S. E. 1004, 19 Am. St. Rep. 879; *Commercial Elec. L. & P. Co. v. Tacoma*, 20 Wash. 288, 55 Pac. 219, 72 Am. St. Rep. 103; *Thomas v. Grafton*, 34 W. Va. 282, 12 S. E. 478, 26 Am. St. Rep. 924; *Brown v. Guyandotte*, 34 W. Va. 299, 12 S. E. 707. Such a corporation may be liable for acts of its officers, which it has specially authorized or afterwards ratified. *Horton v. Newell*, 17 R. I. 571, 23 Atl. 910; *Commercial Elec. L. & P. Co. v. Tacoma*, 20 Wash. 288, 55 Pac. 219, 72 Am. St. Rep. 103.

its police regulations,¹⁶ or in its fire department.¹⁷ But in the management of its own property *a public corporation comes under the same rules with all others, and its agents are its servants.¹⁸

The liability of a municipality for the acts or neglects of its officers and agents is thus summed up in a recent case: "The liability of cities and towns for the negligence of their officers or agents depends upon the nature of the power that the corporation is exercising when the damage complained of is sustained. A town acts in the dual capacities of an *imperium in imperio*,

16—Orlando *v.* Pragg, 31 Fla. 111, 12 So. 368, 34 Am. St. Rep. 17, 19 L. R. A. 196; Culver *v.* Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; Craig *v.* Charleston, 180 Ill. 154, 54 N. E. 184; Culver *v.* Streator, 34 Ill. App. 77; McFadden *v.* Jewell, 119 Ia. 321, 93 N. W. 302, 97 Am. St. Rep. 321; Peters *v.* Lindborg, 40 Kan. 654, 20 Pac. 490; Jolly's Admx. *v.* Hawesville, 89 Ky. 279, 12 S. W. 313; Conway *v.* Russell, 151 Mass. 581, 24 N. E. 1026. See post, p *740. The doctrine of *respondeat superior* does not apply to public agents charged with a duty which can be exercised only through the services of others. They are liable only for their own misconduct. Walsh *v.* Trustees, &c., 96 N. Y. 427; Donovan *v.* McAlpin, 85 N. Y. 185, 39 Am. Rep. 649.

"Sound public policy forbids that public officers should be held responsible for the negligence of those whom they are obliged to employ in the discharge of their duties in the execution of public works, when such officers are not chargeable with any want of diligence or due care on their part." Bowden *v.* Derby, 97 Me. 536, 540,

55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223. See O'Hare *v.* Jones, 161 Mass. 391, 37 N. E. 371. A municipality is not liable for its officer's trespass without color of authority, though in his official business. Kiernan *v.* Jersey City, 13 Atl. Rep. 170 (N. J.). But it is for its officers' negligence in performing ministerial as distinguished from judicial duties. Toledo *v.* Cone, 41 Ohio St. 149; Mulcairns *v.* Janesville, 67 Wis. 24: But see McCarthy *v.* Boston, 135 Mass. 197.

17—Davis *v.* Lebanon, 108 Ky. 688, 57 S. W. 471; Alexander *v.* Vicksburg, 68 Miss. 564, 10 So. 62; Blankenship *v.* Sherman, 33 Tex. Civ. App. 507.

18—See post, p. *738. Where a town kept a poor farm for the care of its own poor and also received there non-resident poor for compensation and derived other revenue from the farm, it was held liable for the negligence of its servants employed there. Neff *v.* Wellesley, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500. Compare Curran *v.* Boston, 151 Mass. 505, 24 N. E. 781, 21 Am. St. Rep. 465, 8 L. R. A. 243.

exercising governmental duties, and of a private corporation enjoying powers and privileges conferred for its own benefit. When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents, subject to their control, although they may be engaged in some work that will enure to the general benefit of the municipality. * * * On the other hand, where a city or town is exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence.¹⁹

The question whether one person is the servant of another arises out of a great variety of circumstances, and many cases are difficult of classification. A few additional illustrations are given: A person employéd to sell sewing machines on commission, who was to give his entire time to the business under the direction of the company, who was furnished with a wagon by the company, but furnished his own horse and harness, was held to be a servant of the company.²⁰ But, generally, persons employed to sell on commission, who conduct their business as they please, are not servants of the consignors or owners of the goods.²¹ One who hires convict labor is liable as master to a convict, "in respect to those incidents of the employment over which he has the same measure of control that a master ordina-

19—*Moffitt v. Asheville*, 103 N. C. 237, 254, 255, 9 S. E. 695, 14 Am. St. Rep. 810. To same effect: *Kinnare v. Chicago*, 171 Ill. 332, 49 N. E. 536; *Murray v. Omaha*, 66 Neb. 279, 92 N. W. 299, 103 Am. St. Rep. 702; *Parks v. Green-*

Davis v. Knoxville, 90 Tenn. 599, 18 S. W. 254.

20—*Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 S. C. Rep. 175, 33 L. Ed. 440.

21—*Abrahams v. California Powder Works*, 5 N. M. 479, 23 Pac. 785, 8 L. R. A. 378.

rily has, but not as to those features of the employment over which he is essentially deprived of such control.'²² A father was employed by the defendant company to mine coal at a specified price per ton, and had his boy to assist in the work, with the knowledge and consent of the company. The boy was held to be a servant of the company as respects the duty owed him by the company.²³ The lessor of a railroad is not liable as master, for injuries to the employes of the lessee.²⁴ Persons employed in the construction of a church are not servants of a building committee who look after the work.²⁵ A Pullman car porter is a servant of the railroad company hauling the car, as respects passengers on the train,²⁶ but he is held not a servant of the railroad company in the sense that makes him a co-servant of the regular train employes.²⁷ Where one furnishes a carriage and driver for the use of another, the presumption is that the driver is the servant of the owner.²⁸ Additional cases are referred to in the margin.²⁹

- 22—Baltimore Boot & Shoe Mfg. Co. v. Jamar, 93 Md. 404, 49 Atl. 847, 86 Am. St. Rep. 428.
- 23—Ringue v. Oregon Coal Co., 44 Ore. 407, 75 Pac. 703.
- 24—East Line, etc. Ry. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L. R. A. 567.
- 25—Wilson v. Clark, 110 N. C. 364, 14 S. E. 962.
- 26—Railroad Co. v. Ray, 101 Tenn. 1, 46 S. W. 554.
- 27—Hughson v. Richmond, etc. R. R. Co., 2 App. D. C. 98.
- 28—Sacker v. Waddell, 98 Md. 43, 56 Atl. 399, 103 Am. St. Rep. 374.
- 29—Gaines v. Bard, 57 Ark. 615, 22 S. W. 570, 38 Am. St. Rep. 266; Railway Co. v. Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; Cotter v. Lindgren, 106 Cal. 602, 39 Pac. 939, 46 Am. St. Rep. 255; Dore v. Babcock, 74 Conn. 425, 50 Atl. 1016; Wells v. Washington Market Co., 8 Mackey, 385; St. Johns, etc. R. R. Co. v. Shalley, 33 Fla. 397, 14 So. 890; Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. Rep. 440, 24 L. R. A. 483; Brow v. Boston, etc. R. R. Co., 157 Mass. 399, 32 N. E. 362; Boyle v. Columbian Fire Roofing Co., 182 Mass. 93, 64 N. E. 726; McDonough v. Lanpher, 55 Minn. 501, 57 N. W. 152, 43 Am. St. Rep. 541; Hanna v. Railway Co., 88 Tenn. 310, 12 S. W. 718, 6 L. R. A. 727; Quinn v. Railroad Co., 94 Tenn. 713, 30 S. W. 1036, 45 Am. St. Rep. 767, 28 L. R. A. 552; Railroad Co. v. Ward, 98 Tenn. 123, 38 S. W. 727, 60 Am. St. Rep. 848; Big Stone Gap Iron Co. v. Keton, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839. As to special policemen see Railway Co. v. Hackett, 58 Ark. 381, 24 S.

The Master's Liability to Third Persons—General Statement. When the relation is found to exist, the question of the master's liability next presents itself. And it will readily occur to every mind that the master cannot, in reason, be held responsible generally for whatever wrongful conduct the servant may be guilty of. A liability so extensive would make him guarantor of the servant's good conduct, and would put him under a responsibility which prudent men would hesitate to assume, except under the stress of necessity. Even the parent is not made chargeable generally for the torts of his child; and if he cannot justly be held responsible for the conduct of one whom the law submits to his general direction and discipline, much less could another be held liable, generally, for the acts of a servant over whom his control is comparatively slight, and who is not submitted to his disciplinary authority.

The maxim applied here is the familiar one: *Qui facit per alium facit per se.* That which the superior has put the inferior in motion to do, must be regarded as done by the superior himself, and his responsibility is the same as if he had done it in person.³⁰ The maxim covers acts of omission as well as of commission, and embraces all cases in which the failure of the servant to observe the rights of others in the conduct of the master's business has been injurious. It is not limited therefore to the cases in which the injurious conduct was directed by the master

W. 881, 41 Am. St. Rep. 105; Illinois Steel Co. v. Novak, 84 Ill. App. 641; Healey v. Lothrop, 178 Mass. 151, 59 N. E. 659, 86 Am. St. Rep. 471; Healey v. Lothrop, 171 Mass. 263, 50 N. E. 540; Tucker v. Erie Ry. Co., 69 N. J. L. 19, 54 Atl. 557. Whether the relation of master and servant exists in a given case held a question of fact. Bernstein v. Roth, 145 Ill. 189, 34 N. E. 37. See Sacker v. Waddell, 98 Md. 43, 56 Atl. 399, 103 Am. St. Rep. 374.

30—"The law which makes one responsible for an act not his

own, because the actual wrong-doer is his servant is based on a rule of public policy." This rule of public policy is the rule of *respondeat superior* and the practical ground of the rule is that "On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit." Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224.

himself; for so restricted it would be of little moment. A tort which one directs or advises another to commit he is always responsible for, jointly with the guilty agent, and his liability does not depend upon the subordination of the agent, but upon the direct connection of the adviser with the wrong. A master must be responsible further, or the relation would be immaterial in the law of legal wrongs. In brief, the rules of his liability are as stated in the following pages:

*1. **Intentional Acts.** The master is liable for the [*626] acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond. When, therefore, a merchant places a clerk in his store to sell his goods, and the clerk disposes of them with false representations of their qualities, the purchaser who brings suit for the fraud need not concern himself with the question whether the fraud was directed or not. His injury does not depend upon that, and it neither affects his equity to compensation, or the moral obligation of the merchant to respond.³¹ So when a railway company puts a conductor in charge of its train, and he purposely and wrongfully ejects a passenger from the cars, the railway company must bear the blame and pay the damages. In this case the company chooses its servant and puts him in charge of its business, and the injury is done while performing it, and in the exercise of the power conferred. If the corporate authorities did not direct the act to be done, they nevertheless put a person of their own selection in a position requiring the exercise of discretionary authority, and by entrusting him with the authority and with the means of doing the injury, have, through his agency, caused it to be done. As between the company and the passenger, the right of the latter to compensation is unquestionable.³² So for an assault upon a passen-

31—*Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380. 32—*Eastern Counties R. Co. v. Broom*, 6 Exch. 314, 327; *Goff v.*

ger by the conductor, brakeman or other employe.³² A railroad company is liable for the use of excessive force by its employees,

Great Nor. R. R. Co., 3 E. & E. 672; Seymour *v.* Greenwood, 7 H. & N. 355; Bayley *v.* M. S. & L. R. Co., L. R. 7 C. P. 415; S. C. on Appeal, L. R. 8 C. P. 148; Moore *v.* Met. R. Co., L. R. 8 Q. B. 36; Philadelphia & Reading R. R. Co. *v.* Derby, 14 How. 468; Chamberlain *v.* Chandler, 3 Mason, 242; Baltimore, &c., R. R. Co. *v.* Bloch-er, 27 Md. 277; Goddard *v.* Grand Trunk R. R. Co., 57 Me. 202, 2 Am. Rep. 39; Moore *v.* Fitchburg R. R. Co., 4 Gray 465, 64 Am. Dec. 83; Ramsden *v.* Boston, &c., R. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Drew *v.* Sixth Ave. R. R. Co., 26 N. Y. 49; Passenger R. R. Co. *v.* Young, 21 Ohio St. 518, 8 Am. Rep. 78; Pa. R. R. Co. *v.* Van-diver, 42 Pa. St. 365, 82 Am. Rep. 520; Pittsburgh, &c., R. Co. *v.* Donahue, 70 Pa. St. 119; Healey *v.* City R. R. Co., 28 Ohio St. 23; Southern Kansas Pac. Ry. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766. See *post*, p. *768. So for the willful misconduct of a brakeman, although he has no authority to eject passengers. Wabash Ry. Co. *v.* Savage, 110 Ind. 156; Chicago &c., R. R. Co. *v.* Flexman, 103 Ill. 546. See Terre Haute &c., R. R. Co. *v.* Jackson, 81 Ind. 19; McKinley *v.* Chicago &c., R. R. Co., 44 Ia. 314, 24 Am. Rep. 748. *Contra*, Marion *v.* Chi-cago, &c., Ry. Co., 59 Ia. 428, 44 Am. Rep. 687. In Townsend *v.* N. Y. Central, &c., R. R. Co., 56 N. Y. 295, 15 Am. Rep. 419, following Hamilton *v.* Third Ave. R. R. Co., 53 N. Y. 25, it is decided that when the conductor, acting in the line of what he believes his duty, removes from the cars a man who refuses to pay his fare or show his ticket, the company cannot be held responsible for more than the actual damages. So Hays *v.* Houston &c., R. R. Co., 46 Tex. 272. And see Hagan *v.* Providence, &c., R. R. Co., 3 R. I. 88, 62 Am. Dec. 377; Frederick *v.* Marquette &c., R. R. Co., 37 Mich. 342, 26 Am. Rep. 531. A policeman called by a railroad company to remove a passenger for refusing to pay fare makes the company liable if he uses ex-cessive force, but if the man and his friends resists and the officer to quell the riot acts as a peace officer, the company is not liable. Jardine *v.* Cornell, 50 N. J. L. 485, 14 Atl. 590. And see cases *post*, p. *630, note; Fohrmann *v.* Consolidated Traction Co., 63 N. J. L. 391, 43 Atl. 892.

33—Birmingham Ry. & Elec. Co. *v.* Mason, 137 Ala. 342, 34 So. 207; Central of Georgia Ry. Co. *v.* Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; Winne-gar *v.* Central Pass. Ry. Co., 85 Ky. 547, 4 S. W. 237; Johnson *v.* Detroit, etc., Ry. Co., 130 Mich. 453, 90 N. W. 274; O'Brien *v.* St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592; Dwinelle *v.* New York Cen-tral, etc., R. R. Co., 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224; Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879; Ma-honing Valley Ry. Co. *v.* De Pascale, 70 Ohio St. 179, 71 N. E. 633, 65 L. R. A. 860; Railroad Co. *v.* Ray, 161 Tenn. 1, 46 S. W. 554; Dillingham *v.* Russell, 73 Tex. 47,

in ejecting a trespasser from its cars.³⁴ And generally the master is liable for the willful or intentional wrongs of his servant

11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; Texas Midland R. R. Co. v. Dzan, 98 Tex. 517; Texas, etc., Ry. Co. v. Williams, 62 Fed. 440, 10 C. C. A. 463. If a conductor shoots a passenger in self defense, the company is not liable for his death. New Orleans, etc., R. R. Co. v. Jopes, 142 U. S. 18, 12 S. C. Rep. 109, 35 L. Ed. 919. If the servant who causes the injury is free from all civil or criminal liability therefore, the master is entitled to like immunity and the rule applies to common carriers. *Ibid.* See, further, cases of assault: Springer Tr. Co. v. Smith, 16 Lea, 498; Coggins v. Chicago, &c., R. R. Co., 18 Ill. App. 620; Stewart v. Brooklyn, &c., Co., 90 N. Y. 588, 43 Am. Rep. 185. Where a passenger went for his baggage and an altercation arose over a charge for excess of weight, during which the depot agent shot and killed him, the company was held liable. Daniel v. Petersburg R. R. Co., 117 N. C. 592, 23 S. E. 327. So for an assault upon a passenger while waiting in a station. Seawill v. Carolina Central R. R. Co., 132 N. C. 856, 44 S. E. 610.

34—Smith v. Savannah, etc., Ry. Co., 100 Ga. 96, 27 S. E. 725; Citizens St. Ry. Co. v. Willooby, 134 Ind. 563, 33 N. E. 627; West Jersey, etc., R. R. Co. v. Welsh, 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. Rep. 659; Cool v. Southern Ry. Co., 128 N. C. 333, 38 S. E. 925; Enright v. Pittsburg Junction R. R. Co., 198 Pa. St. 166, 47 Atl. 938, 82 Am. St. Rep. 795, 53 L. R. A. 330; Galveston, etc., Ry. Co. v. Zantzinger, 93 Tex. 64, 53 S. W. 379, 77 Am. St. Rep. 829, 47 L. R. A. 282; Higgins v. Watervliet, &c., Co., 46 N. Y. 23, 7 Am. Rep. 293; Sanford v. Eighth Av. R. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Coleman v. New York, &c., R. R. Co., 106 Mass. 160; Seymour v. Greenwood, 7 H. & N. 354; New York, &c., Ry. Co. v. Haring, 47 N. J. L. 137, 54 Am. Rep. 123. See Kansas Pacific R. R. Co. v. Kessler, 18 Kan. 523. So for a station agent's ejecting a man from a station. Johnson v. Chicago, &c., Ry. Co., 58 Ia. 348. So where a servant removes a passenger from a part of a boat where he has no right to be. Steamboat Co. v. Brockett, 121 U. S. 637. As to liability for causing arrest of passenger, see Wilke v. Louisville, etc., R. R. Co., 116 Ga. 309, 42 S. E. 525; Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 303; Mulligan v. New York, etc., R. R. Co., 129 N. Y. 506, 29 N. E. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791; Palmeri v. Manhattan Ry. Co., 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136; Penny v. New York Central, etc., R. R. Co., 34 App. Div. 10, 53 N. Y. S. 1043; Duggan v. Baltimore, etc., R. R. Co., 159 Pa. St. 248, 28 Atl. 182, 39 Am. St. Rep. 672; Eichengreen v. Railroad Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702; Missouri, etc., Ry. Co. v. Warner, 19 Tex. Civ. App. 463, 49 S. W. 254; Cunningham v. Seattle Elec. Ry. & P. Co., 3

committed in the performance of his duty as servant, or within the scope of his employment.³⁵

[*627] ***2. Intentional Acts: When Master Not Liable.** But the liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do. To illustrate again with the case of the merchant: While he may justly be held responsible for a fraudulent sale by his clerk of the merchandise entrusted to him for sale, there could be neither reason nor justice in compelling the merchant to respond if the fraud were practiced by

[*628] the *clerk in a sale not of the merchandise, but of his own horse or watch. So if the conductor of a train of

Wash. 471, 28 Pa. 745. False imprisonment for failure to obey an unreasonable rule. *Corbett v. Twenty-Third St. Ry. Co.*, 42 Hun, 587.

35—*Railway Co. v. Hackett*, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; *Western Union Tel. Co. v. Satterfield*, 34 Ill. App. 386; *Field v. Kane*, 99 Ill. App. 1; *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. Rep. 440, 24 L. R. A. 483; *Oakland City Agricultural Soc. v. Bingham*, 4 Ind. App. 545, 31 N. E. 383; *Efroymson v. Smith*, 29 Ind. App. 451, 63 N. E. 328; *McDonald v. Franchen*, 102 Ia. 496, 71 N. W. 427; *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19; *Haehl v. Wabash R. R. Co.*, 119 Mo. 325, 24 S. W. 737; *Knowles v. Bullene*, 71 Mo. App. 341; *Fifth Ave. Bank v. Forty-Second St., etc.*, R. R. Co., 137 N. Y. 231, 33 N. E. 378, 33

Am. St. Rep. 712, 19 L. R. A. 331; *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169, 59 L. R. A. 478; *Dupre v. Childs*, 52 App. Div. 306, 65 N. Y. S. 179; *Schwarting v. Van Wie, etc., Co.*, 69 App. Div. 282, 74 N. Y. S. 747; *Lovick v. Atlantic Coast Line R. R. Co.*, 129 N. C. 427, 40 S. E. 191; *Gulf, etc., R. R. Co. v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; *Bryan v. Adler*, 97 Wis. 124, 72 N. W. 368, 65 Am. St. Rep. 99, 41 L. R. A. 658; *Bergman v. Hendrickson*, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47; *Cobb v. Simon*, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909. A trespass done or suffered by a servant on the land of a third person, without the master's authority, cannot render the master liable, though the servant, in what he did, had in view the master's interest, and supposed he was

cars leaves his train to beat a personal enemy, or from mere wantonness to inflict any injury, the difference between his case and that in which the passenger is removed from the cars is obvious. The one trespass is the individual trespass of the conductor, which he has stepped aside from his employment to commit; the other is a trespass committed in the course of the employment in the execution of orders the master has given, and apparently has the sanction of the master, and contemplates the furtherance of his interests.³⁶ In determining whether or

furthering it. *Horner v. Lawrence*, 37 N. J. 46. But when a servant took another's hay to feed his master's horses for lack of other food, the master was held liable. *Potulni v. Saunders*, 37 Minn. 517, 35 N. W. 379.

36—After a passenger had left the car and reached the sidewalk, the motorman, whom he had insulted, went out and hit him with the car hook. Held that the company was not liable. *Palmer v. Winston-Salem Ry. & Elec. Co.*, 131 N. C. 250, 42 S. E. 604. So where the motorman got off and assaulted the driver of a team ahead, because he would not get off the track. *Rudgeair v. Reading Traction Co.*, 180 Pa. St. 333, 36 Atl. 859. In *Crocker v. New London, &c.*, R. R. Co., 24 Conn. 249, the servant of the defendant, after a person had been put off the cars, kicked him in the face when he attempted to get on again. Held, to be the tort of the servant only. See, also, *Evanston, &c., R. R. Co. v. Baum*, 26 Ind. 70; *Molloy v. New York, &c., R. R. Co.*, 10 Daly 453; *Smith v. Memphis, &c., Co.*, 1 S. W. Rep. 104 (Tenn.); *Central Ry. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425; *McGilvray v. West End St. Ry. Co.*, 164 Mass. 122, 41 N. E. 116; *McKay v. Hudson River Line*, 56 App. Div. 201, 67 N. Y. S. 651. But where a passenger left a street car because insulted by the driver who pursued and beat him in the street, it was held to be one continuous wrong for which the company was liable. *Wise v. Covington, etc., St. Ry. Co.*, 91 Ky. 537, 16 S. W. 351. The master is liable where one employed to guard property shoots one retreating from it. *Golden v. Newbrand*, 52 Ia. 59, 35 Am. Rep. 257. So where a conductor stops his train, chases and seizes a boy and puts him on the train. *Gilliam v. South, &c., R. R. Co.*, 70 Ala. 268. And where an agent issues false shipping receipts for the benefit of a firm of which he is a member and to the injury of plaintiff. *Erb v. Grt. West. Ry. Co.*, 5 Can. S. C. R. 179. In *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507, the master was held not liable where the servant willfully drove over another person and injured him. So in *Vernon v. Cornwell*, 104 Mich. 62, 62 N. W. 175. This doctrine was applied in *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 480; S. C. in error, 2 N. Y. 479, to a case where the master of a vessel purposely ran into and injured an-

not the master shall be held responsible, the motive of the servant in committing the act is important; for if he supposes he is acting in furtherance of the master's interest under a discretionary authority, which the master has conferred upon him, the case will generally have an aspect quite different from what it would present if it were manifest that malice were being indulged, irrespective of the master's interest.³⁷ But the motive is not conclusive. A man may purposely defraud another [*629] in selling his master's goods, that he may gratify his private malice against the purchaser; but if the master had empowered him to make the sale, he must take the responsibility of any wrong committed in making it. The test of the master's responsibility is not the motive of the servant, but whether that which he did was something his employment

other, and in Illinois Cent. R. R. Co. v. Downey, 18 Ill. 259, to one where the conductor of a train of cars purposely increased his speed to run into stock on the track. So where an engineer backed his engine towards a street car crossing the track in order to frighten the passengers and plaintiff was injured in jumping from the car. Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, 27 Am. St. Rep. 223, 15 L. R. A. 475. To same effect: Canton Cotton Warehouse Co. v. Pool, 78 Miss. 147, 28 So. 823, 84 Am. St. Rep. 620; International, etc., Ry. Co. v. Cooper, 88 Tex. 607, 32 S. W. 517. But the master is held liable for the willful act of his servant in driving by a team so as to hit it. Schaefer v. Osterbrink, 67 Wis. 495; and compare Fick v. Chicago, &c., Co., 68 Wis. 469, 60 Am. Rep. 878. Compare, also, Toledo, &c., R. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Chicago, &c., R. R. Co. v. Dickson, 63 Ill. 151, 14 Am. Rep. 114;

Howe v. Newmarch, 12 Allen, 49; Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560; Richberger v. Am. Express Co., 73 Miss. 161, 18 So. 922, 55 Am. St. Rep. 522, 31 L. R. A. 390; City Delivery Co. v. Henry, 139 Ala. 161, 34 So. 389. Railroad company liable for act of engineer in maliciously blowing whistle whereby plaintiff's horse frightened. Skipper v. Clifton Mfg. Co., 58 S. C. 143, 36 S. E. 509; Texas, etc., Ry. Co. v. Scoville, 62 Fed. 730, 10 C. C. A. 479,

37—In case of doubt the test may well be whether he was acting *bona fide* in furtherance of the master's interest. Birmingham Water Works Co. v. Hubbard, 85 Ala. 179, 4 So. 607. The master is not liable in punitive damages for the malicious or wanton act of his servant, unless he has authorized or ratified the act; Maisenbacker v. Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; Woodward v. Raglan, 5 Mackey, 220; Fohrmann v. Consolidated Traction

contemplated, and something which, if he should do it lawfully, he might do in the employer's name.³⁸

Says HOAR, J.: "If the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable."^{38a}

Co., 63 N. J. L. 391, 43 Atl. 892; Gulf, etc., Ry. Co. v. Reed, 80 Tex. 362, 15 S. W. 1105, 26 Am. St. Rep. 749.

38—"If one of the defendants, while engaged in the prosecution of the business of the other, carelessly or negligently set fire to the prairie, or even purposely with a view to benefit or protect the interests of the employer, the latter would be liable for the consequences." TREAT, Ch. J., in Johnson *v.* Barber, 10 Ill. 425. If the servant is not acting within the scope of his employment, his purpose to serve the master will not make the latter liable. Marion *v.* Chicago, &c., Ry. Co., 59 Ia. 428. A boy willfully struck by a car driver cannot recover of the railway company for the injury. Pittsburgh, &c., R. R. Co. *v.* Donahue, 70 Pa. St. 119. See Williams *v.* Pullman, &c., Co., 40 La. Ann. 87, 3 So. 631. A bank is not liable for a theft by the cashier of moneys left in his charge. Foster *v.* Essex Bank, 17 Mass. 479, 510, 9 Am. Dec. 168. See Isaacs *v.* Third Ave. R. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; Jackson *v.* Second Ave. R. R. Co., 47 N. Y. 274, 7 Am. Rep. 448; Moore *v.* Sanborne, 2 Mich. 520, 59 Am. Dec. 209. Nor for the false report of its officer made without express directions, solely

for his own benefit. Brit. Mut. Bkg. Co. *v.* Charnwood, L. R. 18 Q. B. D. 714, and cases pp. 201-206 *ante*. Master not liable for theft by servant. Searle *v.* Parke, 68 N. H. 311, 34 Atl. 744. If a baggageman, in the execution of his orders to keep intruders out of his car, throws an intruder off, the company is *prima facie* liable; but if he acts willfully and maliciously in doing so, outside and in excess of his duty, he alone is responsible. Rounds *v.* Delaware, &c., R. R. Co., 64 N. Y. 129, 21 Am. Rep. 597.

38a—Howe *v.* Newmarch, 12 Alen, 49, 57. See Little Miami R. R. Co. *v.* Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Evansville, &c., R. R. Co. *v.* Baum, 26 Ind. 70; Fraser *v.* Freeman, 43 N. Y. 566, 3 Am. Rep. 740. In Mali *v.* Lord, 39 N. Y. 381, 100 Am. Dec. 448, a merchant was sued for the wrongful act of his superintendent in having the plaintiff arrested and searched on a charge of stealing goods from the merchant. It was held that the merchant was not liable and the general doctrine is stated that the master is not liable for acts of the servant not directed by him, and which the master himself, if present, would not be authorized to do. See, also, Mallach *v.* Ridley, 43 Hun, 336. But this rule is a lit-

[*630] *But "it is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged, when the wrong was committed, and that the act com-

tle vague, and cannot always be true. No one is authorized, in the exercise of his rights, to employ unnecessary force; but in *Rounds v. Delaware, &c., R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597, it was held that the master was liable where the servant, in pursuance of a general authority, made use of unnecessary force to eject a trespasser. Compare *Hibbard v. N. Y. & Erie R. R. Co.*, 15 N. Y. 456. The removal of trespassers being within the implied authority of a brakeman, if he kicks one off a moving train recklessly, the master is liable. *Hoffman v. New York, &c., R. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337. See *Kansas City, &c., Co. v. Kelley*, 36 Kan. 655, 14 Pac. 172; *Carter v. Louisville, &c., Co.*, 98 Ind. 552, 49 Am. Rep. 780. And see cases *ante*, p. 1021, note. So a farmer is liable for his servant's killing a trespassing cow in driving it out of his field. *Evans v. Danielson*, 53 Md. 245. It is, as is said in the leading case of *McManus v. Crickett*, 1 East, 106, "where a servant quits sight of the object for which he was employed, and 'without having in view his master's orders, pursues that which his own malice suggests,'" that the master will not be liable for his acts. See *Southwick v. Estes*, 7 Cush. 385; *Higgins v. Watervliet, &c., Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *Philadelphia, &c., R. R. Co. v. Derby*, 14 How. 468; *Wood v.* Detroit, &c., Co., 52 Mich. 402, 52 Am. Rep. 59; *Marion v. Chicago, &c., Ry. Co.*, 59 Ia. 428, 44 Am. Rep. 687; *Centr. Ry. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709. In *Redding v. Sou. Car. R. R. Co.*, 3 S. C., (N. S.) 1, 16 Am. Rep. 681, the defendant was held responsible for an assault upon a passenger committed by a servant without any warrant in his instructions therefor. In *Toledo, &c., R. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489, a railroad company was made to pay damages for the lawless act of an engineer in frightening horses by blowing off steam. To the same effect is *Chicago, &c., R. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114. It requires some care and caution to distinguish the three cases last mentioned from *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507, and other cases which have followed it. Persons who sent servants to the house of another to remove certain chattels if a sum due them was not paid, were held liable for willful assaults of the servants, it appearing that "such assaults were committed in the execution of the authority given them by the defendants, and for the purpose and as a means of carrying out their orders." *Levi v. Brooks*, 121 Mass. 501. And, see *Croft v. Alison*, 4 B. & Ald. 590. Compare *Oxford v. Peter*, 28 Ill. 434; *Ramsden v. Boston, &c., R. R. Co.*, 104 Mass. 117; *S. C. 6 Am. Rep. 200*.

plained of was done in the course of his employment. The master, in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is justly held responsible *when the servant, [*631] through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.³⁹

3. Unintentional Wrongs. The wrong for which the master shall respond need not be an intentional wrong; indeed the liability is commonly all the plainer if it is not. When the servant, in the course of his employment, so negligently or with such want of skill conducts himself in or manages the business that an injury to some third person results in consequence, the master is responsible for his negligence or want of skill. Every man owes to every other the duty of due care to avoid injury; and whether he manages his business in person or entrusts it to

39—*Rounds v. Delaware, &c.,* R. R. Co., 64 N. Y. 129, 134, 21 Am. Rep. 597. Same approved *Lewis v. Schulte*, 98 Ia. 341, 67 N. W. 266. Compare *Horner v. Lawrence*, 37 N. J. 46. See, also, *Cohen v. Dry Dock, &c., Co.*, 69 N. Y. 170. If the acts were done in the course and within the scope of the employment and with a view to further the master's interests, even though they were willful, the master is liable. *Mott v. Consumers Ice Co.*, 73 N. Y. 543. So where an engineer, within the scope of his power but negligently, puts off his engine one riding thereon at his invitation in violation of master's rules, although the invitation was beyond his authority. *Chicago, &c., Ry. Co. v. West*, 125 Ill. 320, 17 N. E. 788. So where a servant willfully tested a boiler for a higher pressure than the master indicated and it exploded. *Ochsenbein v. Shapley*, 85 N. Y. 214. For reckless acts the master is liable but not for malicious and intentional injuries. *Penn. Co. v. Toomey*, 91 Pa. St. 256; *Cleveland v. Newsom*, 45 Mich. 62; *Wood v. Detroit, &c., Co.*, 52 Mich. 402, 50 Am. Rep. 259. See *Marion v. Chicago, &c., Ry. Co.*, 59 Ia. 428, 44 Am. Rep. 687; *Deihl v. Ottenville*, 14 Lea, 191.

others, he must, at his peril, see that this obligation is observed. If another has suffered an injury through the negligent or improper management of the business, the right of action arises irrespective of the agency by which the business was conducted.⁴⁰

40—Shearm. & Redf. on Neg., § 59; O'Connell *v.* Strong, Dudley, 265; Puryear *v.* Thompson, 5 Humph. 397; Luttrell *v.* Hazen, 3 Sneed, 20; Campbell *v.* Staiert, 2 Murph. 389; Harriss *v.* Mabry, 1 Ired. 240; Brasher *v.* Kennedy, 10 B. Mon. 28; Morgan *v.* Bowman, 22 Mo. 538; Brackett *v.* Lubke, 4 Allen, 138, 81 Am. Dec. 694; McDonald *v.* Snelling, 14 Allen, 290, 92 Am. Dec. 768; Andrus *v.* Howard, 36 Vt. 248, 84 Am. Dec. 680; Tuel *v.* Weston, 47 Vt. 634; Sanford *v.* Eighth Ave. R. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Quinn *v.* Power, 87 N. Y. 535, 41 Am. Rep. 392; Toledo, &c., R. R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489; Hays *v.* Miller, 77 Pa. St. 238, 18 Am. Rep. 445; Smith *v.* Webster, 23 Mich. 298; Corrigan *v.* Union Sugar Refinery, 98 Mass. 577, 96 Am. Dec. 685; Reynolds *v.* Hanrahan, 100 Mass. 313; Pickens *v.* Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; Cincinnati, &c., R. R. Co. *v.* Smith, 22 Ohio St. 227, 10 Am. Rep. 729; Evansville, &c., R. R. Co. *v.* Baum, 26 Ind. 70; Evansville, &c., R. R. Co. *v.* Duncan, 28 Ind. 441; Mahoney *v.* Mahoney, 51 Cal. 118; Pittsburgh, &c., R. R. Co. *v.* Kirk, 102 Ind. 399, 52 Am. Rep. 676; Towle *v.* Pacific Imp. Co., 98 Cal. 342, 33 Pac. 207; Clowdis *v.* Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; Pierce *v.* Connors, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279; Pueblo Elec. St. Ry. Co. *v.* Sherman, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116; Geer *v.* Darrow, 61 Conn. 220, 23 Atl. 1087; Ritchie *v.* Waller, 63 Conn. 155, 28 Atl. 29, 38 Am. St. Rep. 361, 27 L. R. A. 161; Loomis *v.* Hollister, 75 Conn. 718, 55 Atl. 561; Jones *v.* Belt, 8 Houst. 562, 32 Atl. 723; Christian *v.* Irwin, 125 Ill. 619, 17 N. E. 707; Andrews *v.* Bodecker, 126 Ill. 605, 18 N. E. 651, 9 Am. St. Rep. 649; Loyacano *v.* Jurgens, 50 La. Ann. 441, 23 So. 717; American District Tel. Co. *v.* Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479; Young *v.* South Boston Ice Co., 150 Mass. 527, 23 N. E. 326; Smith *v.* Spitz, 156 Mass. 319, 31 N. E. 5; Gunderson *v.* N. W. El. Co., 47 Minn. 161, 49 N. W. 649; Whitehead *v.* St. Louis, etc., Ry. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; Wickham *v.* Wolcott, 1 Neb. (unofficial) 160, 95 N. W. 366; Danbeck *v.* N. J. Traction Co., 57 N. J. L. 463, 31 Atl. 1038; McCann *v.* Consolidated Traction Co., 59 N. J. L. 481, 36 Atl. 888, 38 L. R. A. 236; Swinarton *v.* Le Boutillier, 7 Misc. 639, 28 N. Y. S. 53; Dunn *v.* Agricultural Society, 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754; Harriman *v.* Railway Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Pittsburgh, etc., Ry. Co. *v.* Shields, 47 Ohio St. 382, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464; Chase *v.* Spartanburg Ry.

*The term *business*, as here employed, is not restricted [*632] in its meaning to business in the ordinary sense, but embraces everything the servant may do for the master, with his express or implied sanction.

Co., 64 S. C. 212, 41 S. E. 899; Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855; Euting *v.* Chicago, etc., Ry. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158; Euting *v.* Chicago, etc., Ry. Co., 120 Wis. 651, 98 N. W. 944; Engelhart *v.* Farrant, (1897) 1 Q. B. 240. If one directs his vendee's servant to do certain work in getting out the goods sold in the usual manner, he is not liable, as master, if the servant injures a third person by doing the work carelessly. McCullough *v.* Shoneman, 105 Pa. St. 169. The negligence must arise in the course of the employment. If the servant depart from the employment for purposes of his own, the master is not responsible for his negligence, even though he may at the time be making use of the master's implements or vehicles which have been entrusted to him in the business. See Mitchell *v.* Crassweller, 13 C. B. 237; Aycrigg *v.* New York & Erie R. R. Co., 30 N. J. 460; Bard *v.* Yohn, 26 Pa. St. 482; Wiltse *v.* State, &c., Co., 63 Mich. 639, 30 N. W. 370; McCann *v.* Tillinghast, 140 Mass. 327; Bowler *v.* O'Connell, 162 Mass. 319, 38 N. E. 498, 44 Am. St. Rep. 359, 27 L. R. A. 173; Perlstein *v.* Am. Exp. Co., 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959; McCarthy *v.* Timins, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; Long *v.* Richmond, 68 App. Div. 466, 73 N. Y. S. 912; Branch *v.* International, etc., Ry. Co., 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844; Robinson *v.* McNeill, 18 Wash. 163, 51 Pac. 355; Chicago, etc., Ry. Co. *v.* Bryant, 65 Fed. 969, 13 C. C. A. 249; Sanderson *v.* Collins, (1904) 1 K. B. 628. So where a porter for his own convenience threw a bundle of soiled linen out of a moving car and hit a person. Walton *v.* New York, &c., Co., 139 Mass. 556. Section men kindled a fire on the right of way to warm their dinners and left it burning. It spread to adjoining property. The master not liable. Morier *v.* St. Paul, &c., Ry. Co., 31 Minn. 351, 47 Am. Rep. 793. So where a village officer for his own advantage piled tile upon a city lot and it fell and injured a woman on an adjacent lot. Palmer *v.* St. Albans, 60 Vt. 427, 13 Atl. 569. But where a man was allowed to use another's wagon on their joint account and after delivering an article in the course of such employment was bringing back a load for himself and ran over plaintiff, the owner was held liable. Mulvehill *v.* Bates, 31 Minn. 364, and see to same effect, Rahn *v.* Singer Mfg. Co., 26 Fed. Rep. 912. A druggist's liability for his clerk's mistake in putting up a prescription depends on the want of ordinary care in the clerk. Beckwith *v.* Oatman, 43 Hun, 265; Burgess *v.* Sims Drug Co., 114 Ia. 275, 86 N. W. 307, 89 Am. St. Rep. 359, 54 L. R. A. 364; Osborne *v.* McMasters, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698.

4. Disobedience of Orders. It is immaterial to the master's responsibility that the servant at the time was neglecting some rule of caution which the master had prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and that the injury which actually resulted is attributable to the servant's failure to observe the directions given him. In other words, it is not sufficient for the master to give proper directions; he must also see that they are obeyed.⁴¹

[*633] *Recurring once more to the case of the conductor of a railway train: Let it be supposed that the company has given the most careful and exact directions for a cautious management, and that, amongst other things, it has directed that no train shall leave a station until orders to that effect are received by telegraph from the managing office; but that, notwithstanding these directions, the conductor, confident of his ability to reach the next station without injury, puts his train in motion, and a collision occurs. The case supposed is one in which no moral wrong is attributable to the managing officers; but the fact remains that in the management of their own business through agents an injury has been inflicted on others. That they trusted a servant who has ventured to disobey instructions is their misfortune, but it ought not also to be the misfortune of others who had no voice in his selection, and who had no concern in the question who should manage the company's business beyond the

41—Philadelphia, &c., R. R. Co. v. Derby, 14 How. 468; Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560; Southwick v. Estes, 7 Cush. 385; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Higgins v. Watervliet, P. R. Co., 46 N. Y. 23, 7 Am. Rep. 293; Paulmier v. Erie R. Co., 34 N. J. 151; Johnson v. Centr. Vt. R. R. Co., 56 Vt. 707; Mound City, &c., Co. v. Conlon, 92 Mo. 221; Postal Tel. Co. v. Brantley, 107 Ala. 683, 18 So. 321; Driscoll v. Carlin, 50 N. J. L. 28, 11 Atl. 482; Trimble v. New York Central, etc., R. R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; Long v. Richmond, 68 App. Div. 466, 73 N. Y. S. 912; McClung v. Dearborne, 134 Pa. St. 396, 19 Atl. 698, 19 Am. St. Rep. 708, 8 L. R. A. 204; Texas Trunk Ry. Co. v. Johnson, 75 Tex. 158, 12 S. W. 482; Cook v. Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52; Reinke v. Bentley, 90 Wis. 457, 63 N. W. 1055; Engelhart v. Farrant, (1897) 1 Q. B. 240.

common concern of all the public that it should not be managed to their injury.⁴²

The negligence of a farm servant may afford another apt illustration. The farmer directs his servant to burn over his fallow, but to do so when the wind is in the east, because the adjoining premises on the east would be especially exposed to damage if any other time were chosen. The servant thoughtlessly or recklessly sets the fire when the wind is blowing from the west, and the calamity the farmer had intended to guard against befalls the neighbor. The disobedience is culpable in the servant, and the master, having taken those precautions which, if observed, would have prevented the injury, is free from fault, but, nevertheless, his duty to his neighbor to so use his own as *not to injure the neighbor has failed in performance, and the law leaves him to bear the consequences.⁴³ It would be equally preposterous on the one hand to

42—Philadelphia, &c., R. R. Co. v. Derby, 14 How. 468. See Powell v. Deveney, 3 CUSH. 300, 50 Am. Dec. 738; Weed v. Panama R. R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Luttrell v. Hazen, 3 Sneed, 20. In Harriman v. Pittsburgh, &c., Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507, servants in disregard of instructions placed signal torpedoes on the track, where there was no need of so doing, and a lad was hurt by one exploding. The master was held liable on the ground that the servants were doing the master's work, though deviating from the line of duty in disobeying orders. See also, Pittsburg, etc., Ry. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464; Euting v. Chicago, etc., Ry. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Ry. 936, 60 L. R. A. 158; Euting v. Chicago, etc., Ry. Co., 120 Wis. 651, 98 N. W. 944.

43—Wickham v. Wolcott, 1 Neb. (unofficial) 160, 95 N. W. 366. The following, among a great number of cases, illustrate this general rule: Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312; Keedy v. Howe, 72 Ill. 133; Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Rounds v. Delaware, &c., R. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Kreiter v. Nichols, 28 Mich. 496; Barden v. Felch, 109 Mass. 154; Coleman v. New York, &c., R. R. Co., 106 Mass. 160; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Redding v. S. C. R. R. Co., 3 Sou. Car. (N. s.) 1, 16 Am. Rep. 681; Heenrich v. Pullman, &c., Co., 20 Fed. Rep. 100. See Ochsenbein v. Shapley, 85 N. Y. 214. A servant ordered to go to a place and kill a certain animal, killed the only one he found but the wrong one. The master held liable. Maier v. Randolph, 33 Kan. 340. But where a driver, ordered to go to

hold the master responsible whose servant should purposely set fire to a neighbor's house and thereby destroy it, and on the other to excuse him from the consequences of a fire which he had directed, because the agent he employed was not as careful as he had instructed him to be.⁴⁴

Scope of Employment. "In determining whether a particular act was done in the course of a servant's employment, it is proper to inquire whether he was at the time serving his master. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred, or fairly implied from the nature of the employment and the duties incident to it; and, in determining the question of authority, we are to regard the object, purpose, and end of the employment. Naturally, it would be impossible to lay down a general rule by which all cases could be decided, for in every instance it becomes a mixed question of law and fact, to be settled by reference to the peculiar facts and circumstances of the case."⁴⁵ In view of the importance of this question some further illustrations are added.

Where a servant, in driving home his master's team, took a roundabout way, in order to do an errand of his own, and left the team unhitched which started off and collided with the plaintiff, the master was held liable.⁴⁶ In driving the team by the

a place and return by a certain way, goes to the place and then, at the request and for the convenience of another, goes four miles further on, the master is not liable for an injury caused by the horses at such further point. *Stone v. Hill*, 45 Conn. 44.

44—*In Andrews v. Green*, 62 N. H. 436, the defendant had a number of men clearing a field under an overseer, and gave orders to set no fire unless the defendant was present. One of the men set a fire, which spread to the plaintiff's property. Held not within scope of employment and defendant not liable.

45—*Theisen v. Porter*, 56 Minn. 555, 563, 58 N. W. 265. And see *Palmer v. St. Albans*, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125; *Euting v. Chicago, etc., Ry. Co.*, 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158. "The test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business." *Davis v. Houghtellin*, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737.

46—*Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 38 Am. St. Rep. 361, 27 L. R. A. 161; *Loomis v.*

roundabout way the servant was held to be in the execution of his master's business within the scope of his employment. But the contrary is held in Massachusetts.⁴⁷ And where the servant was employed to post bills in F. and drove fifteen miles away on his own business and there left the bills in the road, whereby the plaintiff's horse was frightened and killed, the master was held not liable.⁴⁸ So where the servant, without the knowledge of the master, takes the latter's horse and carriage for his own purposes and injures one by his negligence.⁴⁹ So where a yard foreman, without authority so to do, took an engine and car and gave himself and fellow servants a free ride to a meeting and one of the company was injured by its negligent management.⁵⁰ So where a section boss loaned a hand car to children to play with, whereby one was injured.⁵¹ Where a section foreman used a hand car in his own business and negligently injured one at a crossing, the company was held not liable in Texas,⁵² but in a similar case in New Jersey the company was held liable, on the ground that it was the company's duty to maintain the crossing in a safe condition and to see that the hand car was not used in such a way as to endanger those rightfully using the crossing.⁵³

A servant is not acting in the line of his employment when he

Hollister, 75 Conn. 718, 55 Atl. 561; Lovejoy *v.* Campbell, 16 S. D. 231, 92 N. W. 24.

47—McCarthy *v.* Timins, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490. In this case the driver of a public hack had been told to take his team to the stable. In going there he turned off from the direct route a few hundred feet to go to a saloon. While he was in the saloon the horses ran and injured the plaintiff. And see Perlstein *v.* Am. Exp. Co., 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959.

48—Smith *v.* Spitz, 156 Mass. 319, 31 N. E. 5,

49—Clark *v.* Buckmobile Co.,

107 App. Div. 120; Quigley *v.* Thompson, 211 Pa. St. 107; Sanderson *v.* Collins, (1904) 1 K. B. 628. So where a servant loaned his master's horse to a friend. Long *v.* Richmond, 68 App. Div. 466, 73 N. Y. S. 912.

50—Chicago, etc., Ry. Co. *v.* Bryant, 65 Fed. 969, 13 C. C. A. 249.

51—Robinson *v.* McNeill, 18 Wash. 163, 51 Pac. 355.

52—Branch *v.* International, etc., Ry. Co., 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844.

53—Salisbury *v.* Erie R. R. Co., 66 N. J. L. 233 (Ct. of E. & A.), 50 Atl. 117, 88 Am. St. Rep. 480, 55 L. R. A. 578.

invites a boy to ride with him in his master's vehicle,⁵⁴ or on his master's horse,⁵⁵ and the master is not liable for an injury to the boy as a result of the invitation. But when the master by his servant is operating a machine intrinsically dangerous, especially to small children, such as a hand car, street car, tug, boat or horse power, it is generally held to be the master's duty to keep such children away from the danger, and it is a breach of this duty if the servant in charge invites or permits them to use it.⁵⁶

Where the servant uses the master's machinery or property to perpetrate a practical joke, in consequence of which a person is injured, the master is not liable.⁵⁷ "When a servant acts without any reference to the service for which he is employed, and

54—Driscoll *v.* Scanlon, 165 Mass. 348, 43 N. E. 100, 52 Am. St. Rep. 523; Schulwitz *v.* Delta Lumber Co., 126 Mich. 559, 85 N. W. 1075.

55—Bowler *v.* O'Connell, 162 Mass. 319, 38 N. E. 498, 44 Am. St. Rep. 359, 27 L. R. A. 173. Here the servant invited a boy of six to ride on a horse he was leading to water. The court says: "The true test of liability on the part of the defendants is this: Was the invitation given in the course of doing their work, or for the purpose of accomplishing it? Was the act done for the purpose, or as a means, of doing what Frank was employed to do? If not, then in respect to that act he was not in the course of the defendant's business. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master." p. 320. And see Formall *v.* Standard Oil Co., 127 Mich. 496, 86 N. W. 946.

56—Hand car, Burke *v.* Ellis,

105 Tenn. 702, 58 S. W. 855; Missouri Pac. Ry. Co. *v.* Rodgers, 89 Tex. 675, 36 S. W. 243. Street car, Pueblo Elec. St. Ry. Co. *v.* Sherman, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116; Danbeck *v.* N. J. Traction Co., 57 N. J. L. 463, 31 Atl. 1038. Tug boat, Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52. In Railway Co. *v.* Bolling, 59 Ark. 395, 27 S. W. 492, 43 Am. St. Rep. 38, 27 L. R. A. 190, where a boy, permitted to ride on a hand car, had his hand caught in the cogs, the company was held not liable. See the following where men invited by employes to ride on train were injured: Alabama, etc., Ry. Co. *v.* McAfee, 71 Miss. 70, 14 So. 260; Stringer *v.* Missouri Pac. Ry. Co., 96 Mo. 299, 9 S. W. 905; Smith *v.* Louisville, etc., Ry. Co., 124 Ind. 394, 24 N. E. 753; Whitehead *v.* St. Louis, etc., Ry. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409.

57—Stephenson *v.* Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, 27 Am. St. Rep. 223, 15 L. R. A. 475; Canton Cotton Warehouse Co. *v.*

not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the master is not responsible in that case for either the act or omission of the servant.⁵⁸ Railroad employes, while scuffling on the station platform, accidentally hit the plaintiff and caused him to fall and break his leg. The company was held not liable, the acts of the employes not being done in pursuance of any authority, express or implied, nor incident to the service.⁵⁹ So where the foreman of a switching crew found a torpedo and exploded it on the track, just for a prank, whereby the plaintiff was injured.⁶⁰ But it is held that a person who employs such dangerous agencies in his business is bound to exercise great care in their custody and use and, if he entrusts them to servants who use them unnecessarily and carelessly, whereby injury results, he is liable for the damage.⁶¹ Where the defendant directed his

Pool, 78 Miss. 147, 28 So. 823, 84
Am. St. Rep. 620; International,
etc., Ry. Co. v. Cooper, 88 Tex.
607, 32 S. W. 517.

58—Stephenson *v.* Southern
Pac. Co., 93 Cal. 558, 29 Pac. 234,
27 Am. St. Rep. 223, 15 L. R. A.
475.

59—Goodloe *v.* Memphis, etc.,
R. R. Co., 107 Ala. 233, 18 So.
166, 54 Am. St. Rep. 67, 29 L. R.
A. 729.

60—Sullivan *v.* Louisville, etc.,
R. R. Co., 115 Ky. 447, 74 S. W.
171. See Obertoni *v.* Boston, etc.,
R. R. Co., 186 Mass. 481, 71 N. E.
980, 67 L. R. A. 422.

61—Harriman *v.* Railway Co.,
45 Ohio St. 11, 12 N. E. 451, 4
Am. St. Rep. 507; Pittsburgh,
etc., Ry. Co. *v.* Shields, 47 Ohio
St. 387, 24 N. E. 658, 21 Am. St.
Rep. 840, 8 L. R. A. 464; Euting
v. Chicago, etc., Ry. Co., 116 Wis.
13, 92 N. W. 358, 96 Am. St. Rep.
936, 60 L. R. A. 158; Euting *v.*
Chicago, etc., Ry. Co., 120 Wis.
651, 98 N. W. 944. The rule ap-

plied to a railroad tricycle. Bar-
more *v.* Vicksburg, etc., R. R. Co.,
85 Miss. 426, 38 So. 210. In 116
Wis. 13, the court says: “The
principle that a master is not re-
sponsible for the torts of his ser-
vant when the servant has de-
parted from his employment is
well understood. If this princi-
ple were as easy of application as
it is of statement, we should have
little difficulty; but, like many
another simple and plain princi-
ple, its application to concrete
facts is sometimes very difficult.
The question, generally, is wheth-
er the servant has departed from
his employment, or whether he
has departed from or neglected
a duty in the line of that employ-
ment. In the first case the prin-
cipal is not responsible for his
acts, and in the second case he is.
Applying the principle to the
present case, supposing that the
jury had found that the engineer
placed the torpedo on the track,
it seems quite plain that a verdict

son to sprinkle the lawn with a hose and the latter, in a spirit of mischief, turned the hose on the plaintiff's horse hitched in the street opposite, whereby the horse was frightened and ran away, the defendant was held not liable. In deciding the case the court of errors and appeals of New Jersey says: "An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent, malicious or mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master in any sense and should not be deemed to be so as a matter of law. As to it, the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it the servant alone should be held responsible."⁶²

As a general rule it is not within the scope of employment for a servant to institute criminal proceedings for the larceny or embezzlement of the master's property, or for malicious injury thereto, or for frauds perpetrated upon the master.⁶³ But in many cases such authority is inferred from the duties as-

for the plaintiff might be sustained. The engineer's duty was to operate the engine; to take care of the torpedoes, and see that they were used only at the proper times and places. The company had placed in his charge these dangerous agencies, and authorized him to use them at proper times. In placing one of them upon the track as he did, he was doing what the company had directly authorized him to do; but he was not doing it at the time or place authorized by the master. He was not beyond the scope of his employment, but he was willfully and wantonly violating a duty resulting from his employment, namely, his duty to safely keep and properly use the torpedoes." pp. 17, 18.

62—*Evers v. Krouse*, 70 N. J. L. 653, 655, 58 Atl. 181. And see *City Delivery Co. v. Henry*, 139 Ala. 161, 34 So. 389; *Vernon v. Cornwell*, 104 Mich. 62, 62 N. W. 175; *Skipper v. Clifton Mfg. Co.*, 58 S. C. 143, 36 S. E. 509; *Texas, etc., Ry. Co. v. Scoville*, 62 Fed. 730, 10 C. C. A. 479.

63—*Wilke v. Louisville, etc., R. R. Co.*, 116 Ga. 309, 42 So. 525; *Oberne v. O'Donnell*, 35 Ill. App. 180; *Singer Mfg. Co. v. Hancock*, 74 Ill. App. 556; *Flora v. Russell*, 138 Ind. 153, 37 N. E. 593; *Hern v. Ia. State Agricultural Soc.*, 91 Ia. 97, 58 N. W. 1092, 24 L. R. A. 655; *Larson v. Fidelity Mut. Life Ass.*, 71 Minn. 101, 73 N. W. 711; *Laird v. Farwell*, 60 Kan. 512, 57 Pac. 98; *Lafith v. New Orleans, etc., R. R. Co.*, 43 La. Ann. 34, 8

signed the agent or from the peculiar circumstances of the case.⁶⁴ Where the plaintiff had purchased a railroad ticket and received her change, and the agent then charged her with passing counterfeit money and demanded other money, which being refused, he put his hands on her and told her not to move until he got an officer, the company was held liable. "What he did was in the endeavor to protect and to recover his employer's property and if, in his conduct, he committed an error which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury."⁶⁵ And where clerks in stores arrest or detain persons on the charge of theft committed on the spot the proprietor is liable, it being part of their duty to protect the master's goods.⁶⁶ And "when one places his property in the

So. 701, 12 L. R. A. 337; Govaski v. Downey, 100 Mich. 429, 59 N. W. 167; Tucker v. Erie Ry. Co., 69 N. J. L. 19, 54 Atl. 557; Mulligan v. New York, etc., R. R. Co., 129 N. Y. 506, 29 N. E. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791; Penny v. New York Central, etc., R. R. Co., 34 App. Div. 10, 53 N. Y. S. 1043; Markley v. Snow, 207 Pa. St. 447, 56 Atl. 990, 64 L. R. A. 685; Cunningham v. Seattle Elec. Ry. & P. Co., 3 Wash. 471, 28 Pac. 745. So in case of malicious garnishment. Alabama State Land Co. v. Reed, 99 Ala. 19, 10 So. 238.

64—Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Dwyer v. St. Louis Transit Co., 108 Mo. App., 152, 83 S. W. 303; Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. 169, 59 L. R. A. 478; Dupre v. Childs, 52 App. Div. 306, 65 N. Y. S. 179; Schwarting v. Van Wie, etc., Co., 69 App. Div. 282, 74 N. Y. S. 747; Lovick v. Atlantic Coast Line R.

R. Co., 129 N. C. 427, 40 S. E. 191; Eichengreen v. Railroad Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702; Gulf, etc., R. R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; Missouri, etc., Ry. Co. v. Warner, 19 Tex. Civ. App. 463, 49 S. W. 254. And see Duggan v. Baltimore, etc., R. R. Co., 159 Pa. St. 248, 28 Atl. 182, 39 Am. St. Rep. 672.

65—Palmeri v. Manhattan Ry. Co., 133 N. Y. 261, 265, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136. And see Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. Rep. 440, 24 L. R. A. 483.

66—Woodward v. Ragland, 5 Mackey, 220; Field v. Kane, 99 Ill. App. 1; Efroymson v. Smith, 29 Ind. App. 451, 63 N. E. 328; McDonald v. Franchere Bros., 102 Ia. 496, 71 N. W. 427; Knowles v. Bullene, 71 Mo. App. 341; Cobb v. Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909.

possession and under the control of another, the right to protect that possession, as well as the right to prevent any interference with its immediate use, springs out of the possession and out of the duty to control and manage it," and the master is liable for the manner in which the servant exercises this authority and for errors of judgment in so doing.⁶⁷ Thus the defendant's servant, having charge of his farm, had difficulty in keeping the plaintiff's hogs out of the crops and thereupon hauled them to a ranch of the defendant's in an adjoining state. It was held that as the defendant could not raise crops without keeping the hogs out, his servant had implied authority to prevent their encroachments and the defendant was liable for his manner of doing so.⁶⁸ Where the defendant's driver struck with his whip a boy who was stealing a ride and caused him to fall under the wheels, it was held that if the driver struck the boy to remove him from the wagon it was within the scope of his employment and the defendant was liable, but if it was merely to gratify a personal malice he was not.⁶⁹ Where a railroad company employed a man to keep trespassers off a bridge, it was held liable for the death of a trespasser shot by the employee.⁷⁰ But where the defendant had property stored on a part of a wharf belonging to a third party and set his servant to guard it, and the latter shot and wounded the plaintiff, who with two others was on the wharf, but none of whom had interfered with the property, the defendant was held not liable.⁷¹

- 67—Galveston, etc., Ry. Co. v. Co., 128 N. C. 333, 38 S. E. 925; Zantzinger, 93 Tex. 64, 53 S. W. 379, 77 Am. St. Rep. 829, 47 L. R. A. 282; Smith v. Savannah, etc., Ry. Co., 100 Ga. 96, 27 S. E. 725; Citizens' St. R. R. Co. v. Willoey, 134 Ind. 563, 33 N. E. 627; Oakland City Agricultural, etc., Soc. v. Bingham, 4 Ind. App. 545, 31 N. E. 383; Enright v. Pittsburg Junction R. R. Co., 198 Pa. St. 166, 47 Atl. 938, 82 Am. St. Rep. 795, 53 L. R. A. 330; West Jersey, etc., R. R. Co. v. Welsh, 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. Rep. 659; Cook v. Southern Ry.
- 68—Barrett v. Oechsner, 92 Tex. 588, 50 S. W. 562, 71 Am. St. Rep. 880.
- 69—Brenan v. Merchant, 205 Pa. St. 258, 54 Atl. 891; Hyman v. Tilton, 208 Pa. St. 641, 57 Atl. 1124.
- 70—Haehl v. Wabash Ry. Co., 119 Mo. 325, 24 S. W. 737. And see Railway Co. v. Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105.
- 71—Holler v. Ross, 68 N. J. L.

It is not, as a general rule, within the scope of the servant's employment to commit an assault upon a third person and the master is not liable for such an assault, though committed while the servant was about his master's business.⁷² A workman employed to move bales of cotton from the sidewalk to the defendant's warehouse waved his hook at some boys playing about the bales, when the hook slipped off the handle and hit the plaintiff, who stood by, watching but not interfering, and put out his eye. The act was held outside the servant's employment, and the master not liable.⁷³ So where some boys placed obstructions on a street car track and then hid themselves and the motor-man threw a stone in the direction of the hiding place and hit the plaintiff.⁷⁴ So where the driver of an ice wagon hit a boy over the head because he had broken the ice axe.⁷⁵ "It is not within the scope of the authority of a servant," says the court, "to whose custody his master's property has been confided, to undertake to secure it from future injury by committing the illegal act of inflicting personal chastisement on persons who have done damage to it in the past." But where a bar keeper assaulted a customer in order to collect pay for drinks, the master was held liable.⁷⁶ So when the assault is made to protect the master's property from trespass or spoliation being at the time committed.⁷⁷ And so in case of an assault upon passengers to whom the master owes the duty of safe carriage.⁷⁸

324 (Ct. of errors and appeals), 75—*Brown v. Boston Ice Co.*, 53 Atl. 472, 59 L. R. A. 943. 178 Mass. 108, 59 N. E. 644, 86

72—*Callahan v. Hyland*, 59 Ill. App. 347; *McDermott v. Am. Brewing Co.*, 105 La. 124, 29 So. 498, 83 Am. St. Ry. 225, 52 L. R. A. 684; *Johanson v. Pioneer Fuel Co.*, 72 Minn. 405, 75 N. W. 719; *Collins v. Butter*, 179 N. Y. 156, 71 N. E. 746; *Meehan v. Morewood*, 52 Hun, 566, 5 N. Y. S. 710.

73—*Guille v. Campbell*, 200 Pa. St. 119, 49 Atl. 938, 86 Am. St. Rep. 705, 55 L. R. A. 111.

74—*Dolan v. Hubinger*, 109 Ia. 408, 80 N. W. 514.

75—*Rahmel v. Lehndorff*, 142 Cal. 681, 76 Pac. 659, 100 Am. St. Rep. 154.

76—*Bergman v. Hendrickson*, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47. And see *ante*, p. 1035, note 65; *Richberger v. Am. Exp. Co.*, 73 Miss. 161, 18 So. 922, 55 Am. St. Rep. 522, 31 L. R. A. 390; *Ziegenheim v. Smith*, 116 Ill. App. 80.

77—See *ante*, p. 1036, note 67.

78—*Ante*, p. 1021, note 36.

Where the master owes a special duty to the plaintiff and entrusts the performance of that duty in whole or in part to his servant, the master is liable for any violation of the duty by the servant whether the same is negligent or willful and malicious. Thus the defendant had a contract with the plaintiff to deliver to it pure milk for use in its business of manufacturing butter and cheese and knew that it was to be mixed with other milk. The defendant's servant out of malice towards the defendant and without his knowledge delivered adulterated milk whereby the products of the plaintiff's factory were of inferior quality and its business greatly damaged. The defendant was held liable for all the damages resulting from the wrong and the court sums up its conclusions in the syllabus as follows:

1. "A master is liable for the malicious acts of his servant whereby others are injured, if the acts are done within the scope of the employment and in the execution of the service for which he was engaged by the master."

2. "Where a master owes to a third person the performance of some duty, as to do or not to do a particular act, and commits the performance of the duty to a servant, the master cannot escape responsibility if the servant fails to perform it, whether such failure be accidental or willful, or whether it be the result of negligence or malice. Nor is the case altered if it appear that the malice was directed to the master."⁷⁹

To render the master liable the servant must be at the time engaged in the master's service. Where the conductor and motorman of a car were changed at a certain point and the new men had taken their respective positions on the car and the old conductor gave the signal to start whereby the plaintiff, who was in the act of boarding the car, was injured, it was held that the old conductor had ceased to be in the master's service and that the company was not liable for his act.⁸⁰ Some additional cases in reference to scope of employment are referred to in the margin.⁸¹

79—Stranhan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634. 80—Lima Ry. Co. v. Little, 67 Ohio St. 91, 65 N. E. 861.

81—Birmingham Water Works

The foregoing rules seem to be just and require support from no reasoning, except such as would readily suggest itself to any

Co. *v.* Hubbard, 85 Ala. 179, 4 So. 807, 7 Am. St. Rep. 35; Towle *v.* Pacific Imp. Co., 98 Cal. 342, 33 Pac. 207; Clowdis *v.* Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; Pierce *v.* Connors, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279; Geer *v.* Darrow, 61 Conn. 220, 23 Atl. 1087; Maisenbacker *v.* Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; Jones *v.* Belt, 8 Houst. 562, 32 Atl. 723; Christian *v.* Irwin, 125 Ill. 619, 17 N. E. 707; Andrews *v.* Bodecker, 126 Ill. 605, 18 N. E. 651, 9 Am. St. Rep. 649; Healy *v.* Patterson, 123 Ia. 73, 98 N. W. 576; Walker *v.* Culman, 9 Kan. App. 691, 59 Pac. 606; Loyacano *v.* Jurgens, 50 La. Ann. 441, 23 So. 717; American District Tel. Co. *v.* Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479; Barabasz *v.* Kabat, 86 Md. 23, 37 Atl. 720; Boyer *v.* Coxen, 92 Md. 366, 48 Atl. 161; Hall *v.* Poole, 94 Md. 171, 50 Atl. 703; Young *v.* South Boston Ice Co., 150 Mass. 527, 23 N. E. 326; Wiltse *v.* Slate Road Bridge Co., 63 Mich. 639, 30 N. W. 370; Walker *v.* Hannibal, etc., R. R. Co., 121 Mo. 575, 26 S. W. 360, 42 Am. St. Rep. 547, 24 L. R. A. 363; Searle *v.* Parke, 68 N. H. 311, 34 Atl. 744; Turley *v.* Boston, etc., R. R. Co., 70 N. H. 348, 47 Atl. 261; McCann *v.* Consolidated Traction Co., 59 N. J. L. 481, 36 Atl. 888, 38 L. R. A. 236; Fehrmann *v.* Consolidated Traction Co., 63 N. J. L. 391, 43 Atl. 892; Fifth Ave. Bank *v.* Forty-Second St., etc., R. R. Co., 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331; Mc-Clung *v.* Dearborne, 134 Pa. St. 396, 19 Atl. 698, 19 Am. St. Rep. 708, 8 L. R. A. 204; Cobb *v.* Columbia, etc., R. R. Co., 37 S. C. 194, 15 S. E. 878; Williams *v.* Gobble, 106 Tenn. 367, 61 S. W. 51; Gulf, etc., Ry. Co. *v.* Reed, 80 Tex. 362, 15 S. W. 1105, 26 Am. St. Rep. 749; Palmer *v.* St. Albans, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125; Reinke *v.* Bentley, 90 Wis. 457, 63 N. W. 1055; Winkler *v.* Fisher, 95 Wis. 355, 70 N. W. 477; Bryan *v.* Adler, 97 Wis. 124, 72 N. W. 368, 65 Am. St. Rep. 99, 41 L. R. A. 658; Deck *v.* Baltimore, etc., R. R. Co., 100 Md. 168; Berry *v.* Boston El. Ry. Co., 188 Mass. 536; Lesch *v.* Great Northern Ry. Co., 93 Minn. 435, 100 N. W. 965; Peterson *v.* Middlesex, etc., Traction Co., 71 N. J. L. 296; Cobb *v.* Simon, 124 Wis. 467, 102 N. W. 891; Cheshire *v.* Bailey, (1905) 1 K. B. 237.

In Brown *v.* Jarvis Engineering Co., 166 Mass. 75, 43 N. E. 1118, 55 Am. St. Rep. 382, 32 L. R. A. 605, the defendant contracted to put in a brick foundation for a printing press in a certain building, and sent a foreman and three men to do the work. The plaintiff came with rolls of paper to be delivered into the basement of the building and the defendant's work had to be suspended while the delivery was being made. To hasten the delivery the defendant's foreman ordered his men to assist the plaintiff and the latter was injured by the negligence of one of them. It was held that the assistance

thoughtful mind. Proceeding further with our subject we encounter questions which are more difficult, and rules a concurrence in which is by no means universal. They will be found, however, to be rules firmly grounded in authority, and they probably subserve the general interest better than any which could be substituted in their place. The rules here referred to relate to the liability of the master to the servant himself, where the latter has been injured in his service.

General Rule: Master Not Liable to Servant. The rule is now well settled that, in general, when a servant, in the execution of his master's business, receives an injury, which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself.

The reason most generally assigned for this rule is that the servant, when he engages in the employment, does so in view of all the incidental hazards, and that he and his employer, [*635] when *making their negotiations, fixing the terms and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing on their stipulations. As the servant then knows that he will be exposed to the incidental risk, "he must be supposed to have contracted that, as between himself and the master, he would run this risk."⁸²

Whether this reason would be sufficient for all cases, if it were a matter of indifference to the general public whether the servant should have redress or not, may be matter of doubt; but it is supplemented by another, which considers the case from the standpoint of public interest. That reason is this: that the opposite doctrine would be unwise, not only because it would subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business, but also because it "would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on

was not within the scope of the 82—ALDERSON, B., in Hutchinson-employment of the men and that son v. Railway Co., 5 Exch. 343, the defendant was not liable. 351.

behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against the master for damages could possibly accord."⁸³ The rule is therefore, one of general public policy, and there are grounds of public interest which make it of high importance. In many employments the public are compelled to rely upon the caution and diligence of servants as the chief protection against accidents which may prove destructive of life or limb; and any rule of law which would give the servant a remedy against the master for any injury resulting to himself from such an accident, instead of compelling him to rely for his protection upon his own vigilance, must necessarily tend in the direction of an abatement of his vigilance, and in the same degree to increase the hazards to others. The case of carriers of persons is the most common and most forcible illustration of this remark. It is of the highest importance in that employment that every one *who has a duty or service to perform upon which [*636] the safety of others may depend, whether in the capacity of master or servant, should be under all reasonable inducements to discharge or perform it with fidelity and prudence, and that no one should be tempted to imperfect vigilance by any promise the law might make to compensate him for injuries against which his own caution might, perhaps, have protected not himself alone, but others also. The inducement to vigilance is sufficiently furnished, in the case of the master, by compelling him to respond to third persons for all injuries, whether caused by his own negligence or by that of his servants; but in the case of a servant it is supplied mainly by this rule, which, by denying him the remedy that is allowed to third persons, makes it his special interest to protect others, since it is only in doing so that he protects himself.

83—ABINGER, Ch. B., in Priestly Cox, 21 Ill. 20, 26, 71 Am. Dec. v. Fowler, 3 M. & W. 1, 6; BREESE, 298; Lawler *v.* Androscoggin R. J., in Illinois Cent. R. R. Co. *v.* R. Co., 62 Me. 463, 16 Am. Rep.

Assumption of Risk—General Rules. By virtue of the contract of service, the servant assumes the usual and ordinary risks incident to the employment;⁸⁴ also such as are obvious and patent to a person of ordinary observation.⁸⁵ As to what constitutes an obvious or patent risk it has been said: "It is one so patent that it would be instantly recognized by a person familiar with the business. It is a risk about which there can be no difference of opinion in the minds of intelligent persons accus-

492; *Hanrathy v. Nor. Cent. R. R.* v. Bennington, etc., R. R. Co., 61 Co., 46 Md. 280.

84—*Lovell v. De Bardelaben C. & I. Co.*, 90 Ala. 13, 7 So. 756; *Colorado Midland Ry. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701; *Minty v. Union Pac. Ry. Co.*, 2 Idaho, 471, 21 Pac. 660; *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329, 33 N. E. 944; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956; *Swanson v. Lafayette*, 134 Ind. 625, 33 N. E. 1033; *Smith v. Sellers*, 40 La. Ann. 527, 4 So. 333; *Boyer v. Eastern Ry. Co.*, 87 Minn. 367, 92 N. W. 326; *Lucey v. Hannibal Oil Co.*, 129 Mo. 32, 31 S. W. 340; *Evans Laundry Co. v. Crawford*, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814; *Henderson v. Williams*, 66 N. H. 405, 23 Atl. 365; *Neely v. S. W. Cotton Seed Oil Co.*, 13 Okl. 356, 75 Pac. 537; *Stager v. Troy Laundry Co.*, 38 Ore. 480, 63 Pac. 645, 53 L. R. A. 459; *Benson v. New York, etc.*, R. R. Co., 23 R. I. 147, 49 Atl. 689; *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430, 50 Atl. 841; *McKeever v. Homestake Min. Co.*, 10 S. D. 599, 74 N. W. 1053; *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah, 468, 11 Pac. 612; *Carbin's Admr.*

Vt. 348, 17 Atl. 491; *Stewart v. Ohio Riv. R. R. Co.*, 40 W. Va. 188, 20 S. E. 922; *Skidmore v. W. Va.*, etc., R. R. Co., 41 W. Va. 293, 23 S. E. 713; *Frangiose v. Horton*, 26 R. I. 291; *Richards v. Riverside Iron Works*, 56 W. Va. 510.

85—Iowa Gold Min. Co. v. Diefenthaler, 32 Colo. 391, 76 Pac. 981; *Ryan v. Chelsea Paper Mfg. Co.*, 69 Conn. 454, 37 Atl. 1062; *Daniel v. Forsythe*, 106 Ga. 568, 32 S. E. 621; *Gunning System v. La Pointe*, 212 Ill. 274, 72 N. E. 393; *Rietman v. Stolle*, 120 Ind. 314, 22 N. E. 304; *McCarthy v. Mulgrew*, 107 Ia. 76, 77 N. W. 527; *Hanson v. Hammell*, 107 Ia. 171, 77 N. W. 839; *Flockhart v. Hocking Coal Co.*, 126 Ia. 576, 102 N. W. 494; *Southern Kansas Ry. Co. v. Moore*, 49 Kan. 616, 31 Pac. 138; *Missouri, etc., Ry. Co. v. Puckett*, 62 Kan. 770, 64 Pac. 631; *Bogenschutz v. Smith*, 84 Ky. 330; *Kelly v. Barber Asphalt Co.*, 93 Ky. 363, 20 S. W. 271; *Wilson v. Chesapeake & W. Co.*, 117 Ky. 567, 78 S. W. 453; *Baltimore, etc., R. R. Co. v. State*, 41 Md. 268; *Jones v. Mfg. Co.*, 92 Me. 565, 43 Atl. 512, 69 Am. St. Rep. 535; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, 15 N. E. 576; *Yates v. McCullough Iron Co.*, 69 Md. 370, 16 Atl. 280; *Toomey v. Eu-*

tomed to the service.⁸⁶ A master has a right to conduct his business in a dangerous way, if it is not unlawful and does not interfere with the rights of others and if the danger is apparent, the servant assumes the risk.⁸⁷ It is also held that a servant assumes such risks, incident to the employment, as he might discover by the exercise of ordinary care and prudence on his part.⁸⁸ But this probably means no more than that he assumes

- reka Iron & S. Works, 89 Mich. 249, 50 N. W. 842; *Mushinski v. Vincent*, 135 Mich. 26, 97 N. W. 43; *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; *Harff v. Green*, 168 Mo. 308, 67 S. W. 576; *Missouri Pac. R. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044; *Foley v. Jersey City Elec. Lt. Co.*, 54 N. J. L. 411, 24 Atl. 487; *Conway v. Furst*, 57 N. J. L. 645, 32 Atl. 380; *McDonald v. Standard Oil Co.*, 69 N. J. L. 445, 55 Atl. 289; *Gibson v. New York & Erie R. R. Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *Kaare v. Troy Steel & I. Co.*, 139 N. Y. 369, 34 N. E. 901; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367; *Johnston v. Oregon Short Line*, 23 Ore. 94, 31 Pac. 283; *Bernish v. Roberts*, 143 Pa. St. 1, 21 Atl. 998; *Pintorelli v. Horton*, 22 R. I. 374, 48 Atl. 142; *Gann v. Railroad Co.*, 101 Tenn. 380, 47 S. W. 493, 70 Am. St. Rep. 687; *Williamson v. Sheldon Marble Co.*, 66 Vt. 427, 29 Atl. 669; *Robinson v. Dinniny*, 96 Va. 41, 30 S. E. 442; *Week v. Tremont Mill Co.*, 3 Wash. 629, 29 Pac. 215; *Olsen v. McMurray Cedar L. Co.*, 9 Wash. 500, 37 Pac. 679; *Bullevant v. Spokane*, 14 Wash. 577, 45 Pac. 42; *French v. First Ave. Ry. Co.*, 24 Wash. 83, 63 Pac. 1108; *Foss v. Bigelow*, 102 Wis. 413, 78 N. W. 570; *Groth v. Thomann*, 110 Wis. 488, 86 N. W. 178. See notes, *post*, pp. *651, *652. 86—*Johnston v. Oregon Short Line*, 23 Ore. 94, 31 Pac. 283. 87—*State v. South Baltimore Car Works*, 99 Md. 461, 58 Atl. 447; *Williamson v. Sheldon Marble Co.*, 66 Vt. 427, 29 Atl. 669; *Robinson v. Dininny*, 96 Va. 41, 30 S. E. 442; *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Seldonridge v. Chesapeake, etc., Ry. Co.*, 46 W. Va. 569, 33 S. E. 293; *Osborne v. Lehigh Valley Coal Co.*, 97 Wis. 27, 71 N. W. 814. 88—*Indianapolis, etc., Rapid Transit Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; *Flockhart v. Hocking Coal Co.*, 126 Ia. 576, 102 N. W. 494; *Shemwell v. Owensboro, etc., R. R. Co.*, 117 Ky. 556; *Cunningham v. Bath Iron Works*, 92 Me. 501, 43 Atl. 106; *Yates v. McCullough Iron Co.*, 69 Md. 370, 16 Atl. 280; *Balle v. Detroit Lumber Co.*, 73 Mich. 158, 41 N. W. 216; *Scharenbroich v. St. Cloud Fiber Ware Co.*, 59 Minn. 116, 60 N. W. 1093; *Boyce v. Johnson*, 72 N. H. 41, 54 Atl. 707; *Coyle v. Griffing Iron Co.*, 63 N. J. L. 609, 44 Atl. 665, 47 L. R. A. 147; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Stager v. Troy Laundry Co.*, 38 Ore. 480, 63 Pac. 645, 53 L. R. A. 459; *Master- son v. Eldridge*, 208 Pa. St. 242,

the usual and ordinary risks of the business and such as are obvious and patent, not that he is to make any positive effort to ascertain defects and dangers, nor that he assumes risks that he might have ascertained by investigation.⁸⁹ In some cases the rule is stated to be that the servant assumes the risk of all dangers incident to the employment, however they may arise, against which he may protect himself, by the exercise of ordinary observation and care.⁹⁰ The doctrine of assumption of risk applies as well to those risks which arise or become known to the servant during the service as to those in contemplation at the time of the original hiring.⁹¹

Another proposition, which follows from what has already been said and which is held in many cases, is that if a servant, with full knowledge of a defect or danger, enters or continues in the service, he assumes the risk of such defect or danger, whether it is an ordinary or obvious risk or otherwise.⁹² "If a

57 Atl. 515; *Desrosiers v. Bourn*,
26 R. I. 6; *Latremoile v. Bennington*, etc., R. R. Co., 63 Vt. 336, 22
Atl. 656; *Southern Ry. Co. v. Manzy*, 98 Va. 692, 37 S. E. 285;
Showalter v. Fairbanks, 88 Wis. 376, 60 N. W. 257; *Osborne v. Lehigh Valley Coal Co.*, 97 Wis. 27, 71 N. W. 814; *Diesenrieter v. Maiting Co.*, 97 Wis. 279, 72 N. W. 735; *Mielke v. Chicago*, etc., Ry. Co., 103 Wis. 1, 78 N. W. 402, 74 Am. St. Rep. 834; *Cudahy Packing Co. v. Marcan*, 106 Fed. 645, 45 C. C. A. 515; *King v. Morgan*, 109 Fed. 446, 48 C. C. A. 507. "A servant assumes the perils incident to his service of which he is informed, or which ordinary care would disclose to him." *Henderson v. Williams*, 66 N. H. 405, 413, 23 Atl. 365. If the servant has as good an opportunity as the master to know the danger, he assumes the risk. *Crane v. Chicago*, etc., Ry. Co., 124 Ia. 81, 99 N. W. 169; *Roth v. Eccles*, 28 Utah, 456, 79 Pac. 918.

89—*Silveira v. Iverson*, 128 Cal. 187, 60 Pac. 687; *Murphy v. Marston Coal Co.*, 183 Mass. 385, 67 N. E. 342. A servant is not expected to go about scrutinizing, testing and measuring. *Johnston v. Oregon Short-Line*, 23 Ore. 94, 31 Pac. 233; *Henderson Tobacco Extracts Works v. Wheeler*, 116 Ky. 322, 76 S. W. 34. And see *Gulf*, etc., Ry. Co. v. *Davis*, 35 Tex. Civ. App. 285, 80 S. W. 253.

90—*Staubley v. Potomac Elec. Power Co.*, 21 App. D. C. 160; *Durand v. New York*, etc., R. R. Co., 65 N. J. L. 656, 48 Atl. 1013; *Kaufhold v. Arnold*, 163 Pa. St. 269, 29 Atl. 883.

91—*Dillenberger v. Weingartner*, 64 N. J. L. 292, 45 Atl. 638.

92—*Money v. Lower Vein, &c., Co.*, 55 Ia. 671; *Mayes v. Chicago, &c., Co.*, 63 Ia. 562; *Worden v. Humeston, &c., Co.*, 72 Ia. 201, 33 N. W. 629; *Umback v. Lake Shore, &c., Co.*, 83 Ind. 191; *Wannemaker v. Burke*, 111 Penn. St. 423; *Mans-*

servant, knowing that the master has neglected his duty and that he is thereby subject to dangers not incident to the employment, continues in the service, the increased danger becomes an

field Coal Co. *v.* McEnery, 91 Penn. St. 185, 36 Am. Rep. 662; McQueen *v.* Centr., &c., R. R. Co., 30 Kan. 689; Chicago, &c., Co. *v.* Geary, 110 Ill. 383; Swoboda *v.* Ward, 40 Mich. 420; Highland Ave. &c., R. R. Co. *v.* Walters, 91 Ala. 435, 8 So. 357; Louisville, etc. R. R. Co. *v.* Banks, 104 Ala. 508, 16 So. 547; Louisville, etc. R. R. Co. *v.* Stutts, 105 Ala. 368, 17 So. 29, 53 Am. St. Rep. 127; Arkadelphia Lumber Co. *v.* Bettea, 57 Ark. 76, 20 S. W. 808; Iowa Gold. Min. Co. *v.* Diefenthaler, 32 Colo. 391, 76 Pac. 981; South Florida R. R. Co. *v.* Weese, 32 Fla. 212, 13 So. 436; Harvey *v.* Alturas Gold Min. Co., 3 Idaho, 510, 31 Pac. 819; Herdman-Harrison Milling Co. *v.* Spehr, 145 Ill. 329, 33 N. E. 944; Indianapolis, etc. Ry. Co. *v.* Watson, 114 Ind. 20, 14 N. E. 721, 5 Am. St. Rep. 578; Jenney Elec. L. & P. Co. *v.* Murphy, 115 Ind. 566, 18 N. E. 30; Rogers *v.* Leyden, 127 Ind. 50, 26 N. E. 210; Meador *v.* Lake Shore, etc., Ry. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384; Indianapolis, etc. Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; Southern Kan. Ry. Co. *v.* Drake, 53 Kan. 1, 35 Pac. 825; Morbach *v.* Home Min. Co., 53 Kan. 731, 37 Pac. 122; Ray *v.* Jeffries, 86 Ky. 367, 5 S. W. 867; Breckenridge Co. *v.* Hicks, 94 Ky. 362, 22 S. W. 554, 42 Am. St. Rep. 361; Wood *v.* Heiges, 83 Md. 257, 34 Atl. 872; State *v.* Lazaretto Guano Co., 90 Md. 177, 44 Atl. 1017; Harff *v.* Green, 168 Mo. 308, 67 S. W. 576; McAndrews *v.* Mont. Union Ry. Co., 15 Mont. 290, 39 Pac. 85; Missouri Pac. R. R. Co. *v.* Baxter, 42 Neb. 793, 60 N. W. 1044; Enright *v.* Oliver, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710; Alexander *v.* Tennessee, etc. Min. Co., 3 N. M. 255; Odell *v.* New York Central, etc. R. R. Co., 120 N. Y. 323, 24 N. E. 478, 17 Am. St. Rep. 650; Drake *v.* Auburn City Ry. Co., 173 N. Y. 466, 66 N. E. 121; Farley *v.* Picard, 78 Hun, 560, 29 N. Y. S. 802; Roth *v.* Northern Pac. Lumbering Co., 18 Ore. 205, 22 Pac. 842; Philadelphia, etc. R. R. Co. *v.* Hughes, 119 Pa. St. 301, 13 Atl. 286; New York, etc. R. R. Co. *v.* Lyons, 119 Pa. St. 324, 13 Atl. 205; Disano *v.* New Eng. Steam Brick Co., 20 R. I. 452, 40 Atl. 7; Rogers *v.* Galveston City Ry. Co., 76 Tex. 502, 13 S. W. 540; Missouri Pac. Ry. Co. *v.* Somers, 78 Tex. 439, 14 S. W. 779; Gulf, etc. Ry. Co. *v.* Brentford, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377; Gulf, etc. Ry. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151; Fritz *v.* Salt Lake, etc., Elec. Lt. Co., 18 Utah, 493, 56 Pac. 90; Carbin's Admr. *v.* Bennington, etc., R. R. Co., 61 Vt. 348, 17 Atl. 491; Norfolk, etc., R. R. Co. *v.* Jackson, 85 Va. 489, 8 S. E. 370; Norfolk, etc., R. R. Co. *v.* McDonald, 88 Va. 352, 13 S. E. 706; McDonald *v.* Norfolk, etc., R. R. Co., 95 Va. 98, 27 S. E. 821; Grout *v.* Tacoma Eastern R. R. Co., 33 Wash. 524, 74 Pac. 665; Oliver *v.* Ohio Riv. R. R. Co., 42 W. Va. 703, 26 S. E. 444; Stephenson *v.* Duncan, 73 Wis. 404, 41 N. W. 447, 9 Am. St. Rep. 806; Sweet *v.* Ohio Coal Co., 78 Wis. 127, 47 N. W. 182, 9 L. R.

incident of the service which he assumes, and, for an injury resulting therefrom, the master is not liable.”⁹³

“However gross the fault of the master in subjecting the servant to the risk of injury from defective buildings, premises or appliances, yet where the servant knows the defects and dangers, and still knowingly and without protest consents to incur the risk to which he is exposed thereby, he is deemed to assume such risk and to waive any claim for damages against his master in case of injury.”⁹⁴ In some of the cases continuing in the service with knowledge of the danger is regarded as contributory negligence, not as a waiver or assumption of risk.⁹⁵

A. 861; *Peterson v. Sherry Lumber Co.*, 90 Wis. 83, 62 N. W. 948; *Promer v. Milwaukee, etc., Ry. Co.*, 90 Wis. 215, 63 N. W. 90, 48 Am. St. Rep. 905; *Erdman v. Illinois Steel Co.*, 95 Wis. 1, 69 N. W. 993, 60 Am. St. Rep. 66; *Pautz v. Plankinton Packing Co.*, 118 Wis. 47, 94 N. W. 654; *Washington, etc., R. R. Co. v. McDade*, 135 U. S. 554, 10 S. C. Rep. 1044, 34 L. Ed. 235; *Mississippi Riv. Logging Co. v. Schneider*, 74 Fed. 195, 20 C. C. A. 390; *Pierce v. Clavin*, 82 Fed. 550, 27 C. C. A. 227; *Lindsay v. New York, etc., R. R. Co.*, 112 Fed. 384, 50 C. C. A. 298; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477; *Butler v. Frazee*, 25 App. D. C. 392; *Campbell v. Illinois Central R. R. Co.*, 124 Ia. 302, 100 N. W. 30; *Buehner v. Creamery Package Co.*, 124 Ia. 445, 100 N. W. 345, 104 Am. St. Rep. 354; *Foster v. Chicago, etc.; Ry. Co.*, 127 Ia. 84; *Faber v. C. Reiss Coal Co.*, 124 Wis. 554, 102 N. W. 1049. So if he continues in service after failure to amend within a reasonable time after promise of amendment he assumes the risk. *Eureka, &c., Co. v. Buss*, 81 Ala. 220. Otherwise now by

statute. *Mobile, &c., Ry. Co. v. Holborn*, 6 South. Rep. 146 (Ala.). So if one, knowing the incompetence of his fellow or superior servant, remains without complaint in the employment, he assumes the risk of injury therefrom. *McDermott v. Hannibal, &c., Ry. Co.*, 87 Mo. 285; *Kansas, &c., Co. v. Peavy*, 34 Kan. 472; *Hatt v. Nay*, 144 Mass. 186; *Lake Shore, &c., Co. v. Stupak*, 108 Ind. 1.

93—*Skinner v. Central Vt. R. R. Co.*, 73 Vt. 336, 340, 50 Atl. 1099.

94—*Carey v. Sellars*, 41 La. Ann. 500, 6 So. 813; *Pollich v. Sellars*, 42 La. Ann. 623, 7 So. 786. “The rule of the assumption of obvious risks does not rest wholly upon the implied agreement of the employee, but on an independent act of waiver, evidenced by his continuing in the employment with a full knowledge of all the facts.” *Drake v. Auburn City Ry. Co.*, 173 N. Y. 466, 473, 66 N. E. 121.

95—*Highland Ave., etc., R. R. Co. v. Walters*, 91 Ala. 435, 8 So. 357; *Louisville, etc., R. R. Co. v. Banks*, 104 Ala. 508, 16 So. 547; *Harff v. Green*, 168 Mo. 308, 67 S. W. 576; *Curtis v. McNair*, 173 Mo.

In Virginia it is held that "the law does not prescribe a rule so inflexible or unwise as that a servant must forthwith refrain from using a defective machine or appliance, or immediately quit the service of the master, upon the discovery of the defect in the machine or appliance, or that he is working by the side of a negligent fellow servant, upon the pain of conferring immunity upon the master for all liability for an injury incurred in consequence of such defect or incompetency. The true test in all such cases is, whether a person of ordinary prudence, acting with such prudence, would, under all the circumstances, have refused to incur the risk."⁹⁶ And in Missouri it is held that though an appliance be defective, yet if the servant might reasonably suppose that he could safely use it by taking due care, his knowledge of the defect and his continuance in the service will not necessarily bar a recovery for an injury resulting from the defect.⁹⁷ And other cases are to the same effect.⁹⁸

270, 73 S. W. 167; Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138. See Graham *v.* Newburg, etc., Co., 38 W. Va. 273, 18 S. E. 584; Eldridge *v.* Atlas S. S. Co., 134 N. Y. 187, 32 N. E. 66. Assumption of risk and contributory negligence are considered and distinguished in St. Louis Cordage Co. *v.* Miller, 126 Fed. 495, 61 C. C. A. 477.

96—Norfolk, etc., R. R. Co. *v.* Ampley, 93 Va. 108, 25 S. E. 226. In Richmond, etc., R. R. Co. *v.* Norment, 84 Va. 167, 173, 4 S. E. 211, 10 Am. St. Rep. 827, it is said: "It is a cruel, an inhuman doctrine that the employer, though he is aware that his own neglect to furnish the proper safeguards for the lives and limbs of those in his employment, puts them in constant hazard of injury, is not to be held accountable to those employes who, serving him under such circumstances, are injured by his negligent acts and omissions,

the injured parties, after themselves becoming cognizant of the peril occasioned by their employer's negligent way of conducting his business, continue in his employment and receive his pay, though they may be virtually compelled to remain by the stern necessity of earning the daily food essential to keep away starvation itself."

97—Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167.

98—Southern Pac. Co. *v.* Yeargin, 109 Fed. 436, 48 C. C. A. 497; Williams *v.* Birmingham B. & M. Co., (1899) 2 Q. B. 338; Going *v.* Ala. Steel & Wire Co., 141 Ala. 537; Pressly *v.* Yarn Mills, 138 N. C. 410; Hicks *v.* Manufacturing Co., 138 N. C. 319; Marks *v.* Cotton Mills, 138 N. C. 401; Texas, etc., R. R. Co. *v.* Kelly, 98 Tex. 123. From remaining a few days the presumption is not conclusive that

Other circumstances are to be considered besides the fact of continuance in the service with knowledge of the danger. Where an engine became defective during a trip, it was held that the engineer did not assume the risk by continuing to the end of the trip.⁹⁹ So where a seaman was ordered to operate a winch which he knew to be defective and dangerous and obeyed, because otherwise he would be punished.¹

It is essential to the assumption of risk, not only that the servant should know the defect out of which the danger arises, but that he should appreciate the danger, or that the danger should be manifest to a man of ordinary intelligence and experience in the line of work in which the servant is engaged.² A servant cannot be heard to say that he did not appreciate a danger which was manifest to an ordinarily prudent person of

he takes the risk. *Lyberg v. North Pac., &c., Co.*, 39 Minn. 15, 38 N. W. 632.

99—*Olney v. Boston, etc., R. R. Co.*, 71 N. H. 427, 52 Atl. 1097.

1—*Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187, 32 N. E. 66. “He had to choose between present punishment with a possible hope of remote justification, and customary obedience to orders with the hope that by care he would escape injury. Grant that he made a mistake in judgment under these difficult conditions, the law does not adjudge it to be negligence, and the jury upon consideration have refused to do so. We cannot hold that their refusal was error.” p. 190.

2—*Mullin v. California Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535; *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425; *Montgomery Coal Co. v. Baringer*, 218 Ill. 327; *Stomme v. Hanford Produce Co.*, 108 Ia. 137, 78 N. W. 841; *Myhan v. Louisiana Elec. L. & P. Co.*, 41 La. Ann. 964, 6 So. 799, 17 Am. St. Rep.

436, 7 L. R. A. 172; *Gualden v. K. C. Southern Ry. Co.*, 106 La. 409, 30 So. 889; *Fickett v. Lisbon Falls Fibre Co.*, 91 Me. 268, 39 Atl. 996; *Anderson v. Clark*, 155 Mass. 368, 29 N. E. 589; *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; *Sullivan v. Hannibal, etc., R. R. Co.*, 107 Mo. 66, 17 S. W. 748, 28 Am. St. Rep. 388; *Demars v. Glen Mfg. Co.*, 67 N. H. 404, 40 Atl. 902; *Burns v. Delaware, etc., Tel. Co.*, 70 N. J. L. 745, 59 Atl. 220, 67 L. R. A. 956; *Welle v. Celluloid Co.*, 175 N. Y. 401, 67 N. E. 609; *Sims v. Lindsay*, 122 N. C. 678, 30 S. E. 19; *Stager v. Troy Laundry Co.*, 38 Ore. 480, 63 Pac. 645, 53 L. R. A. 459; *Langlois v. Dunn Worsted Mills*, 25 R. I. 645, 57 Atl. 910; *Knoxville Iron Co. v. Pace*, 101 Tenn. 476, 48 S. W. 232; *Williamson v. Sheldon Marble Co.*, 66 Vt. 427, 29 Atl. 669; *Shoemaker v. Bryant, etc., Co.*, 27 Wash. 637, 68 Pac. 380; *Northern Pac. Coal Co. v. Richmond*, 58 Fed. 756, 7 C. C. A. 485; *Cudahy Packing Co. v. Marcan*,

his intelligence and experience.³ An adult servant is presumed to possess ordinary intelligence and capacity and is held in law to know and comprehend the dangers which are open and obvious to a person of ordinary understanding and experience, and he cannot show a want of such capacity without also showing that the master had notice of the fact.⁴

The assurance of the master, or of one placed in authority by him, that there is no danger, or that a place or appliance is safe, is an important element to be considered in determining the assumption of risk. Though the servant may think there is some danger, yet if there is any reason to doubt, he may rely upon such an assurance and incur the danger without assuming the risk.^{4a} But if the danger is obvious and the servant is able

106 Fed. 645, 45 C. C. A. 515; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477. That a servant may know of the defects in an appliance without being held to know and accept the risk arising therefrom, see *Russell v. Minn., &c., Co.*, 32 Minn. 230; *Cook v. St. Paul, &c., Co.*, 34 Minn. 45; *Wuotilla v. Duluth, &c., Co.*, 37 Minn. 153, 33 N. W. 551. See, also, *Lasure v. Graniteville, &c., Co.*, 18 S. C. 275.

3—*St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477; *King v. Morgan*, 109 Fed. 446, 48 C. C. A. 507. A minor assumes risks which he knows and is able to appreciate such as the liability to slip on a greasy floor. *Cudahy Packing Co. v. Marcan*, 106 Fed. 645, 45 C. C. A. 515.

4—*Diesenrieter v. Malting Co.*, 97 Wis. 279, 72 N. W. 735.

4a—*Consolidated Coal Co. v. Wombacker*, 134 Ill. 57, 24 N. E. 627; *Larch v. Stratton*, 101 Ky. 672, 42 S. W. 756; *Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256; *Cole v. St. Louis*

Transit Co., 183 Mo. 81, 81 S. W. 1138; *McKinnon v. Riler-Conley Mfg. Co.*, 186 Mass. 155, 71 N. E. 296; *Duerst v. St. Louis Stamping Co.*, 163 Mo. 607, 63 S. W. 827; *Lee v. Smart*, 45 Neb. 318, 63 N. W. 940; *Reese v. Clark*, 198 Pa. St. 312, 47 Atl. 994; *Williams v. Clark*, 204 Pa. St. 416, 54 Atl. 315; *Record v. Cooperage Co.*, 108 Tenn. 657, 69 N. W. 334; *Grout v. Tacoma Eastern R. R. Co.*, 33 Wash. 524, 74 Pac. 665. In *McKee v. Tourtelotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542, the court says: "When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior, one who too, from the nature of the callings of the two men and of the superior's duty, seems likely to make the more accurate forecast, and if to this is added a command to go on with his work and to run the risk, it becomes a complex question of the particular circumstances whether the infe-

to understand and appreciate it as well as his superior, he is not justified in relying upon such assurances.^{4b} And it makes no difference that the servant is told to go on with his work or quit the employment.^{4c}

It follows, as a matter of course, from the foregoing, that a servant does not assume unusual and extraordinary risks of which he is ignorant, nor those which are latent and not plainly open to view, nor risks which are not readily appreciated by a servant of ordinary care, intelligence and experience.⁵ If the servant undertakes to do something not in the line of his duty, he assumes all of the attendant risks.⁶ The doctrine of assumption of risk rests upon an implied contract and the bur-

rior is not justified as a prudent man in surrendering his own opinion and obeying the command. The nature and the degree of the danger, the extent of the plaintiff's appreciation of it, and the exigency of the work, all enter into consideration, and no universal rule can be laid down." pp. 70-71.

4b—*Toomey v. Eureka Iron & S. Works*, 89 Mich. 249, 50 N. W. 842; *Vogt v. Honstain*, 81 Minn. 174, 83 N. W. 533; *Pintorelli v. Horton*, 22 R. I. 374, 48 Atl. 142; *Showalter v. Fairbanks*, 88 Wis. 376, 60 N. W. 257.

4c—*Wells & French Co. v. Kapaczynski*, 218 Ill. 149; *Lamson v. Am. Ax & Tool Co.*, 177 Mass. 144; *Ittner Brick Co. v. Killian*, 67 Neb. 589, 93 N. W. 951.

5—*Gisson v. Schwabacher*, 99 Cal. 419, 34 Pac. 104; *Colorado Midland Ry. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701; *McCormick Harvesting Machine Co. v. Burandt*, 136 Ill. 170, 26 N. E. 588; *Consolidated Coal Co. v. Hoenni*, 146 Ill. 614, 35 N. E. 162; *Mobile, etc., R. R. Co. v. Vallowe*, 214 Ill. 124, 73 N. E. 416; *Illinois Central*

R. R. Co. v. Langan, 116 Ky. 318, 76 S. W. 32; *Campbell v. Eveleth*, 83 Me. 50, 21 Atl. 784; *Murphy v. Marston Coal Co.*, 183 Mass. 385, 67 N. E. 342; *Ribich v. Lake Supr. Smelting Co.*, 123 Mich. 401, 82 N. W. 279, 81 Am. St. Rep. 215, 48 L. R. A. 649; *Sims v. Lindsay*, 122 N. C. 678, 30 S. E. 19; *Pilling v. Narragansett Machine Co.*, 19 R. I. 666, 36 Atl. 129, 61 Am. St. Rep. 805; *St. Louis, etc., Ry. Co. v. McClain*, 80 Tex. 85, 15 S. W. 789; *Gulf, etc., Ry. Co. v. Hill*, 95 Tex. 629, 69 S. W. 136; *New York, etc., R. R. Co. v. O'Leary*, 33 Fed. 737, 35 C. C. A. 562; *Texas, etc., Ry. Co. v. Archibald*, 170 U. S. 665, 18 S. C. Rep. 777; *Ingham v. Honor Co.*, 113 La. 1040, 37 So. 963; *Levins v. Bancroft*, 114 La. 105, 38 So. 72. In *Black v. Va. Portland Cement Co. (Va.)*, 51 S. E. 831, it is held that the servant does not assume risks that may be obviated by the master.

6—*Hamrick v. Balfour Quarry Co.*, 132 N. C. 282, 43 S. E. 820. If there is a safe and an unsafe way of doing a thing and the servant chooses the latter, he does so at

den is on the master to show that the servant assumed the risk in question and the matter should be specially pleaded to be available as a defense.⁷

Assumption of Risk—Illustrations. Trainmen take the risk of a low bridge over the track, and of posts, poles or other structures or obstructions near thereto, if they know, or by the exercise of ordinary care might know, of their existence.⁸ But

his own risk. *Benson v. New York*, etc., R. R. Co., 26 R. I. 405. Am. Rep. 684; *Clark v. Richmond*, &c., Co., 78 Va. 709; *Illick v. Flint*, &c., Co., 67 Mich. 632, 35 N. W. 708. Otherwise not. *Balt., &c., Co. v. Rowan*, 104 Ind. 88; *Louisville, &c., Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584; *Chicago, &c., Co. v. Russell*, 91 Ill. 298; *Ill., &c., Co. v. Whalen*, 19 Ill. App. 116; *Fisk v. Fitchburg R. R. Co.*, 158 Mass. 238, 33 N. E. 510; *Quinn v. New York*, etc., R. R. Co., 175 Mass. 150, 55 N. E. 891; *Ladd v. Brockton St. Ry. Co.*, 180 Mass. 454, 62 N. E. 730; *Drake v. Auburn City Ry. Co.*, 173 N. Y. 466, 66 N. E. 121; *Carbin's Admir. v. Bennington*, etc., R. R. Co., 61 Vt. 348, 17 Atl. 491; *Haffner v. Chesapeake*, etc., Ry. Co., 96 Va. 528, 31 S. E. 899; *Norfolk, &c., R. R. Co. v. Marpole*, 97 Va. 594, 34 S. E. 462; *Williamson v. Newport News*, etc., R. R. Co., 34 W. Va. 657, 12 S. E. 824, 26 Am. St. Rep. 927, 12 L. R. A. 297; *Kenney v. Meddaugh*, 118 Fed. 209, 55 C. C. A. 115; *Cincinnati, &c., R. R. Co. v. Sampson*, 97 Ky. 65, 30 S. W. 12; *Erslew v. New Orleans*, etc., R. R. Co., 49 La. Ann. 86, 21 So. 153; *Pikesville*, etc., R. R. Co. v. *Russell*, 88 Md. 563, 42 Atl. 214; *Phelps v. Chicago*, etc., Ry. Co., 122 Mich. 171, 81 N. W. 101, 84 N. W. 66; *Potter v. Detroit*, etc., Ry. Co., 122 Mich. 179, 81 N. W. 80; *Pierce v. Camden*, etc., Ry. Co., 58 N. J. L. 400,

7—*Mace v. Boedker*, 127 Ia. 721; *Dempsey v. Sawyer*, 95 Me. 295, 49 Atl. 1035; *Dowd v. New York*, etc., R. R. Co., 170 N. Y. 459, 63 N. E. 541; *Faulkner v. Mammoth Min. Co.*, 23 Utah, 437, 66 Pac. 799; *Oregon Short Line*, etc., Ry. Co. v. *Tracy*, 66 Fed. 931, 14 C. C. A. 199. But if the plaintiff's evidence discloses the fact, it is available though not pleaded. *Iowa Gold Min. Co. v. Diefenthaler*, 32 Colo. 391, 76 Pac. 981. In Illinois it is held that the burden is on the plaintiff to show that he did not assume the risk. *Chicago*, etc., R. R. Co. v. *Heerey*, 203 Ill. 492; *Wells & French Co. v. Kapaczynski*, 218 Ill. 149. In *Evans Laundry Co. v. Cranford*, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814, it is held that the assumption of risks not ordinarily incident to the service must be pleaded but that the assumption of the ordinary risks need not be.

8—*Baylor v. Delaware*, &c., Co., 40 N. J. L. 23; *Perigo v. Chicago*, &c., Co., 52 Ia. 276; *Balt., &c., Co v. Stricker*, 51 Md. 47, 34 Am. Rep. 291; *Lovejoy v. Boston*, &c., Co., 125 Mass. 79, 28 Am. Rep. 206; *Wells v. Burlington*, &c., Co., 56 Ia. 520; *Clark v. St. Paul*, &c., Co., 28 Minn. 128; *Pittsburg*, &c., Co. v. *Sentmeyer*, 92 Pa. St. 276, 37

other cases hold that a servant does not assume the risk of obstructions near the track unless he knows not only of their existence in a general way but also of their dangerous proximity to the track.⁹ A railroad servant assumes the risk of unblocked guard rails or frogs.¹⁰ So of an unguarded ash pit, of which he has knowledge.¹¹ So of a car loaded with projecting rails or

- 35 Atl. 286; Gates *v.* Chicago, etc., kee, etc., R. R. Co., 80 Wis. 584, 50 Ry. Co., 2 S. D. 422, 50 N. W. 907; N. W. 942.
S. C. Gates *v.* Chicago, etc., R. R. Co., 4 S. D. 433, 57 N. W. 200; Darling *v.* New York, etc., R. R. Co., 17 R. I. 708, 24 Atl. 462; Piddock *v.* Union Pac. Ry. Co., 5 Utah, 612, 19 Pac. 191, 1 L. R. A. 131; Morissette *v.* Canadian Pac. Ry. Co., 74 Vt. 232, 52 Atl. 520; Texas, etc., Ry. Co. *v.* Swearingen, 196 U. S. 51, 25 S. C. Rep. 164. See Holden *v.* Fitchburg, &c., Co., 129 Mass. 268; Kearns *v.* Chicago, &c., Co., 66 Ia. 599; Riley *v.* W. Va., &c., Co., 27 W. Va. 145.
9—Mobile, etc., R. R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416; Coles *v.* Union Terminal Ry. Co., 124 Ia. 48, 99 N. W. 108; Nugent *v.* Boston, etc., R. R. Co., 80 Me. 62, 12 Atl. 797; Wither *v.* Somerset Traction Co., 98 Me. 61, 56 Atl. 204; Flanders *v.* Chicago, etc., Ry. Co., 51 Minn. 193, 53 N. W. 544; McCabe *v.* Mont. Cent. Ry. Co., 30 Mont. 323, 76 Pac. 701; Johnston *v.* Oregon Short Line, 23 Ore. 94, 31 Pac. 283; Whipple *v.* New York, etc., R. R. Co., 19 R. I. 587, 35 Atl. 305, 61 Am. St. Rep. 796; Crandall *v.* New York, etc., R. R. Co., 19 R. I. 594, 35 Atl. 307; Missouri Pac. Ry. Co. *v.* Somers, 71 Tex. 700, 9 S. W. 741; McDonald *v.* Washington, etc., Ry. Co., 31 Wash. 585, 72 Pac. 481; Kelleher *v.* Milwau- 10—McGinnis *v.* Can. South., &c., Co., 49 Mich. 466; Lake Shore, &c., Co. *v.* McCormick, 74 Ind. 440; Chicago, &c., Co. *v.* Lonergan, 118 Ill. 41; Smith *v.* St. Louis, &c., Co., 69 Mo. 32; Rush *v.* Mo. Pac. Ry. Co., 36 Kan. 129, 12 Pac. 582; Wilson *v.* Winona, &c., Co., 37 Minn. 326, 33 N. W. 908; Mayes *v.* Chicago, &c., Co., 63 Ia. 562; Southern Pac. Co. *v.* Seley, 152 U. S. 145, 14 S. C. Rep. 530, 38 L. Ed. 391; Wood *v.* Locke, 147 Mass. 604, 18 N. E. 578; Appel *v.* New York, etc., R. R. Co., 111 N. Y. 550, 19 N. E. 93. Contra, Seley *v.* Southern Pac. Co., 6 Utah, 319, 23 Pac. 751; Piersons *v.* Chicago, etc., Ry. Co., 127 Ia. 13; Sherman *v.* Chicago, &c., Co., 34 Minn. 259; Huhn *v.* Miss., &c., Co., 92 Mo. 440.
11—Williams *v.* Louisville, etc., R. R. Co., 111 Ky. 822, 64 S. W. 738. So of a dry well. Needham *v.* Louisville, etc., R. R. Co., 85 Ky. 423, 3 S. W. 797, 11 S. W. 306. Of icy platform. Adkins *v.* Atlanta, etc., Ry. Co., 27 S. C. 71, 2 S. E. 849. But held not to take risk of clinker beside track. Louisville, etc., R. R. Co. *v.* Vestal, 105 Ky. 461, 49 S. W. 204. Or of defective planking at a crossing. Fluhrer *v.* Lake Shore, etc., Ry. Co., 121 Mich. 212, 80 N. W. 23.

logs,¹² of handling disabled cars being taken to the repair shop,¹³ of cars with double dead woods,¹⁴ and generally of defective appliances of which he is aware.¹⁵ So of smoke and gases in a tunnel.¹⁶ One employed to shovel snow from the tracks at a distance from any dwelling takes the risk of injury

12—Centr., &c., Co. *v.* Husson, 101 Pa. St. 1; Toledo, &c., Co. *v.* Black, 88 Ill. 112; Scott *v.* Oreg., &c., Co., 14 Ore. 211; Day *v.* Toledo, &c., Co., 42 Mich. 523.

13—Fraker *v.* St. Paul, &c., Co., 32 Minn. 54; Watson *v.* Houston, &c., Co., 58 Tex. 434; Barkdoll *v.* Penn., &c., Co., 13 Atl. Rep. 82. (Penn.); Flannagan *v.* Chicago, &c., Ry. Co., 50 Wis. 462. See Yeaton *v.* Boston, &c., Co., 135 Mass. 418.

14—Kohn *v.* McNulta, 147 U. S. 238, 13 S. C. Rep. 298; Smithson *v.* Mich. &c., Co., 45 Mich. 212; Simms *v.* So. Car, &c., Co., 26 S. C. 490, 2 S. E. 486; Hathaway *v.* Mich. Centr., &c., Co., 51 Mich. 253, 47 Am. Rep. 569; and with three link couplings. Darracott *v.* Chesapeake, &c., Co., 83 Va. 288, 2 S. E. 511. But see Crane *v.* Miss., &c., Co., 87 Mo. 588; Louisville, &c., Co. *v.* Frawley, 110 Ind. 18. Of mismatched couplings. McDonald *v.* Norfolk, etc., R. R. Co., 95 Va. 98, 27 S. E. 821.

15—Philadelphia, etc., R. R. Co. *v.* Hughes, 119 Pa. St. 301, 13 Atl. 286; New York, etc., R. R. Co. *v.* Lyons, 119 Pa. St. 324, 13 Atl. 205; Norfolk, etc., R. R. Co. *v.* McDonald, 88 Va. 352, 13 S. E. 706; Secord *v.* Chicago, etc., R. R. Co., 107 Mich. 540, 65 N. W. 550.

16—Baltimore, etc., R. R. Co. *v.* State, 75 Md. 152, 23 Atl. 310, 32 Am. St. Rep. 372. So of too sharp curve in track in yard. Tuttle *v.* Detroit, &c., Co., 122 U. S. 189. Of

ice or irregularity of road bed when leaving cars or coupling. Piquegno *v.* Chicago, &c., Co., 52 Mich. 40; Batterson *v.* Chicago, &c., Co., 53 Mich. 125. Of culvert under track. Couch *v.* Railroad Co., 22 S. C. 557; De Forest *v.* Jewett, 88 N. Y. 264. Of old light rails in a yard. Mich. Centr., &c., Co. *v.* Austin, 40 Mich. 247. But see *contra*, as to rails in the line. Devlin *v.* Wabash, &c., Co., 87 Mo. 545. See Hulehan *v.* Green Bay, &c., Co., 68 Wis. 520; Rosenbaum *v.* St. Paul, &c., Co., 38 Min. 173, 36 N. W. 447. Of bucking snow. Bryant *v.* Burlington, &c., Co., 66 Ia. 305, 55 Am. Rep. 275; Morse *v.* Minn., &c., Co., 30 Minn. 465. Of falling snow from a bank left near track. Dowell *v.* Burlington, &c., Co., 62 Ia. 629; Brown *v.* Chicago, &c., Co., 64 Ia. 652. Of snow plow coming over track without warning. Olson *v.* St. Paul, &c., Co., 38 Minn. 117, 35 N. W. 866. See Kelley *v.* Chicago, &c., Co., 53 Wis. 74; Patton *v.* Centr. Ia., &c., Co., 73 Ia. 306, 35 N. W. 149. A tower-man is held not to take the risk of defects in tracks by which trains are derailed. Lake Shore, etc., Ry. Co. *v.* Conway, 169 Ill. 505, 48 N. E. 483. And see further Bence *v.* New York, etc., R. R. Co., 181 Mass. 221, 63 N. E. 396; Gulf, etc., Ry. Co. *v.* Donnelly, 70 Tex. 371, 8 S. W. 52, 8 Am. St. Rep. 608; Southern Pac. Co. *v.* Yeargin, 109 Fed. 436, 48 C. C. A. 497.

from frost while so employed.¹⁷ Trainmen do not take the risk of an unsafe track.^{17a}

One employed about a mill or factory assumes the risk of unguarded machinery with which he is familiar,¹⁸ or which is patent to ordinary observation.¹⁹ So of the danger of falling earth in excavating,²⁰ or of falling rock in a quarry.²¹ So in case of defective machinery or appliances.²² A servant whose duty it is to repair electrical lines takes the risk of defective poles and cross arms,²³ of defective insulation of the wires,²⁴ or

17—*King v. Interstate Consolidated R. R. Co.*, 23 R. I. 583, 51 Atl. 301. 454; *Rummell v. Dilworth*, 111 Pa. St. 343; *Huizenga v. Cutler, &c., Co.*, 51 Mich. 272; *Kelly v. Barber Asphalt Co.*, 93 Ky. 363, 20 S. W. 271.

17a—*Smith v. Erie R. R. Co.*, 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302; *Wright v. Southern Ry. Co.*, 123 N. C. 280, 31 S. E. 652; *Wilkie v. Raleigh, etc.*, R. R. Co., 127 N. C. 203, 37 S. E. 204; *Wellman v. Oregon Short Line*, 21 Ore. 530, 28 Pac. 625; *Hamilton v. Michigan Central R. R. Co.*, 135 Mich. 95, 97 N. W. 392.

18—*Sanborn v. Atchison, &c., R. R. Co.*, 35 Kan. 292; *Schroeder v. Mich. Car Co.*, 56 Mich. 132; *Kelley v. Silver Spring Co.*, 12 R. I. 112; *White v. Sharp*, 27 Hun, 94; *Pingree v. Leyland*, 135 Mass. 398; *Cunningham v. Bath Iron Works*, 92 Me. 501, 43 Atl. 106; *Roth v. Northern Pac. Lumbering Co.*, 18 Ore. 205, 22 Pac. 842; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 447, 9 Am. St. Rep. 806. So of the danger of slipping on a greasy floor. *Yess v. Chicago Brass Co.*, 124 Wis. 406, 102 N. W. 932.

19—*Kean v. Detroit Copper, &c., Co.*, 66 Mich. 277, 33 N. W. 395; *Houston, &c., Ry. Co. v. Conrad*, 62 Tex. 627. See *Hughes v. Winona, &c., R. R. Co.*, 27 Minn. 137; *Cagney v. Hannibal, &c., Co.*, 69 Mo. 416; *Porter v. Hannibal, &c., R. R. Co.*, 71 Mo. 66, 36 Am. Rep.

454; *Rummell v. Dilworth*, 111 Pa. St. 343; *Huizenga v. Cutler, &c., Co.*, 51 Mich. 272; *Kelly v. Barber Asphalt Co.*, 93 Ky. 363, 20 S. W. 271. 20—*Naylor v. Chicago, &c., Ry. Co.*, 53 Wis. 661; *Galveston, &c., Ry. Co. v. Lempe*, 59 Tex. 19; *Brown v. Elec. Ry. Co.*, 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666.

21—*Morbach v. Home Min. Co.*, 53 Kan. 731, 37 Pac. 122; *Mielke v. Chicago, etc., R. R. Co.*, 103 Wis. 1, 78 N. W. 402, 74 Am. St. Rep. 834.

22—*Jenney Elec. L. & P. Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Meador v. Lake Shore, etc., Ry. Co.*, 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384; *Gulf, etc., Ry. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151; *Fritz v. Salt Lake, etc., Elec. Lt. Co.*, 18 Utah, 493, 56 Pac. 90.

23—*Maryland Tel. & Tel. Co. v. Cloman*, 97 Md. 620, 55 Atl. 681; *Roberts v. Missouri, etc., Tel. Co.*, 166 Mo. 370, 66 S. W. 155; *Britton v. Central Union Tel. Co.*, 131 Fed. 844, 65 C. C. A. 598; *Sias v. Consolidated Lighting Co.*, 73 Vt. 35, 50 Atl. 554. But see *Barto v. Iowa Tel. Co.*, 126 Ia. 241, 101 N. W. 876, 106 Am. St. Rep. 347; *Dawson v. Lawrence Gas Lt. Co.*, 188 Mass. 481.

24—*Street R. R. Co. v. Simmons*,

of defective insulation in the wires of another company in dangerous proximity to the line he is repairing.²⁵ So one employed to take down decayed and unsafe poles takes the risk of their falling.²⁶ "As a general rule, a servant cannot recover for any injury caused by the very defect which he is employed to repair."²⁷ An employe in a store takes the risk of slipperiness of marble stairs with which she is familiar.²⁸ Where the master keeps a dangerous dog and the servant knows of his vicious propensity, he takes the risk if he continues in the service.²⁹ A servant employed in a white lead factory assumes the risk of injury from the lead.³⁰ Additional cases are noted in the margin,³¹ and the matter is considered more at length in the following pages, which treat of the duty and liabilities of the master to the servant.

Whether Servant Assumes Risk from Violation of Statutory Duties by Master. A statute of Vermont forbade the use of side ladders on freight cars under a penalty and made the company

107 Tenn. 392, 64 S. W. 705; Bowlers *v.* Bristol Gas & Elec. Co., 100 Va. 533, 42 S. E. 296; Anderson *v.* Inland Tel. & Tel. Co., 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410. 25—Chisholm *v.* New Eng. Tel. & Tel. Co., 176 Mass. 125, 57 N. E. 383.

26—Saxton *v.* N. W. Tel. Exch. Co., 81 Minn. 314, 84 N. W. 109; Broderick *v.* St. Paul City Ry. Co., 74 Minn. 163, 77 N. W. 28.

27—Broderick *v.* St. Paul City Ry. Co., 74 Minn. 163, 165, 77 N. W. 28.

28—Kline *v.* Abraham, 178 N. Y. 377, 70 N. E. 923.

29—Farley *v.* Picard, 78 Hun. 560, 29 N. Y. S. 802.

30—Berry *v.* Atlantic White Lead, etc., Co., 30 App. Div. 205, 51 N. Y. S. 602.

31—See Anthony *v.* Leeret, 105 N. Y. 591, case of a trap door in a passage; Beittenmiller *v.* Bergner, etc., Co., 12 Atl. Rep. 599 (Penn.),

poisonous vapor; Moulton *v.* Gage, 138 Mass. 390, unrailed platform. See, also, Penn. Co. *v.* Lynch, 90 Ill. 333; Schultz *v.* Chicago, &c., Co., 67 Wis. 616, 58 Am. Rep. 881; Sykes *v.* Packer, 99 Penn. St. 465. And see generally, Nofsinger *v.* Goldman, 122 Cal. 609, 55 Pac. 425; Indianapolis, etc., Rapid Transit Co. *v.* Foreman, 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669; Southern Kan. Ry. Co. *v.* Moore, 49 Kan. 616, 31 Pac. 138; Wuotilla *v.* Duluth Lumber Co., 37 Minn. 153, 33 N. W. 551, 5 Am. St. Rep. 832; Burns *v.* Delaware & A. Tel. & Tel. Co., 70 N. J. L. 745, 59 Atl. 220, 67 L. R. A. 956; Stager *v.* Troy Laundry Co., 38 Ore. 480, 63 Pac. 645, 53 L. R. A. 459; Groth *v.* Thomann, 110 Wis. 488, 86 N. W. 178; Latremoile *v.* Bennington, etc., R. R. Co., 63 Vt. 336, 22 Atl. 656; Anderson *v.* Southern Ry. Co., 70 S. C. 490.

violating the statute liable for injuries occasioned thereby. The plaintiff, while riding on a side ladder kept in use by the defendant company in violation of the statute, was knocked off and injured by contact with a post near the track. It was held that he did not assume the risk arising from the violation of the statute. The court says: "We think the ordinary doctrine of assumption of risk does not apply to a case where the negligence of the employer consists in the disregard of a statutory duty imposed upon him for the protection of his employes; certainly not when an action is expressly given for the breach. And this is exactly the difference between cases of negligence arising from the disregard of statutory obligation, like the present, and cases of negligence arising from the failure of the employer to fulfill his common law duty of providing safe appliances,—that in the latter case the common law duty is to be applied in connection with the common law rule of the assumption of risk; while in the former, statutory rule is accompanied by the bestowal of a right of action for the breach of it in favor of those who must necessarily be deprived of any action by the application of the common law rule of the assumption of risk; and, consequently, the common law rule is inconsistent with the statute and falls to the ground." * * *

"Everybody knows that there are large classes who get their living from day to day in such service as that in which the plaintiff was engaged, who must work where they are working, and keep their job at all hazards, if they would not bring themselves and their families to want. To say to such men, 'If you do not like the conditions you may quit,' is often only a heartless mockery. The legislature understood this; and the act we are considering was an attempt to better the condition of that very class by compelling the employer to yield something of profit in the interest of humanity, and to save the lives and limbs of his workmen by adopting safer instruments of labor. It seems to us a court should be very slow to construe the beneficial purpose out of such a law, or make it of no effect. On broad lines of public good and social progress, it is plain that

such legislation is to be largely looked to if government is to remain firm and secure in the respect and affection of the people.''³²

And in North Carolina it is held that the doctrine of assumption of risk "has no application where the law requires the adoption of new devices to save life or limb, and the employe either ignorant of that fact or expecting daily compliance with the law, continues in service with the appliances formerly in use."³³ And the same is held in other jurisdictions.³⁴

***Injuries by Negligence of Fellow Servants.** The [*637] rule which exempts the master from responsibility for injuries to his servants, proceeding from risks incidental to the employment, extends to cases where the injury results from the negligence *of other servants in the same em- [*638] ployment.³⁵ Whatever controversy there may for a

32—*Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; *S. C. Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263, 47 Atl. 827, 82 Am. St. Rep. 939.

33—*Grenlee v. Southern Ry. Co.*, 122 N. C. 977, 982, 30 S. E. 115, 65 Am. St. Rep. 734, 41 L. R. A. 399.

34—*Monteith v. Kokomo Wood Enamelling Co.*, 159 Ind. 449, 64 N. E. 610, 58 L. R. A. 944; *Green v. Am. Car & Foundry Co.*, 163 Ind. 135, 71 N. E. 268; *Buehner Chair Co. v. Feulner*, 164 Ind. 368; *Davis v. Mercer Lumber Co.*, 164 Ind. 413; *Narramore v. Cleveland, etc., Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499. In the last case the court says: "The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive

law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that." p. 302. Citing *Baddeley v. Granville*, 19 Q. B. D. 423; *Durant v. Mining Co.*, 97 Mo. 62, 10 S. W. 484; *Grand v. Mich. Cent. etc., R. R. Co.*, 83 Mich. 564, 47 N. W. 837; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Boyd v. Coal Co. (Ind. App.)* 50 N. E. 368. *Contra*, *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986.

35—The injured person may recover from his fellow servant. *Rogers v. Overton*, 87 Ind. 410; *Osborne v. Morgan*, 130 Mass. 102;

time have been on this point may now be said, by an overwhelming weight of authority, to have been thoroughly quieted [*639] and settled.³⁶ Some disputes still remain *which con-

Griffiths v. Woolfram, 22 Minn. 185. etc., R. R. Co., 28 Fla. 251, 9 So. 696.

36—The following cases, with numerous others, sustain the text:
Alabama: *Walker v. Bolling*, 22 Ala. 294; *Whatley v. Zenida Coal Co.*, 122 Ala. 118, 26 So. 124.

Arizona: *Southern Pacific Co. v. McGill*, 5 Arizona, 36, 44 Pac. 302.

Arkansas: *St. Louis, &c., Co. v. Shackelford*, 42 Ark. 417; *St. Louis, etc., Ry. Co. v. Rice*, 51 Ark. 467, 11 S. W. 639, 4 L. R. A. 173; *Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250.

California: *Hogan v. Central Pacific R. R. Co.*, 49 Cal. 129; *McDonald v. Hazeltine*, 53 Cal. 35; *Stephens v. Doe*, 73 Cal. 26, 14 Pac. 378; *Long v. Coronado R. R. Co.*, 96 Cal. 269, 31 Pac. 170; *Trewatha v. Buchanan Gold Min. & M. Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916; *Stevens v. San Francisco*, etc., R. R. Co., 100 Cal. 554, 35 Pac. 165.

Colorado: *Summerhays v. Kansas Pac. Ry. Co.*, 2 Colorado, 484; *Denver, etc., R. R. Co. v. Sipes*, 23 Colo. 226, 47 Pac. 287; *Litsen v. Brown*, 11 Colo. App. 11, 52 Pac. 287.

Connecticut: *Hayden v. Smithville Manf. Co.*, 29 Conn. 548; *Burke v. Norwich & Worcester R. R. Co.*, 34 Conn. 474; *Sullivan v. New York*, etc., R. R. Co., 62 Conn. 209, 25 Atl. 711; *Peterson v. New York*, etc., R. R. Co., 77 Conn. 351.

Florida: *Parrish v. Pensacola*,

etc., R. R. Co., 28 Fla. 251, 9 So. 696.
Georgia: *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698; *Brush Elec. L. & P. Co. v. Wells*, 110 Ga. 192, 35 S. E. 365; *Colley v. Southern Cotton Oil Co.*, 120 Ga. 258, 47 S. E. 932.

Idaho: *Snyder v. Viola M. & S. Co.*, 3 Idaho, 28, 26 Pac. 127.

Illinois: *Illinois Central R. R. Co. v. Cox*, 21 Ill. 20, 71 Am. Dec. 298; *Toledo, Wabash & Western R. R. Co. v. Durkin, Admx.*, 76 Ill. 395; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; *Meyer v. Illinois Cent. R. R. Co.*, 177 Ill. 591, 52 N. E. 848; *World's Columbian Exposition v. Lehigh*, 196 Ill. 612, 63 N. E. 1089.

Indiana: *Columbus, &c., R. R. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615; *Taylor v. Evansville*, etc., R. R. Co., 121 Ind. 124, 22 N. E. 876, 16 Am. St. Rep. 372; *Lake Shore, etc., Ry. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303.

Iowa: *Sullivan v. Railroad Co.*, 11 Iowa, 421; *Benn v. Null*, 65 Ia. 407; *Thelman v. Moeller*, 73 Ia. 108, 34 N. W. 765, 5 Am. St. Rep. 663; *Treka v. Burlington*, etc., Ry. Co., 100 Ia. 205, 69 N. W. 422.

Kansas: *Kansas Pacific R. R. Co. v. Salmon*, 11 Kan. 83.

Kentucky: *Casey v. Louisville*, etc., R. R. Co., 84 Ky. 79; *Fort Hill Stone Co. v. Orm's Admr.*, 84 Ky. 183; *Cincinnati, etc., Ry. Co. v. Roberts*, 110 Ky. 856, 62 S. W. 901.

Maine: *Lawler v. Androscoggin*

cern the proper limits of the doctrine, and what and how many are the exceptional cases.

R. R. Co., 62 Me. 463, 16 Am. Rep. 492; *Cowan v. Umbagog Pulp Co.*, 91 Me. 26, 39 Atl. 340; *Small v. Allington*, etc., Mfg. Co., 94 Me. 551, 48 Atl. 177; *Stewart v. International Paper Co.*, 96 Me. 30, 51 Atl. 237.

Maryland: *Wonder v. Baltimore, &c.*, R. R. Co., 32 Md. 411, 3 Am. Rep. 143; *Hanrathy v. Nor. Cent. R. R. Co.*, 46 Md. 280; *Yates v. McCullough Iron Co.*, 69 Md. 370, 16 Atl. 280.

Massachusetts: *Farwell v. Boston, &c.*, R. R. Co., 4 Met. 49, 38 Am. Dec. 339; *O'Connor v. Roberts*, 120 Mass. 227; *Benson v. Goodwin*, 147 Mass. 237, 17 N. E. 517; *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 34 N. E. 185, 38 Am. St. Rep. 396; *O'Connor v. Rich*, 164 Mass. 560, 42 N. E. 111, 49 Am. St. Rep. 483.

Michigan: *Davis v. Detroit, &c.*, R. R. Co., 20 Mich. 105, 4 Am. Rep. 364; *Michigan Central R. R. Co. v. Dolan*, 32 Mich. 510; *La Pierre v. Chicago, etc.*, Ry. Co., 99 Mich. 212, 58 N. W. 60; *Wellihan v. National Wheel Co.*, 128 Mich. 1, 87 N. W. 75; *Randa v. Detroit Screw Works*, 134 Mich. 343, 94 N. W. 454.

Minnesota: *Foster v. Minnesota R. R. Co.*, 14 Minn. 360; *Marsh v. Herman*, 47 Minn. 537, 50 N. W. 611; *Hefferen v. Northern Pac. R. R. Co.*, 45 Minn. 471, 45 N. W. 1, 526; *Neal v. Northern Pac. R. R. Co.*, 57 Minn. 365, 59 N. W. 312, 47 Am. St. Rep. 618.

Mississippi: *Howd v. Miss. Cent. R. R. Co.*, 50 Miss. 178; *McMaster v. Illinois Cent. R. R. Co.*, 65 Miss. 264, 4 So. 59, 7 Am. St. Rep. 653; *Louisville, etc., Ry. Co. v. Petty*,

67 Miss. 255, 7 So. 351, 19 Am. St. Rep. 304.

Missouri: *Harper v. Indianapolis, &c.*, R. R. Co., 47 Mo. 567, 4 Am. Rep. 353; *Lee v. Detroit Bridge & Iron Works*, 62 Mo. 565; *Ryan v. McCully*, 123 Mo. 636, 27 S. W. 533; *Grattis v. Kansas City, etc., Ry. Co.*, 153 Mo. 380, 55 S. W. 108, 77 Am. St. Rep. 721, 48 L. R. A. 399.

Montana: *Hastings v. Montana Union Ry. Co.*, 18 Mont. 493, 46 Pac. 264.

New Hampshire: *Hanley v. Grand Trunk Ry. Co.*, 62 N. H. 274; *McLaine v. Head, etc.*, Co., 71 N. H. 294, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462; *Galvin v. Pierce*, 72 N. H. 79, 54 Atl. 1014.

New Jersey: *Harrison v. Central R. R. Co.*, 31 N. J. 293; *Maher v. Thropp*, 59 N. J. L. 186, 35 Atl. 1057; *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557, 38 Atl. 677; *Pfeiffer v. Dialogue*, 64 N. J. L. 707, 46 Atl. 772.

New Mexico: *Cerillos Coal R. R. Co. v. Deserant*, 9 N. M. 49, 49 Pac. 807; *Deserant v. Cerillos Coal R. R. Co.*, 9 N. M. 495, 55 Pac. 290.

New York: *Sherman v. Rochester, &c.*, R. R. Co., 17 N. Y. 153; *Hofnagle v. N. Y. C. & H. R. R. Co.*, 55 N. Y. 608; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 556, 8 Am. St. Rep. 787, 3 L. R. A. 559; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021; *Vogel v. Am. Bridge Co.*, 180 N. Y. 373, 73 N. E. 1.

North Carolina: *Ponton v. Wilmington, &c.*, R. R. Co., 6 Jones (N. C.) L. 245; *Hagins v. Cape Clear, etc., Ry. Co.*, 106 N. C. 537, 11 S. E. 590; *Hobbs v. Atlantic, etc.*, R.

Servants of Different Grades or Ranks. In some quarters a strong disposition has been manifested to hold the rule not

R. Co., 107 N. C. 1, 12 S. E. 129, 9 Creek Min. Co. *v.* Davis, '90 Tenn. L. R. A. 838; *Omstead v. Raleigh*, 130 N. C. 243, 41 S. E. 292. 711, 18 S. W. 387; Railroad Co. *v. Jackson*, 106 Tenn. 438, 61 S. W. 771.

North Dakota: *Eli v. Northern Pacific* R. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

Ohio: *Pittsburgh, Ft. Wayne & Chicago R. R. Co. v. Devinney*, 17 Ohio St. 197; *Kelly Island L. & T. Co. v. Pachuta*, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep. 706.

Oregon: *Mast v. Kern*, 34 Ore. 247, 54 Pac. 950, 75 Am. St. Rep. 580; *Johnson v. Portland Stone Co.*, 40 Ore. 436, 67 Pac. 1018, 68 Pac. 425.

Pennsylvania: *Caldwell v. Brown*, 53 Pa. St. 453; *Hays v. Millar*, 77 Pa. St. 238, 18 Am. Rep. 445; *Allegheny Heating Co. v. Rohan*, 118 Pa. St. 223, 11 Atl. 789; *Bernisch v. Roberts*, 143 Pa. St. 1, 21 Atl. 998; *Rehm v. Pennsylvania R. R. Co.*, 164 Pa. St. 91, 30 Atl. 356; *Prescott v. Ball Engine Co.*, 176 Pa. St. 459, 35 Atl. 224, 53 Am. St. Rep. 683; *Spees v. Boggs*, 198 Pa. St. 112, 47 Atl. 875, 82 Am. St. Rep. 792, 52 L. R. A. 933; *Duffy v. Platt*, 205 Pa. St. 296, 54 Atl. 1000; *O'Neal v. Clydesdale Stone Co.*, 207 Pa. St. 378, 56 Atl. 929;

Rhode Island: *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659; *Healey v. New York, etc.*, R. R. Co., 20 R. I. 136, 37 Atl. 676; *Sullivan v. Nicholson File Co.*, 21 R. I. 540, 45 Atl. 549.

South Carolina: *Murray v. R. R. Co.*, 1 McMullen, 385; *Evans v. Chamberlain*, 40 S. C. 104, 18 S. E. 213.

Tennessee: *Fox v. Sandford*, 4 Snead, 36, 67 Am. Dec. 587; Coal

Creek Min. Co. *v. Davis*, '90 Tenn. 711, 18 S. W. 387; Railroad Co. *v. Jackson*, 106 Tenn. 438, 61 S. W. 771.

Texas: *Houston, &c., Co. v. Miller*, 51 Tex. 270; *Galveston, etc., Ry. Co. v. Farmer*, 73 Tex. 85, 11 S. W. 156; *Galveston, etc., Ry. Co. v. Smith*, 76 Tex. 611, 13 S. W. 562, 18 Am. St. Rep. 18.

Utah: *Stephani v. Southern Pac. Co.*, 19 Utah, 196, 57 Pac. 34.

Vermont: *Hard v. Vermont, &c., R. R. Co.*, 32 Vt. 473.

Virginia: *Norfolk, etc., R. R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Norfolk, etc., R. R. Co. v. Nuckols' Admr.*, 91 Va. 193, 21 S. E. 342; *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

Washington: *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830; *Pugh v. Oregon Imp. Co.*, 14 Wash. 331, 44 Pac. 547, 689; *Wilson v. Northern Pac. Ry. Co.*, 31 Wash. 67, 71 Pac. 773; *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114; *Millett v. Puget Sound I. & S. Works*, 37 Wash. 438, 79 Pac. 980.

West Virginia: *Berns v. Gaston Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304.

Wisconsin: *Anderson v. Milwaukee R. R. Co.*, 37 Wis. 321; *Kliegel v. Weisel, etc.*, Mfg. Co., 84 Wis. 184, 53 N. W. 1119; *Porter v. Silver Creek, etc., Co.*, 84 Wis. 418, 54 N. W. 1019; *Dahlke v. Illinois Steel Co.*, 100 Wis. 431, 76 N. W. 362; *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885.

United States: *Dillon v. Union*

applicable to the case of a servant who, at the time of the injury, was under the general direction and control of another, who was entrusted with duties of a higher grade, and from

Pac. R. Co., 3 Dill. 319; Kielley *v.* Belcher Silver So., 3 Sawyer, 437, 500; Halverson *v.* Nisen, 3 Sawyer, 462; Armour *v.* Hahn, 111 U. S. 313; Railroad Co. *v.* Fort, 17 Wall. 553; Northern Pac. R. R. Co. *v.* Hamby, 154 U. S. 349, 14 S. C. Rep. 983, 38 L. Ed. 1009; Northern Pac. Co. *v.* Peterson, 162 U. S. 346, 16 S. C. Rep. 843, 40 L. Ed. 994; Northern Pac. Ry. Co. *v.* Charliss, 162 U. S. 359, 16 S. C. Rep. 848, 40 L. Ed. 999; New England R. R. Co. *v.* Conroy, 175 U. S. 323, 20 S. C. Rep. 85, 44 L. Ed. 181; Northern Pac. Ry. Co. *v.* Dixon, 194 U. S. 338, 24 S. C. Rep. 683, 48 L. Ed. 1006; Balch *v.* Haas, 73 Fed. 974, 20 C. C. A. 151; Weeks *v.* Scharer, 111 Fed. 330, 49 C. C. A. 371.

England: Bartonhill Coal Co. *v.* Reid, 3 Macq., H. L. 266; Same *v.* McGuire, Id. 300; Hutchinson *v.* Railway Co., 5 Exch. 343; Morgan *v.* Railway Co., L. R. I Q. B. 149; Brown *v.* Cotton Co., 3 H. & C. 511; Hedley *v.* Pinkney & Sons S. S. Co. (1894) A. C. 222.

The mere fact of minority does not affect the rule. Houston, &c., Co. *v.* Miller, 51 Tex. 270; Fisk *v.* Cent. Pac., &c., Co., 72 Cal. 38, 13 Pac. 144. The rule has no application to a common employment merely, where the master is not the same. Svenson *v.* Atlantic, &c., Co., 33 N. Y. Sup. Ct. 277; Kelly *v.* Johnson, 128 Mass. 530, 35 Am. Rep. 398; Louisville, &c., Co. *v.* Conroy, 63 Miss. 562, 56 Am. Rep. 835, a carefully considered case. And see Muster *v.* Chicago, &c., Co.,

61 Wis. 325, 50 Am. Rep. 141. But, see, Ewan *v.* Lippencott, 47 N. J. L. 192, 54 Am. Rep. 148. Nor does the rule cover the case where two railroads by arrangement use the same track so as to make the servants of each fellow-servants. Phillips *v.* Chicago, &c., Co., 64 Wis. 475; Phila., &c., Co. *v.* State, 58 Md. 372; Sullivan *v.* Tioga R. R. Co., 44 Hun, 304; Ziegler *v.* Danbury, &c., Co., 52 Conn. 543. In Illinois in such case the negligence of the servants of the one master is held an ordinary risk of the business of those of the other. Clark *v.* Chicago, &c., Co., 92 Ill. 43. One going to his work along the tracks or from it to catch a train as ordered is in the master's service within the rule. Ewald *v.* Chicago, &c., Co., 70 Wis. 420, 36 N. W. 12, 591; O'Brien *v.* Boston, &c., Co., 138 Mass. 387. The usual rule is not changed by the fact that those who did the harm were unreasonably overworked, when that was not the cause of their negligence. Johnson *v.* Pittsburgh, &c., Co., 114 Pa. St. 443. The rule is modified by statute in many states. See St. Louis, etc., Ry. Co. *v.* Rickman, 65 Ark. 138, 45 S. W. 56; Chicago, etc., R. R. Co. *v.* Rouse, 178 Ill. 132, 52 N. E. 952, 44 L. R. A. 410; Callahan *v.* St. Louis, etc., R. R. Co., 170 Mo. 473, 71 S. W. 208, 94 Am. St. Rep. 746, 60 L. R. A. 249; Railroad Co. *v.* Margrat, 51 Ohio St. 130, 37 N. E. 11; Railway Co. *v.* Erick, 51 Ohio St. 146, 37 N. E. 128.

whose negligence the injury resulted.³⁷ But it cannot [*640] *be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible,

37—Little Miami R. R. Co. v. Stevens, 20 Ohio, 415; Cleveland, &c., R. R. Co. v. Keary, 3 Ohio St. 201. See these cases explained in Pittsburgh, &c., R. R. Co. v. Devinney, 17 Ohio St. 197. See also, Louisville, &c., R. R. Co. v. Collins, 2 Duv. 114; Same v. Robinson, 4 Bush, 507; Toledo, &c., R. R. Co. v. O'Connor's Admx., 77 Ill. 391; Denver, etc., R. R. Co. v. Driscoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243; Colorado Midland Ry. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701; Wabash, etc., Ry. Co. v. Hawk, 121 Ill. 259, 12 N. E. 253, 2 Am. St. Rep. 82; Consolidated Coal Co. v. Wombacher, 134 Ill. 57, 24 N. E. 627; Chicago, etc., Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Pittsburg Bridge Co. v. Walker, 170 Ill. 550, 48 N. E. 915; Nall v. Louisville, etc., Ry. Co., 129 Ind. 260, 28 N. E. 183; Baldwin v. St. Louis, etc., Ry. Co., 75 Ia. 297, 39 N. W. 507; Evans v. La. Lumber Co., 111 La. 534, 35 So. 736; Carlson v. N. W. Tel. Exch. Co., 63 Minn. 428, 65 N. W. 914; Holman v. Kempe, 70 Minn. 422, 73 N. W. 186; Peterson v. Am. Grass. Twine Co., 90 Minn. 343, 96 N. W. 913; Stephens v. Hannibal, etc., R. R. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; Dayharsh v. Hannibal, etc., R. R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; Sullivan v. Hannibal, etc., R. R. Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. Rep. 388; Russ v. Wabash Western Ry. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; Foster v. Missouri Pac. R. R. Co., 115 Mo. 165, 21 S. W. 916; Bane v. Irwin, 172 Mo. 306, 72 S. W. 522; Union Pac. R. R. Co. v. Doyle, 50 Neb. 555, 70 N. W. 43; Logan v. North Carolina R. R. Co., 116 N. C. 940, 21 S. E. 959; Louisville, etc., R. R. Co. v. Northington, 91 Tenn. 56, 17 S. W. 880, 16 L. R. A. 268; Electric Ry. Co. v. Lawson, 101 Tenn. 404, 47 S. W. 489; Missouri Pac. Ry. Co. v. Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867; Nix v. Texas Pac. Ry. Co., 82 Tex. 473, 18 S. W. 571, 27 Am. St. Rep. 897; Cunningham v. Union Pac. Ry. Co., 4 Utah, 206, 7 Pac. 795; Reddon v. Union Pac. Ry. Co., 5 Utah, 344, 15 Pac. 262; Anderson v. Ogden Ry. & Depot Co., 8 Utah, 128, 30 Pac. 305; Armstrong v. Oregon Short Line, etc., Co., 8 Utah, 420, 32 Pac. 693; Richmond Granite Co. v. Bailey, 92 Va. 554, 24 S. E. 232; Zintek v. Stinson Mill Co., 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055; Zintek v. Stinson Mill Co., 9 Wash. 395, 37 Pac. 340; McDonough v. Great Northern Ry. Co., 15 Wash. 244, 46 Pac. 334; Keating v. Pacific Steam Whaling Co., 21 Wash. 415, 58 Pac. 224; Bailey v. Cascade Timber Co., 32 Wash. 319, 73 Pac. 385; Woods v. Lindvall, 48 Fed. 62, 1 C. C. A. 34; Cleveland, etc., Ry. Co. v. Brown, 56 Fed. 804, 6 C. C. A. 142; Chicago House Wrecking Co. v. Birney, 117 Fed. 72, 54 C. C. A. 458. In the following Kentucky cases it is held that a servant may recover for the gross negli-

therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class. Nor on grounds of public policy could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful. And in this regard it can make little difference what is the grade of servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to report it.⁴⁰

gence of a fellow servant of a superior rank or grade but not for his ordinary negligence. Louisville, etc., R. R. Co. v. Brantley, 96 Ky. 297, 28 S. W. 477, 49 Am. St. Rep. 291; Cincinnati, etc., R. R. Co. v. Palmer, 98 Ky. 382, 33 S. W. 199. If the master himself works with his servants and injures one of them by his negligence, he is liable therefor, and if he has partners in the business, they are liable also. *Ashworth v. Stanwix*, 3 El. & El. 701; *Mellors v. Shaw*, 1 Best & S. 437; *McCarraher v. Gaskell*, 42 Hun, 451. See *Stroher v. Elting*, 97 N. Y. 102.

40—Persons are fellow servants where they are engaged in the same common pursuit under the same general control. “A foreman is a servant, as much as any other servant whose work he superintends.” *WILLES*, J., in *Gal-*

lagher v. Piper, 16 C. B. (N. S.) 669, 694. The same doctrine was declared in *Wigmore v. Jay*, 5 Exch. 354; *Feltham v. England*, L. R. 2 Q. B. 33; *Chicago, &c., R. R. Co. v. Murphy*, 53 Ill. 336, 5 Am. Rep. 48; *Summersett v. Fish*, 117 Mass. 312; and *O'Connor v. Roberts*, 120 Mass. 227; *Zeigler v. Day*, 123 Mass. 152. In this country it has often been declared that the grade of service of the two servants is unimportant “provided the services of each in his particular sphere and department are directed to the accomplishment of the same general end.” *BACON*, J., in *Warner v. Erie R. R. Co.*, 39 N. Y. 468, 470. See *Coon v. Syracuse, &c., R. R. Co.*, 5 N. Y. 492; *Columbus, &c., R. R. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615; *Hayes v. Western R. R. Corp.*, 3 *Cush.* 270; *Hard v. Vermont, &c.*,

In New York it is held that "a servant who sustains an injury from the negligence of a superior agent, engaged in the same general business, cannot maintain an action against their common employer, although he was subject to the control of such superior agent, and could not guard against his negligence or its consequences."⁴¹ And in another case: "If the master does or must employ some one to represent him in managing the performance of the work, and he neglects no precaution in the selection of a competent foreman and in making all reasonable provision for a safe and proper execution of the work, he has discharged his duty. As to the details in the execution of the work, the foreman and workmen are fellow servants. This is

R. R. Co., 32 Vt. 473; O'Connell *v.* B. & O. R. R. Co., 20 Md. 212, 83 Am. Dec. 549; Sherman *v.* Rochester, &c., R. R. Co., 17 N. Y. 153; Ryan *v.* Cumberland, &c., R. R. Co., 23 Pa. St. 384; Chicago, &c., R. R. Co. *v.* Keefe, 47 Ill. 108; Pittsburgh, &c., R. R. Co. *v.* Devinney, 17 Ohio St. 197; Wood *v.* New Bedford Coal Co., 121 Mass. 252; St. Louis, &c., R. R. Co. *v.* Britz, 72 Ill. 256; Malone *v.* Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; McMaster *v.* Ill. Centr. R. R. Co., 65 Miss. 264, 4 So. 59; McDermott *v.* Boston, 133 Mass. 349; Doughty *v.* Penobscot, &c., Co., 76 Me. 143; Cassidy *v.* Maine, &c., Co., Id. 488; Conley *v.* Portland, 78 Me. 217; Hoth *v.* Peters, 55 Wis. 405; Peschel *v.* Chicago, &c., Co., 62 Wis. 338; Mathews *v.* Case, 61 Wis. 491, 50 Am. Rep. 151; Heine *v.* Chicago, &c., Co., 58 Wis. 525; Peterson *v.* Whitebreast, &c., Co., 50 Ia. 673, 32 Am. Rep. 143; Foley *v.* Chicago, &c., Co., 64 Ia. 644; Fraeker *v.* St. Paul, &c., Co., 32 Minn. 54; Kirk *v.* Railway Co., 94 N. C. 625, 55 Am. Rep. 621; Loughlin *v.* State, 105 N. Y. 159; Caniff *v.*

Blanchard, &c., Co., 66 Mich. 638, 33 N. W. 744; Keystone, &c., Co. *v.* Newbury, 96 Pa. St. 246, 42 Am. Rep. 543; Reese *v.* Biddle, 112 Pa. St. 72; Waddell *v.* Simoson, 112 Pa. St. 567; Lehigh, &c., Coal Co. *v.* Jones, 86 Pa. St. 432; Benson *v.* Goodwin, 147 Mass. 237, 17 N. E. 517, where a mate and sailor on a vessel are held fellow servants. It is immaterial that one is in position of greater responsibility than the other, so long as the negligence of that one might contribute to the danger of the other. Quincy Min. Co. *v.* Kitts, 42 Mich. 34. "No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if it had been by a stranger, he might have had a right of action." POLLOCK, C. B., in Abraham *v.* Reynolds, 5 H. & N. 143. See Conway *v.* Belfast, &c., R. R. Co., 11 Irish L. T. Rep. 115; S. C. 4 Law & Eq. Rep. 451.

41—Keenan *v.* New York, etc., R. R. Co., 145 N. Y. 190, 39 N. E. 711, 45 Am. St. Rep. 604.

a logical application of the rule of law and it is a just one."⁴² And in Massachusetts the rule is held to be well established "that the fact that one servant has control over another is immaterial, and that a master is not responsible, at common law, for the negligence of a superior servant, even in giving orders whereby injury is sustained by an inferior servant."⁴³

In addition to the cases already cited, numerous decisions made since the second edition of this work was published support these views, and the great weight of authority now is, that the mere fact that one servant has authority over another does not create an exception to the general rule that exempts the master from liability for an injury to one servant by the negligence of a fellow servant.⁴⁴

42—*Vogel v. Am. Bridge Co.*, etc., R. R. Co., 79 Mich. 409, 44 N. W. 1034, 19 Am. St. Rep. 180, 7 L. R. A. 623; *Lepan v. Hall*, 128 Mich. 523, 87 N. W. 619; *Wellihan v. National Wheel Co.*, 128 Mich. 1, 87 N. W. 75; *Mikolojczak v. North Am. Chemical Co.*, 129 Mich. 80, 88 N. W. 75; *Randa v. Detroit Screw Works*, 134 Mich. 343, 94 N. W. 454; *Olson v. St. Paul, etc., Ry. Co.*, 38 Minn. 117, 35 N. W. 866; *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793; *Lagroue v. Mobile, etc., R. R. Co.*, 67 Miss. 592, 7 So. 432; *Hastings v. Montana Union Ry. Co.*, 18 Mont. 493, 46 Pac. 264; *McLaine v. Head, etc., Co.*, 71 N. H. 294, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462; *O'Brien v. Am. Dredging Co.*, 53 N. J. L. 291, 21 Atl. 324; *Gilmore v. Oxford Iron, etc., Co.*, 55 N. J. L. 39, 25 Atl. 707; *Maher v. Thropp*, 59 N. J. L. 186, 35 Atl. 1057; *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557, 38 Atl. 677; *Enright v. Oliver*, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710; *Atchison, etc., R. R. Co. v. Martin*, 7 N. M.

43—*Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 72, 34 N. E. 185, 38 Am. St. Rep. 396.

44—*St. Louis, etc., Ry. Co. v. Rice*, 51 Ark. 467, 11 S. W. 639, 4 L. R. A. 173; *Stephens v. Doe*, 73 Cal. 26, 14 Pac. 378; *Noyes v. Wood*, 102 Cal. 389, 36 Pac. 766; *Nixon v. Selby Smelting Co.*, 102 Cal. 458, 36 Pac. 803; *Donovan v. Ferris*, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25; *Sullivan v. New York, etc., R. R. Co.*, 62 Conn. 209, 25 Atl. 711; *Whittlesey v. New York, etc., R. R. Co.*, 77 Conn. 100, 107 Am. St. Rep. 21; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124, 22 N. E. 876, 16 Am. St. Rep. 372; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Dill v. Marmon*, 164 Ind. 507; *Dube v. Lewiston*, 83 Me. 211, 22 Atl. 112; *Small v. Allington, etc., Mfg. Co.*, 94 Me. 551, 48 Atl. 177; *Kalleck v. Deering*, 161 Mass. 469, 37 N. E. 450, 42 Am. St. Rep. 421; *Harrison v. Detroit*,

[*641] **Servants in Different Departments.** *It has also sometimes been insisted that the law should exclude from the scope of the general rule the case of a servant injured by the negligence of another who, though employed in the same general business, had his service in some distinct branch of it as in the case of a laborer on the track of a railroad injured by the carelessness of an engine driver,⁴⁵ a car-

158, 34 Pac. 536; *Deserant v. Cer-*
rillos Coal R. R. Co., 9 N. M. 495,
 55 Pac. 290; *Hussey v. Coger*, 112
 N. Y. 614, 20 N. E. 556, 8 Am. St.
 Rep. 787, 3 L. R. A. 559; *Perry v.*
Rogers, 157 N. Y. 251, 51 N. E.
 1021; *Quigley v. Levering*, 167 N.
 Y. 58, 60 N. E. 276, 54 L. R. A. 62;
Malbie v. Belden, 167 N. Y. 307,
 60 N. E. 645, 54 L. R. A. 52; *Vitto*
v. Keegan, 15 App. Div. 329, 44 N.
 Y. S. 1; *Eli v. Northern Pac. R.*
R. Co., 1 N. D. 336, 48 N. W. 222,
 26 Am. St. Rep. 621, 12 L. R. A.
 97; *Kelly Island L. & T. Co. v.*
Pachuta, 69 Ohio St. 462, 69 N. E.
 988, 100 Am. St. Rep. 706; *Stege-*
man v. Humbers, 2 Ohio C. C. 51;
Mast v. Kern, 34 Ore. 247, 54 Pac.
 950, 75 Am. St. Rep. 580; *Johnson*
v. Portland Stone Co., 40 Ore. 436,
 67 Pac. 1013, 68 Pac. 425; *Kenney*
v. Corbin, 132 Pa. St. 341, 19 Atl.
 141; *Spancake v. Philadelphia*, etc.,
R. R. Co., 148 Pa. St. 184, 23 Atl.
 1006, 33 Am. St. Rep. 821; *Haley*
v. Keim, 151 Pa. St. 117, 25 Atl.
 98; *Leneoski v. Susquehanna Coal*
Co., 157 Pa. St. 153, 27 Atl. 577;
Prevost v. Citizens' Ice, etc., Co.,
 185 Pa. St. 617, 40 Atl. 88, 64 Am.
 St. Rep. 659; *Hughes v. Leonard*,
 199 Pa. St. 123, 48 Atl. 862; *Duffy*
v. Platt, 205 Pa. St. 296, 54 Atl.
 1000; *Larich v. Moies*, 18 R. I.
 513, 28 Atl. 661; *Di Marcho v.*
Builders Iron Foundry, 18 R. I.
 514, 27 Atl. 328; *Morgridge v.*
Prov. Telephone Co., 20 R. I. 386,
 39 Atl. 328, 78 Am. St. Rep. 879;
Milhench v. Jencks Mfg. Co., 24
 R. I. 131, 52 Atl. 687; *Brabham v.*
Am. Tel. & Tel. Co., 71 S. C. 53,
 50 S. E. 716; *Allen v. Goodwin*,
 92 Tenn. 385, 21 S. W. 760; *Rich-*
mond Locomotive Works v. Ford,
 94 Va. 627, 27 S. E. 509; *Moore*
Lime Co. v. Richardson, 95 Va.
 326, 28 S. E. 334, 64 Am. St. Rep.
 785; *Robinson v. Dininny*, 96 Va.
 41, 30 S. E. 442; *Russell Creek*
Coal Co. v. Wells, 96 Va. 416, 31
 S. E. 614; *Wiskie v. Montello*
Granite Co., 111 Wis. 443, 87 N. W.
 461, 87 Am. St. Rep. 885; *Okonski*
v. Pennsylvania, etc., *Fuel Co.*, 114
 Wis. 448, 90 N. W. 429; *Northern*
Pac. R. R. Co. v. Peterson, 162 U.
 S. 346, 16 S. C. Rep. 843, 40 L. Ed.
 994; *Northern Pac. R. R. Co. v.*
Charliss, 162 U. S. 359, 16 S. C.
 Rep. 848, 40 L. Ed. 999; *Alaska*
Min. Co. v. Whelan, 168 U. S. 86,
 18 S. C. Rep. 40, 42 L. Ed. 390;
Martin v. Atchison, etc., *R. R. Co.*,
 166 U. S. 399, 17 S. C. Rep. 994,
 41 L. Ed. 1051; *Kansas*, etc., *Ry.*
Co. v. Waters, 70 Fed. 28, 16 C. C.
 A. 609; *Balch v. Haas*, 73 Fed.
 974, 20 C. C. A. 151; *McDonald v.*
Buckley, 109 Fed. 290, 48 C. C. A.
 372.

45—See *Nashville, &c., R. R. Co. v. Carroll*, 6 Heisk. 347; *Ryan v. Chicago, &c., R. R. Co.*, 60 Ill. 171, 14 Am. Rep. 32; *Toledo, &c., R. R.*

penter employed on buildings injured by the negligence of a yardmaster in making up trains; and the [*642] like. But in the main the authorities agree that the general rule must apply to such cases, and that, on the reasons on which the rule is rested, they cannot be distinguished from those in which the service of both persons was in the same line.⁴⁶ This

Co. *v.* Moore, 77 Ill. 217; Chicago, &c., Co. *v.* Moranda, 93 Ill. 302, 34 Am. Rep. 168; North Chicago, &c., Co. *v.* Johnson, 114 Ill. 57; Chicago, &c., Co. *v.* Hoyt, 122 Ill. 369, 12 N. E. 225; Garrahy *v.* Kansas, &c., R. R. Co., 25 Fed. Rep. 258; Fay *v.* Minn., &c., Co., 30 Minn. 231; Tierney *v.* Minn., &c., Co., 33 Minn. 311; Davis *v.* Centr. Vt., &c., Co., 55 Vt. 84, 45 Am. Rep. 590; St. Louis, &c., Co. *v.* Harper, 44 Ark. 524; Calvo *v.* Railroad Co., 23 S. C. 526, 55 Am. Rep. 28; St. Louis, &c., Co. *v.* Weaver, 35 Kan. 412, 57 Am. Rep. 176; Miss., &c., Co. *v.* Dwyer, 36 Kan. 58, 12 Pac. 352; Houston, &c., Co. *v.* Marcelles, 59 Tex. 334; Texas, &c., Co. *v.* Kirk, 62 Tex. 227; James *v.* Emmet Min. Co., 55 Mich. 335; Condon *v.* Miss., &c., Co., 78 Mo. 567; Kentucky, &c., Co. *v.* Ackley, 87 Ky. 278, 8 S. W. 691. So where a member of a city fire department is injured by the negligence of the street department. Turner *v.* Indianapolis, 96 Ind. 51. See elaborate notes on who are fellow servants, to McLeod *v.* Ginther, 8 A. & E. R. R. Cas. 162; Chicago, &c., Co. *v.* Ross, 17 A. & E. R. R. Cas. 514.

46—It was held in Morgan *v.* Railway Co., L. R. 1 Q. B. 149, that a railway company was not liable to a carpenter employed to work at his trade on its line, who was injured by the negligence of

its porters in shifting an engine on its turn table close by the shed on which the carpenter was working. “The plaintiff and the porters were engaged in one common employment, and were doing work for the common object of their masters, viz., fitting the line for traffic.” ERLE, Ch. J., p. 154. “If a carpenter’s employment is to be distinguished from that of porters employed by the same company, it will be sought to split up the employees in every large establishment into different departments of service, although the common object of their service, however different, is but the furtherance of the business of the master; yet it might be said with truth that no two had a common immediate object.” POLLOCK, C. B., p. 155. And, see, Feltham *v.* England, L. R. 2 Q. B. 33. It is held in Massachusetts that a railroad company is not responsible to a person employed by it to repair its cars, for a personal injury arising from the negligence of a switchman, in failing properly to adjust a switch on the track over which he is carried by the company to his place of work, unless negligence in the employment of the man is made out. Gilman *v.* Eastern R. R. Corp., 10 Allen, 233, 87 Am. Dec. 635. See Hodgkins *v.* Eastern R. R. Co., 119 Mass. 419; Lawler *v.* Androscoggin R. R.

doctrine that servants in different departments of the master's business are not fellow servants has probably had its chief

Co., 62 Me. 463, 16 Am. Rep. 492; *Lea*, 145; *Chicago, &c., Co. v. Wonder*, 60 Miss. 977; *Capper v. Louisville, &c., Co.*, 103 Ind. 305; *Connelly v. Minn., &c., Co.*, 38 Minn. 80, 35 N. W. 582; *Roberts v. Chicago, &c., Co.*, 33 Minn. 218; *New York, &c., Co. v. Bell*, 112 Pa. St. 400. In *Randall v. Balt., &c., Co.*, 109 U. S. 478, a brakeman is held fellow servant with an engineer on another train which strikes him while he is switching. But, see *Chicago, &c., Co. v. Ross*, 112 U. S. 377. The rule of exemption extends to "every member of an establishment." *POLLOCK*, C. B., in *Abraham v. Reynolds*, 5 H. & N. 143. In the case of railway companies it is said there is no good reason to limit the rule to cases where the servants are in the same department of a general employment. It can make no difference whether the brakeman is injured by the carelessness of another brakeman, or by that of the engineer or conductor, nor whether the fireman is injured by the engineer, or by a machinist charged with fitting the engine for the road. The rule should be the same for all cases. *Mobile, &c., R. R. Co. v. Thomas*, 42 Ala. 672. In Maryland it is said that fellow servant includes all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though in different grades and departments of it. *Wonder v. Baltimore, &c., R. R. Co.*, 32 Md. 411, 3 Am. Rep. 143. Says *WILLIAMS*, J.: "Servants, it is said,

development in Illinois, and the doctrine as now held in that state is not so much a question of departments as of association in the work of the master and of opportunity to influence one another to caution and to guard against each other's negligence. In order to constitute two employees of the same master fellow servants, it is held to be "essential that they should be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their duties shall bring them into habitual association so that they may exercise an influence upon each other, promotive of proper caution." And again, "The basis of the classification of servants of the same master into those who are fellow servants and those who are not, as established in this state, is such personal relation and association between them as affords opportunity and power to influence each other to proper caution by counsel, advice and example, or the want of such personal relation and association.

are engaged in a common employment when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity ought to be able to foresee, when accepting their employment, that it may possibly expose them to the risk of injury in case he is negligent. That this is the proper test is evident from the reason assigned for the exemption of masters from liability to their servants, viz.: that the servant takes the risk into account when fixing his wages. He cannot take into account a risk which he has no reason to anticipate, and he does take into account the risks, which the average experience of his fellows has led him, as a class, to anticipate." Baird *v.* Pettit, 70 Pa. St. 477, 482. But in Illinois a day laborer on a railroad track has been allowed to recover against the railway company for an injury resulting from

the negligence of an engine driver. Toledo, &c., R. R. Co. *v.* O'Connor, 77 Ill. 391. In a case where an engineer and conductor are held fellow servants it is said that to make persons fellow servants they must be directly co-operating in a particular business in the same line of employment or their usual duties must bring them habitually together so that they may exercise a mutual influence upon each other, promotive of proper caution. Chicago, &c., Ry. Co. *v.* Snyder, 117 Ill. 376. And see, Toledo, &c., R. R. Co. *v.* Moore, 77 Ill. 217; Ryan *v.* Chicago, &c., R. R. Co., 60 Ill. 171, 14 Am. Rep. 32; Nashville, &c., R. R. Co. *v.* Carroll, 6 Heisk. 347; McKnight *v.* The Iowa, &c., R. R. Co., 43 Iowa, 406. The subject is largely considered in Wonder *v.* Baltimore & Ohio R. R. Co., 32 Md. 411, 3 Am. Rep. 143, and the cases are carefully examined.

Where they are brought together in direct co-operation in the performance of a particular work, they have such opportunity and power and are brought within the relation required by the rule. Where their usual duties bring them into habitual association, the association must be sufficiently personal to furnish the same opportunity and power to exercise an influence upon each other promotive of proper caution.⁴⁷ It follows that where one servant is injured by the negligence of his fellow servant, their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable.⁴⁸ The Illinois rule prevails in Nebraska, where it is held "that employment in the service of a common master is not alone sufficient to constitute two men fellow servants within the rule, exempting the master from liability to one for injuries caused by the negligence of the other, and that to make the rule applicable there must be some association in the same department of duty or line of employment."⁴⁹ So in Kentucky and Utah.⁵⁰ The department doctrine has been

47—*Pagels v. Meyer*, 193 Ill. 172, 176, 179, 61 N. E. 1111. See also, Chicago, &c., *R. R. Co. v. Hoyt*, 122 Ill. 369, 12 N. E. 225; *Peoria, etc., Ry. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951; *Joliet Steel Co. v. Shields*, 146 Ill. 603, 34 N. E. 1108; *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216.

48—*Joliet Steel Co. v. Shields*, 134 Ill. 209, 213, 25 N. E. 569. In *World's Columbian Exposition v. Lehigh*, 196 Ill. 612, 63 N. E. 1089, members of different gangs under the same foreman were held to be fellow servants.

49—*Union Pac. R. R. Co. v. Erickson*, 41 Neb. 1, 16, 59 N. W. 347, 29 L. R. A. 137. The court further says in this case: "When the law of fellow servants was

first announced business enterprises were comparatively small and simple. The servants of one master were not numerous. They were all engaged in the pursuit of a simple and common undertaking. Now, things have changed. Large enterprises are conducted by persons or by corporations employing vast numbers of servants divided into classes, each pursuing a different portion of the work, and each practically independent of the other. The old reasons do not apply to the new conditions." pp. 15, 16.

50—*Angel v. Jellico Coal Min. Co.*, 115 Ky. 728, 74 S. W. 714; *Daniels v. Union Pac. Ry. Co.*, 6 Utah, 357, 23 Pac. 762. And see *Fisher v. Oregon Short Line*,

adopted in Tennessee,⁵¹ but the later cases limit it to the railroad service.⁵² In a Washington case, where a mining company had two tunnels, each in charge of a superintendent, one being 800 feet above the other on the side of a mountain, the men employed in the different tunnels were held not to be fellow servants in a case where an employe in the lower tunnel was injured by a rock negligently discharged from the upper tunnel.⁵³ The Illinois doctrine is expressly repudiated in many of the states and is not generally regarded in determining who are fellow servants.⁵⁴

Who Are Fellow Servants. It has been very truly said that "All the decisions that have been rendered and all the text books that have been written have not succeeded in giving a definition of who are fellow servants, which is plain and broad and comprehensive enough to be universally applicable or to be universally accepted."⁵⁵ *Prima facie*, all who serve the same master and are engaged in the same general business or undertaking are fellow servants.⁵⁶ "All serving a common master, working under the same control, deriving authority and compensation

22 Ore. 533, 30 Pac. 425, 16 Am. etc., R. R. Co. v. Nuckol's Admr., St. Rep. 519.

51—East Tennessee, etc., R. R. Co. v. De Armond, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. Rep. 816; Louisville, etc., R. R. Co. v. Lahr, 86 Tenn. 335, 6 S. W. 663; Railroad Co. v. Jackson, 106 Tenn. 438, 61 S. W. 771; Freeman v. Railroad Co., 107 Tenn. 340, 64 S. W. 1; Stuber v. Louisville, etc., R. R. Co., 113 Tenn. 305, 87 S. W. 411.

52—Coal Creek Min. Co. v. Davis, 90 Tenn. 711, 18 S. W. 387; Virginia Iron, etc., Co. v. Hamilton, 107 Tenn. 705, 65 S. W. 401.

53—Uren v. Golden Tunnel Min. Co., 24 Wash. 261, 64 Pac. 174.

54—See Colley v. Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932; Brodeur v. Valley Falls Co., 16 R. I. 448, 17 Atl. 54; Norfolk,

55—Glover v. Kansas City Bolt & Nut Co., 153 Mo. 327, 342, 55 S. W. 88.

56—Colley v. Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932; Enright v. Oliver, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710; Wilson v. Charleston, etc., Ry. Co., 51 S. C. 79, 28 S. E. 91; Norfolk, etc., R. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342; Quebec S. S. Co. v. Merchant, 133 U. S. 375, 10 S. C. Rep. 397, 33 L. Ed. 656; Baltimore, etc., R. R. Co. v. Baugh, 149 U. S. 368, 13 S. C. Rep. 914, 37 L. Ed. 772; Northern Pac. R. R. Co. v. Peterson, 162 U. S. 346, 16 S. C. Rep. 843, 40 L. Ed. 994; Northern

from the same source and engaged in the same general business, although in different grades and departments, are fellow servants, and take the risk of each other's negligence.⁵⁷ The rule has been variously phrased,⁵⁸ but the gist of it is that those engaged in a common service or employment are fellow servants. The difficulty lies in determining what is a common service or employment. In one case it is said: "Fellow servants are engaged in a common employment when each of them is occupied in service of such a kind that the others, in the exercise of ordinary sagacity, ought to foresee when accepting their employment that his negligence would probably expose them to injury."⁵⁹ But in a multitude of cases in which a recovery has been sustained the servant injured and the servant by whose

Pac. R. R. Co. v. Charliss, 162 U. S. 359, 16 S. C. Rep. 848, 40 L. Ed. 999; Alaska Min. Co. v. Whelan, 168 U. S. 86, 18 S. C. Rep. 40, 42 L. Ed. 390.

57—Norfolk, etc., R. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342; Wonder v. Baltimore, etc., R. R. Co., 32 Md. 411, 3 Am. Rep. 143.

58—"When persons are employed in a common undertaking, all sustain toward each other the relation of fellow servants when exercising only the ordinary duties of their employment, even when they cannot see each other, or are working apart and not in conjunction." Wilson v. Charleston, etc., Ry. Co., 51 S. C. 79, 96, 28 S. E. 91. All engaged in a common service are fellow servants. Northern Pac. R. R. Co. v. Peterson, 162 U. S. 346, 16 S. C. Rep. 843, 40 L. Ed. 994.

59—Mann v. O'Sullivan, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149. And see Baird v. Pettit, 70 Pa. St. 477, 482; Norfolk, etc.,

R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342. In the last case the fellow servant question is elaborately considered and the court sums up its conclusions in part as follows: "1. A person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow servant.

"2. The liability does not depend upon the fact that the servant injured may be in a different department of the service from the wrong-doer. The test is, were the departments so far separated from each other as to exclude the probability of contact, and of danger from the negligent performance of their duties by employees of the different departments? If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow servant in such other department.

"3. The liability does not depend upon gradations in employ-

sault the injury happened, were engaged in a common employment. The tendency of the modern authorities, in determining the question of liability, is to consider the nature of the act or omission from which the injury results. Some expressions of judicial opinion upon this point may profitably be quoted: "The liability of the appellant is to be determined by the character of the act through which the injury was sustained in reference to the act, and not by the rank or station of the employee under whose direction the act was performed. Where the negligence is in an act which the master must personally perform, the person to whom he delegates its performance is his agent, and the master is responsible for his negligence. If, on the other hand, it is an act which may be delegated to another, or may be performed by an employee, the person by which it is performed is a fellow servant with the other employes, irrespective of his rank, and the master is not responsible to them for his negligence in its performance."⁶⁰ "The test whether the individual employes concerned were fellow servants is not found in the fact that they were engaged in a common employment under the same general control and paid by the same principal, but is whether the negligent servant, in the act or omission complained of, represented the master in the performance of any duty owed by the master to the servant injured. The responsibility of the master is determined by the nature of the act in question, and not by a difference in rank or grade of service between particular servants."⁶¹ The rule "now unquestionably established and supported by the great weight of authority, both in this country and in England, is that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employe. * * * The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master,

ment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice principal." p. 207.

60—*Callan v. Bull*, 113 Cal. 593, 602, 603, 45 Pac. 1017.

61—*McLaine v. Head, etc., Co.*, 71 N. H. 294, 295, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462.

or is the act of a co-servant, is, was the offending employe in the performance of the master's duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows; if not, he was a mere co-servant, engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or to his control over them.⁶²

These are but a few of many similar expressions of opinion, and the views expressed are supported by a multitude of cases, some of which are referred to in the margin, and others of which are cited in the following pages, wherein the duties of the master to the servant are considered.⁶³

When the power to hire and discharge his co-employes is

62—*Mast v. Kern*, 34 Ore. 247, 250, 252, 54 Pac. 950, 75 Am. St. Rep. 580.

63—*Cal.*: *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Shelton v. Pacific Lumber Co.*, 140 Cal. 507, 74 Pac. 13.

Colo.: *Deep Min. & Dr. Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210; *Carleton M. & M. Co. v. Ryan*, 29 Colo. 401, 68 Pac. 279.

Conn.: *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382, 50 Atl. 1030; *Peterson v. New York, etc.*, R. R. Co., 77 Conn. 351.

Ill.: *Chicago, etc., R. R. Co. v. Scanlan*, 170 Ill. 106, 48 N. E. 826; *Chicago, etc., R. R. Co. v. Maroney*, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; *Chicago Union Traction Co. v. Sawusch*, 218 Ill. 130.

Ind.: *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124, 22 N. E. 876, 16 Am. St. Rep. 372; *Nall v. Louisville, etc., Ry. Co.*, 129 Ind.

260, 28 N. E. 183; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303.

Ia.: "A master is liable for the negligence of a superior servant when the servant is engaged in the performance of some of the master's personal duties, but not otherwise; and it is the character of the work, rather than the rank of the servant that controls." *Scott v. Chicago, etc., Ry. Co.*, 113 Ia. 381, 85 N. W. 631. And see, *Beresford v. Am. Coal Co.*, 124 Ia. 34, 98 N. W. 902; *Collingwood v. Ill. & Ia. Fuel Co.*, 125 Ia. 537, 101 N. W. 283.

Kan.: *Atchison, etc., R. R. Co. v. Seeley*, 54 Kan. 21, 37 Pac. 104.

Me.: *Small v. Allington, etc., Mfg. Co.*, 94 Me. 551, 48 Atl. 177.

Mich.: *Sadowski v. Michigan Car Co.*, 84 Mich. 100, 47 N. W. 598; *Wellihan v. National Wheel Co.*, 128 Mich. 1, 87 N. W. 75; *Mikolojczak v. North Am. Chemical Co.*, 129 Mich. 80, 88 N. W. 75; *Randa v. Detroit Screw Works*, 134 Mich. 343, 94 N. W. 454.

vested in the superior servant, this fact is, in some cases, regarded as sufficient to remove him from the relation of fellow servant with the men under him. Thus in one case it is said: "The test of the question whether one in charge of other servants is to be regarded as a fellow servant or a middleman is involved in the inquiry whether those who act under his orders have just reason for believing that the failure or refusal to obey the superior will or may be followed by a discharge from the

Minn.: *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793. *Am. St. Rep.* 659; *Ricks v. Flynn*, 196 Pa. St. 263, 46 Atl. 360; *Casey v. Pa. Asphalt Pav. Co.*, 198 Pa. St. 348, 47 Atl. 1128; *Hughes v. Leonard*, 199 Pa. St. 123, 48 Atl. 862.

N. H.: *McLaine v. Head, etc., Co.*, 71 N. H. 294, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462. *R. I.*: *Morgridge v. Providence Tel. Co.*, 20 R. I. 386, 39 Atl. 328, 78 Am. St. Rep. 879; *Vartaman v. New York, etc., R. R. Co.*, 25 R. I. 398, 56 Atl. 184.

N. J.: *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604; *Smith v. Erie R. R. Co.*, 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302; *Burns v. Delaware, etc., Tel. & Tel. Co.*, 70 N. J. L. 745, 59 Atl. 220, 67 L. R. A. 956. *S. C.*: *Wilson v. Charleston, etc., Ry. Co.*, 51 S. C. 79, 28 S. E. 91.

New York: *Hussey v. Coger*, 112 N. Y. 616, 20 N. E. 556, 8 Am. St. Rep. 787, 3 L. R. A. 559; *Hankins v. New York, etc., R. R. Co.*, 142 N. Y. 416, 37 N. E. 466, 40 Am. St. Rep. 616, 25 L. R. A. 396; *Vogel v. Am. Bridge Co.*, 180 N. Y. 373, 73 N. E. 1. *Tenn.*: *Louisville, etc., R. R. Co. v. Lahr*, 86 Tenn. 335, 6 S. W. 663; *Allen v. Goodwin*, 92 Tenn. 385, 21 S. W. 760; *Railroad Co. v. Bolton*, 99 Tenn. 273, 41 S. W. 442; *Gann v. Railroad Co.*, 101 Tenn. 380, 47 S. W. 493, 70 Am. St. Rep. 687; *Ohio Riv., etc., Ry. Co. v. Edwards*, 111 Tenn. 31, 76 S. W. 897.

N. D.: *Eli v. Northern Pacific R. R. Co.*, 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97. *Tex.*: *Galveston, etc., Ry. Co. v. Smith*, 76 Tex. 611, 13 S. W. 562, 18 Am. St. Rep. 78.

Oregon: *Mast v. Kern*, 34 Ore. 247, 54 Pac. 950, 75 Am. St. Rep. 580; *Brunell v. Southern Pac. Co.*, 34 Ore. 256, 56 Pac. 129; *Wagner v. Portland*, 40 Ore. 389, 60 Pac. 985, 67 Pac. 300, 91 Am. St. Rep. 485. *Va.*: *Norfolk, etc., R. R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Norfolk, etc., R. R. Co. v. Nuckol's Admr.*, 91 Va. 193, 21 S. E. 342; *Southern Ry. Co. v. Manzy*, 98 Va. 692, 37 S. E. 285; *Norfolk, etc., Ry. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726.

Penn.: *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160; *Prevost v. Citizens' Ice, etc., Co.*, 185 Pa. St. 617, 40 Atl. 88, 64 *Wash.*: *McDonough v. Great Northern Ry Co.*, 15 Wash. 244, 46 Pac. 334.

service in which they are engaged."⁶⁴ But the weight of authority is that the power to hire and discharge is no more important than the matter of grade or rank,⁶⁵ and this is a sequence of the rule that the liability of the master depends upon the nature of the act or omission causing the injury. When the plaintiff and the employe, whose negligence caused the injury, are in the same common service, the presumption is that they are fellow servants and the burden is on the plaintiff to

W. Va.: Jackson *v.* Norfolk, etc., R. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337.

Wis.: Dwyer *v.* Am. Express Co., 82 Wis. 307, 52 N. W. 304, 33 Am. St. Rep. 44; Kliegel *v.* Weisel, etc., Mfg. Co., 84 Wis. 148, 53 N. W. 1119; Wiskie *v.* Mantello Granite Co., 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885; Okonski *v.* Pa., etc., Coal Co., 114 Wis. 448, 90 N. W. 429; Horn *v.* La Crosse Box Co., 123 Wis. 399, 101 N. W. 935.

U. S.: "The question turns rather on the character of the act than on the relation of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is negligence in the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor." Baltimore, etc., R. R. Co. *v.* Baugh, 149 U. S. 368, 387, 13 S. C. Rep. 914, 37 L. Ed. 772. See Northern Pac. R. R. Co. *v.* Peterson, 162 U. S. 346, 16 S. C. Rep. 843, 40 L. Ed. 994; Northern Pac. R. R. Co. *v.* Charliss, 162 U. S. 359, 16 S. C. Rep. 848, 40 L. Ed. 999; Alaska

Treadwell Gold Min. Co. *v.* Wheilan, 64 Fed. 462, 12 C. C. A. 225.

64—Turner *v.* Goldsboro Lumber Co., 119 N. C. 387, 396, 397, 26 S. E. 23. And see Wabash, etc., Ry. Co. *v.* Hawk, 121 Ill. 259, 12 N. E. 253, 2 Am. St. Rep. 82; Missouri Pac. Ry. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867; Nix *v.* Texas Pac. Ry. Co., 82 Tex. 473, 18 S. W. 571, 27 Am. St. Rep. 897.

65—Noyes *v.* Wood, 102 Cal. 389, 36 Pac. 766; Nixon *v.* Selby Smelting, etc., Co., 102 Cal. 458, 36 Pac. 803; Union Pac. R. R. Co. *v.* Doyle, 50 Neb. 555, 70 N. W. 43; Gilmore *v.* Oxford Iron, etc., Co., 55 N. J. L. 39, 25 Atl. 707; Ohio Riv., etc., Ry. Co. *v.* Edwards, 111 Tenn. 31, 76 S. W. 897; Belch *v.* Haas, 73 Fed. 974, 20 C. C. A. 151; McDonald *v.* Buckley, 109 Fed. 290, 48 C. C. A. 372. And see, further, Bloyd *v.* Railway Co., 58 Ark. 66, 22 S. W. 1089, 41 Am. St. Rep. 85; Harrison *v.* Detroit, etc., R. R. Co., 79 Mich. 409, 44 N. W. 1034, 19 Am. St. Rep. 180, 7 L. R. A. 623; Palmer *v.* Mich. Cent. R. R. Co., 93 Mich. 363, 53 N. W. 397, 32 Am. St. Rep. 507, 17 L. R. A. 636; Reddon *v.* Union Pac. Ry. Co., 5 Utah, 344, 15 Pac. 262; Woods *v.* Lindvall, 48 Fed. 62; 1 C. C. A. 34; Cleveland, etc., Ry. Co. *v.* Brown, 56 Fed. 804, 6 C. C. A. 142.

show an exception to the general rule.⁶⁶ On a given state of facts, the question of who are fellow servants is one of law for the court,⁶⁷ but ordinarily it is a mixed question of law and fact. "It was for the court, by proper instructions, to explain and define the relation of fellow servants, so far as it is capable of legal definition, and for the jury, in considering the evidence, to determine whether the relation as thus defined, in fact existed."⁶⁸

Fellow Servants. Illustrations. Railroad Service. In Chicago, etc., Ry. Co. v. Ross,⁶⁹ the Supreme Court of the United States held that the conductor of a train was a vice-principal of the company and not a fellow servant with the engineer of the same train. This decision has had a potent influence upon the state courts and in many cases it has been held that the conductor of a train is not a fellow servant of the other employes on the train, and, consequently, that the latter may recover for injuries resulting from the negligence of the former.⁷⁰ But the Ross case has been, in effect overruled by a case holding that the conductor and brakeman of the same train are fellow servants. The court makes a long review of cases and says: "While the opinion in the Ross case contains a lucid exposition of many of the established rules regulating the relations be-

66—Chicago City Ry. Co. v. etc., R. R. Co. v. Swan, 176 Ill. Leach, 208 Ill. 198, 70 N. E. 222, 424, 429, 52 N. E. 916. 100 Am. St. Rep. 216. 69—112 U. S. 377.

67—Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017; National Fertilizer Co. *v.* Travis, 102 Tenn. 16, 49 S. W. 832; East Tennessee, etc., R. R. Co. *v.* De Armond, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. Rep. 816; West Chicago St. R. R. Co. *v.* Dwyer, 162 Ill. 482, 44 N. E. 815.

68—Lake Erie, etc., R. R. Co. *v.* Middleton, 142 Ill. 550, 32 N. E. 453; Wilson *v.* Charleston, etc., Ry. Co., 5 S. C. 79, 28 S. E. 91. "The definition of fellow servants is a question of law. Whether a given case falls within that definition is a question of fact." Chicago,

70—Walker *v.* Gillett, 59 Kan. 214, 52 Pac. 442; Newport News, etc., Co. *v.* Dentzel, 91 Ky. 42, 14 S. W. 958; Clark *v.* Hughes, 51 Neb. 780, 71 N. W. 776; Shadd *v.* Georgia, etc., R. R. Co., 116 N. C. 968, 21 S. E. 554; Railroad Co. *v.* Kenley, 92 Tenn. 207, 21 S. W. 326; Openshaw *v.* Utah, etc., Ry. Co., 6 Utah, 137; Howe *v.* Northern Pac. Ry. Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; Lough *v.* Davis Co., 35 Wash. 449, 77 Pac. 732; Alabama Great So. R. R. Co. *v.* Baldwin, 113 Tenn. 409, 82 S. W. 487.

tween masters and servants, and particularly as respects the duties of railroad companies to their various employes, we think it went too far in holding that the conductor of a freight train is, *ipso facto*, a vice-principal of the company.⁷¹ There has been a similar course of division in Virginia.⁷² The better rule is that the conductor of a train is a fellow servant with the other employes on the train,⁷³ and that all such employes are fellow servants with respect to each other, while engaged in the operation and handling of the train.⁷⁴ So the employes on different trains are fellow servants.⁷⁵

71—New England R. R. Co. v. Conroy, 175 U. S. 323, 341, 20 S. C. Rep. 85, 44 L. Ed. 181.

72—Conductor and brakeman held not fellow servants. Ayers' Admx. v. Richmond, etc., R. R. Co., 84 Va. 679, 5 S. E. 582; Richmond, etc., R. R. Co. v. Williams, 86 Va. 165, 9 S. E. 990, 19 Am. St. Rep. 876; Norfolk, etc., R. R. Co. v. Thomas, 90 Va. 205, 17 S. E. 884, 44 Am. St. Rep. 906. *Contra*: Norfolk, etc., R. R. Co. v. Houchins, 95 Va. 398, 28 S. E. 578, 64 Am. St. Rep. 791.

73—Congrave v. Southern Pac. R. R. Co., 88 Cal. 360, 26 Pac. 175; Long v. Coronado R. R. Co., 96 Cal. 269, 31 Pac. 170; Meyer v. Illinois Central R. R. Co., 177 Ill. 591, 52 N. E. 848; Edmonson v. Kentucky Central Ry. Co., 105 Ky. 479, 49 S. W. 200, 448; La Pierre v. Chicago, etc., Ry. Co., 99 Mich. 212, 58 N. W. 60; Grattis v. Kansas City, etc., Ry. Co., 153 Mo. 380, 55 S. W. 108, 77 Am. St. Rep. 721, 48 L. R. A. 399; Jackson v. Norfolk, etc., R. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337.

74—Engineer and brakeman. Dysart v. Kansas City, etc., R. R. Co., 145 Mo. 83, 46 S. W. 751; Hagins v. Cape Clear, etc., Ry. Co., 106 N. C. 537, 11 S. E. 590; Miller v. Southern Pac. Co., 20 Ore. 285, 26 Pac. 70; Evans v. Chamberlain, 40 S. C. 104, 18 S. E. 213; Naylor v. New York Central, etc., R. R. Co., 33 Fed. 801. But see Rickey v. Southern Ry. Co., 69 S. C. 387, 48 S. E. 285. Engineer and fireman. Louisville, etc., Ry. Co. v. Petty, 67 Miss. 255, 7 So. 351, 19 Am. St. Rep. 304; Hobbs v. Atlantic, etc., R. R. Co., 107 N. C. 1, 12 S. E. 124, 9 L. R. A. 838; Baltimore, etc., R. R. Co. v. Baugh, 149 U. S. 368, 13 S. C. Rep. 914, 37 L. Ed. 772. Brakeman and fireman, Southern Ry. Co. v. Clifford, 110 Ky. 727, 62 S. W. 514. The two engineers of two engines attached to same train. Cincinnati, etc., Ry. Co. v. Roberts, 110 Ky. 856, 62 S. W. 901. The engineer, fireman, brakemen and shovellers on a gravel train. Parrish v. Pensacola, etc., R. R. Co., 28 Fla. 251, 9 So. 696. Baggage man and engineer held not fellow servants. Chicago, etc., R. R. Co. v. Swan, 176 Ill. 424, 52 N. E. 916. So of Pullman porter and the conductor and engineer of train. Jones v. St. Louis S. W. Ry. Co., 125 Mo. 666, 28 S. W. 883, 46 Am. St. Rep.

A train dispatcher is not a fellow servant with employes on the trains whose movements he directs and controls.⁷⁶ But there is a difference of opinion whether the same rule applies to a local station agent or telegraphic operator, whose duty it is to give information to the train dispatcher or to receive and communicate his orders. A local telegraphic operator, on inquiry from the train dispatcher as to whether a certain train had arrived at his station, replied by mistake in the negative. Thereupon the train dispatcher gave orders which resulted in a collision of two trains and the death of the fireman on one of them. The local operator and the fireman were held by the Supreme Court of the United States to be fellow servants.⁷⁷ So in Penn-

514, 26 L. R. A. 718. A conductor while riding to his home on a pass is not a fellow servant of those operating the train. Illinois Central R. R. Co. v. Leiner, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266.

75—Denver, etc., R. R. Co. v. Sipes, 23 Colo. 226, 47 Pac. 287; McMaster v. Illinois Central, etc., R. R. Co., 65 Miss. 264, 4 So. 59, 7 Am. St. Rep. 653; Relyea v. Kansas City, etc., R. R. Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; Miller v. Central R. R. Co., 69 N. J. L. 413, 55 Atl. 245; Healey v. New York, etc., R. R. Co., 20 R. I. 136, 37 Atl. 676; Norfolk, etc., R. R. Co. v. Donnelly, 88 Va. 853, 14 S. E. 692; Oakes v. Mase, 165 U. S. 363, 17 S. C. Rep. 345, 41 L. Ed. 747; Northern Pac. R. R. Co. v. Poirier, 167 U. S. 48, 17 S. C. 741, 42 L. Ed. 72; St. Louis, etc., Ry. Co. v. Needham, 63 Fed. 107, 11 C. C. A. 56; Northern Pac. R. R. Co. v. Mase, 63 Fed. 114, 11 C. C. A. 63; Rosney v. Erie R. R. Co., 135 Fed. 311, — C. C. A. —. *Contra:* Kentucky Central R. R. Co. v. Ackley, 87 Ky. 278, 8 S. W. 691, 12 Am. St. Rep. 480; Daniel v. Chesapeake, etc., Ry. Co., 36 W.

Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870, 16 L. R. A. 383.

76—*Railroad Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097, 25 L. R. A. 386; *Darrigan v. New York*, etc., R. R. Co., 52 Conn. 285; *McKune v. California*, etc., Co., 66 Cal. 302; *Hunn v. Mich. Cent. R. R. Co.*, 78 Mich. 513, 44 N. W. 502; *Millsaps v. Louisville*, etc., Ry. Co., 69 Miss. 423, 13 So. 696; *Smith v. Wabash*, etc., R. R. Co., 92 Mo. 359; *Hankins v. New York*, etc., R. R. Co., 142 N. Y. 416, 37 N. E. 466, 40 Am. St. Rep. 616, 25 L. R. A. 396; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514; *Brommer v. Philadelphia*, etc., Ry. Co., 205 Pa. St. 432, 54 Atl. 1092; *Galveston*, etc., Ry. Co. v. *Smith*, 76 Tex. 611, 13 S. W. 562, 18 Am. St. Rep. 78; *Hogan v. Missouri*, etc., Ry. Co., 88 Tex. 679, 32 S. W. 1035; *Northern Pac. Ry. Co. v. Dixon*, 194 U. S. 338, 24 S. C. Rep. 683, 48 L. Ed. 1006; *Northern Pac. R. R. Co. v. Poirier*, 67 Fed. 881, 15 C. C. A. 52; *Felton v. Harbeson*, 104 Fed. 737, 44 C. C. A. 188.

77—*Northern Pac. Ry. Co. v. Dixon*, 194 U. S. 338, 24 S. C. Rep. 683, 48 L. Ed. 1006. The court

sylvania.⁷⁸ But the contrary is held in Tennessee and West Virginia.⁷⁹ There is a similar difference of opinion as to whether trainmen and track repairers are fellow servants.⁸⁰

says: "It is urged that it is as much the duty of the company to give correct orders for the running of its trains so they would not collide as it was to see that their servants had reasonably safe tools and machinery with which to work, and a reasonably safe place in which to work, and hence, that one who is employed in securing the correct orders for the movement of trains is doing the personal work of the employer, and not to be regarded as a fellow servant of those engaged in operating and running the trains. But the master does not guarantee the safety of place or of machinery. His obligation is only to use reasonable care and diligence to secure such safety. Here the company had adopted reasonable rules for the operation of all its trains. No imputation is made of a want of competency in either the train dispatcher or the telegraph operator. So far as appears, they were competent and proper persons for the work in which they were employed. A momentary act of negligence is charged against the telegraph operator. No reasonable amount of care and supervision which the master had taken beforehand would have guarded against such unexpected and temporary act of negligence. Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He cannot be personally present everywhere, and in the nature of things cannot guard against every temporary act of negligence by one of its employees." pp. 346-7. Four judges dissent.

78—*Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. 175, 34 Am. St. Rep. 620.

79—*East Tennessee, etc., R. R. Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. Rep. 816; *Railroad Co. v. Bentz*, 108 Tenn. 670, 69 S. W. 317, 91 Am. St. Rep. 763, 58 L. R. A. 690; *Flannagan v. Chesapeake, etc., Ry. Co.*, 40 W. Va. 436, 21 S. E. 1028, 52 Am. St. Rep. 896. And see, *Railroad Co. v. Jackson*, 106 Tenn. 438, 61 S. W. 771; *Galveston, etc., Ry. Co. v. Farmer*, 73 Tex. 85, 11 S. W. 156.

80—Cases holding they are fellow servants: *Elliott v. Chicago, etc., Ry. Co.*, 5 Dak. 523, 41 N. W. 758; *Connelly v. Minneapolis Eastern Ry. Co.*, 38 Minn. 80, 35 N. W. 582; *Swartz v. Great Northern Ry. Co.*, 93 Minn. 339, 101 N. W. 504; *Trinity, etc., Ry. Co. v. Mitchell*, 72 Tex. 609, 10 S. W. 698; *Norfolk, etc., R. R. Co. v. Nuckol's Admr.*, 91 Va. 193, 21 S. E. 342; *Northern Pac. R. R. Co. v. Hambly*, 154 U. S. 349, 14 S. C. Rep. 983, 38 L. Ed. 1009; *Northern Pac. R. R. Co. v. Charliss*, 162 U. S. 359, 16 S. C. Rep. 848, 40 L. Ed. 999; *Martin v. Atchison, etc., R. R. Co.*, 166 U. S. 399, 17 S. C. Rep. 994, 41 L. Ed. 1051; *McPeck v. Central Vt. R. R. Co.*, 79 Fed. 590, 25 C. C. A. 110.

Contra: Hamilton v. Michigan

A section foreman is held to be a fellow servant of the men under him in some jurisdictions,⁸¹ but the contrary is held in others.⁸² Those who inspect and repair cars and engines are

Central R. R. Co., 135 Mich. 95, 536; *Eli v. Northern Pac. R. R.* 97 N. W. 392; *Miller v. Missouri Pac. R. R. Co.*, 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673; *Schlereth v. Missouri Pac. R. R. Co.*, 115 Mo. 87, 21 S. W. 1110; *Swadley v. Missouri Pac. R. R. Co.*, 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366; *Union Pac. R. R. Co. v. Erickson*, 41 Neb. 1, 59 N. W. 347, 29 L. R. A. 137; *Omaha, etc., Ry. Co. v. Krayenbuhl*, 48 Neb. 553, 67 N. W. 447; *Smith v. Erie R. R. Co.*, 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302; *Fisher v. Oregon Short Line*, 22 Ore. 533, 30 Pac. 425, 16 Am. St. Rep. 519; *Freeman v. Railroad Co.*, 107 Tenn. 340, 64 S. W. 1; *Louisville, etc., R. R. Co. v. Martin*, 113 Tenn. 266, 87 S. W. 418; *Torian's Adm'x v. Richmond, etc., R. R. Co.*, 84 Va. 192, 4 S. E. 339; *Bateman v. Peninsular Ry. Co.*, 20 Wash. 133, 54 Pac. 996; *Haney v. Pittsburg, etc., Ry. Co.*, 38 W. Va. 570, 18 S. E. 748. And see cases cited p. 1066, n. 45.

81—*Sullivan v. New York, etc., R. R. Co.*, 62 Conn. 209, 25 Atl. 711; *Whittlesey v. New York, etc., R. R. Co.*, 72 Conn. 100, 107 Am. St. Rep. 21; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Olson v. St. Paul, etc., Ry. Co.*, 38 Minn. 117, 35 N. W. 866; *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793; *Lagrone v. Mobile, etc., R. R. Co.*, 67 Miss. 592, 7 So. 432; *Hastings v. Montana Union Ry. Co.*, 18 Mont. 493, 46 Pac. 264; *Atchison, etc., R. R. Co. v. Martin*, 7 N. M. 158, 34 Pac.

A member of one section gang and foreman of another held fellow servants. *Clarke v. Pennsylvania Co.*, 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811. So the two foremen of two gangs. *Sherrin v. St. Joseph, etc., Ry. Co.*, 103 Mo. 378, 15 S. W. 442.

82—*Bloyd v. Railway Co.*, 58 Ark. 66, 22 S. W. 1089, 41 Am. St. Rep. 85; *Colorado Midland Ry. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701; *Wabash, etc., Ry. Co. v. Hawk*, 121 Ill. 259, 12 N. E. 253, 2 Am. St. Rep. 82; *Illinois Central R. R. Co. v. Josey's Admr.*, 110 Ky. 342, 61 S. W. 703, 54 L. R. A. 78, 96 Am. St. Rep. 455; *Stephens v. Hannibal, etc., R. R. Co.*, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; *Schroeder v. Chicago, etc., R. R. Co.*, 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; *Russ v. Wabash, etc., Ry. Co.*, 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; *Union Pac. R. R. Co. v. Doyle*, 50 Neb.

generally held not to be fellow servants of those who operate them.^{82a} Those who load cars or whose duty it is to see that they are properly loaded, are held to be fellow servants of those who move them.⁸³ Additional cases relating to the railroad service are referred to in the margin.⁸⁴

555, 70 N. W. 43; *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959; *Louisville, etc., R. R. Co. v. Northington*, 91 Tenn. 56, 17 S. W. 880, 16 L. R. A. 268; *Electric Ry. Co. v. Lawson*, 101 Tenn. 406, 47 S. W. 489; *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867.

82a—*Chicago, etc., R. R. Co. v. Hoyt*, 122 Ill. 369, 12 N. E. 225; *Marsh v. Lehigh Valley R. R. Co.*, 206 Pa. St. 558, 56 Atl. 52; *International, etc., Ry. Co. v. Kernan*, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; *Daniels v. Union Pac. Ry. Co.*, 6 Utah, 357, 23 Pac. 762; *Norfolk, etc., Ry. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726; *Terre Haute, etc., R. R. Co. v. Mansberger*, 65 Fed. 196, 12 C. C. A. 574; *Texas, etc., Ry. Co. v. Barrett*, 67 Fed. 214, 14 C. C. A. 373; *Texas, etc., Ry. Co. v. Thompson*, 70 Fed. 944, 17 C. C. A. 524. See *Philadelphia, etc., R. R. Co. v. Hughes*, 119 Pa. St. 301, 13 Atl. 286.

83—*Byrnes v. New York, etc., R. R. Co.*, 113 N. Y. 251, 21 N. E. 50, 4 Am. St. Rep. 151; *Ford v. Lake Shore, etc., R. R. Co.*, 117 N. Y. 638, 22 N. E. 946; *Galveston, etc., Ry. Co. v. Farmer*, 73 Tex. 85, 11 S. W. 156. *Contra*: *Atchison, etc., R. R. Co. v. Seeley*, 54 Kan. 21, 37 Pac. 104.

84—The following held to be fellow servants: Car inspector and crew of switch engine in same

yard; *Taylor v. Railroad Co.*, 93 Tenn. 305, 27 S. W. 663. Yard master and switchman therein; *Pennsylvania Co. v. Fishack*, 123 Fed. 465, 59 C. C. A. 269. Car repairer and yard switchmen; *Smith v. Chicago, etc., Ry. Co.*, 91 Wis. 503, 65 N. W. 183. Postal clerk and brakeman of train; *Foreman v. Pennsylvania R. R. Co.*, 195 Pa. St. 499, 46 Atl. 109. Section hand riding on work train and conductor and engineer of train; *Knathlor v. Oregon Short Line*, 21 Ore. 136, 27 Pac. 91. Yard inspector and yard foreman; *St. Louis, etc., Ry. Co. v. Rice*, 51 Ark. 467, 11 S. W. 639, 4 L. R. A. 173. Yard hostler and engineer; *Louisville, etc., Ry. Co. v. Petty*, 67 Miss. 255, 7 So. 351, 19 Am. St. Rep. 304. Car inspector and car repairer; *Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250. Laborer employed to clear snow from tracks and track walker and conductor of train; *Fagundes v. Central R. R. Co.*, 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824. Conductor on street car and gripman of following car; *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216. Gripman and watchman stationed at a dangerous curve to signal trains; *Murray v. St. Louis Cable & Ry. Co.*, 98 Mo. 573, 12 S. W. 252, 14 Am. St. Rep. 661, 5 L. R. A. 735.

Held not to be fellow servants: Car repairer and foreman of switch yard; *Pool v. Southern Pac.*

Fellow Servants. Illustrations. Other Employments. As already shown, a mere foreman is ordinarily held to be a fellow servant of the men under him.⁸⁵ A cotton mill was in charge of a superintendent, with foremen over the different rooms or departments of the work. The assistant foreman of the machine shop, while crossing the yard, was killed by a barrel negligently thrown from the fourth floor by the foreman of the slushing room. The latter was held to be a fellow servant and the de-

Co., 20 Utah, 210, 58 Pac. 326. Car repairer and those operating switch engine; *Pool v. Southern Pac. Co.*, 7 Utah, 303, 26 Pac. 654; Richmond, etc., R. R. Co. v. Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827. Night hostler and man under him; *Dayharsh v. Hannibal*, etc., R. R. Co., 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900. Servant riding to and from home and those operating train or car; *Dickerson v. West End St. Ry. Co.*, 177 Mass. 365, 59 N. E. 60, 83 Am. St. Rep. 284, 52 L. R. A. 326; *Noe v. Rapid Ry. Co.*, 133 Mich. 152, 94 N. W. 743; *McNulty v. Pennsylvania R. R. Co.*, 182 Pa. St. 479, 38 Atl. 524, 61 Am. St. Rep. 721, 38 L. R. A. 376. Road master and men under him; *Harrison v. Detroit*, etc., R. R. Co., 79 Mich. 409, 44 N. W. 1034, 19 Am. St. Rep. 180, 7 L. R. A. 623; *Palmer v. Mich. Cent. R. R. Co.*, 93 Mich. 363, 53 N. W. 397, 32 Am. St. Rep. 507, 17 L. R. A. 636; *Foster v. Missouri Pac. R. R. Co.*, 115 Mo. 165, 21 S. W. 916; *Wright v. Southern Ry. Co.*, 128 N. C. 77, 38 S. E. 283.

See further on the subject: *Chicago, &c., Co. v. McLellan*, 81 Ill. 109; *Ry. Co. v. Lavallee*, 36 Ohio St. 221; *Van Amburg v. Railroad Co.*, 37 La. Ann. 650; *Moon v. Richmond, &c., Co.*, 78 Va. 745, 49

Am. Rep. 401; *Sioux City, &c., Co. v. Smith*, 22 Neb. 775, 36 N. W. 285; *Burlington, &c., Co. v. Crockett*, 19 Neb. 138; *Macy v. St. Paul, &c., Co.*, 35 Minn. 200; *Boatwright v. Northeastern, &c., Co.*, 25 S. C. 128; *Moore v. Wabash, &c., Ry. Co.*, 85 Mo. 588; *McDermott v. Hannibal, &c., Co.*, 87 Mo. 285; *Hoke v. St. Louis, &c., Co.*, 88 Mo. 360; *Criswell v. Pittsburgh, &c., Ry. Co.*, 30 W. Va. 798, 6 S. E. 31; *Hobson v. New Mexico*, etc., R. R. Co., 2 Ariz. 171, 11 Pac. 545; *Chicago, etc., R. R. Co. v. Kelly*, 127 Ill. 637, 21 N. E. 203; *Lake Shore, etc., Ry. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Louisville, etc., R. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. 607; *Church v. Chicago*, etc., R. R. Co., 119 Mo. 203, 23 S. W. 1056; *Sullivan v. Tioga R. R. Co.*, 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793; *Railroad Co. v. Ward*, 98 Tenn. 123, 38 S. W. 727, 60 Am. St. Rep. 848.

85—*Stephens v. Doe*, 73 Cal. 26, 14 Pac. 378; *Noyes v. Wood*, 102 Cal. 389, 36 Pac. 766; *Nixon v. Selby Smelting, etc., Co.*, 102 Cal. 458, 36 Pac. 803; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Donovan v. Ferris*, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25; *Dube v. Lewiston*, 83 Me. 211, 22 Atl. 112; *Small v. Allington, etc., Mfg. Co.*, 94 Me. 551, 48 Atl. 177; *Moody v.*

fendant not liable.⁸⁶ A corporation was engaged in the construction of asphalt pavements with a plant at Pittsburg. The work at this point was in charge of a general superintendent, who supervised and directed all the operations at this point. There were four gangs of men, one being at the works where the asphalt was prepared, which was in charge of a foreman. But the superintendent visited the works two or three times a day and supervised the work. The foreman hired and discharged the men and directed them where and how to work. The foreman was held to be a fellow servant of the men under him and the company was held not liable for an injury to one of them by reason of his being ordered by the foreman into an unsafe place.⁸⁷ But where a foreman has entire charge and

Hamilton Mfg. Co., 159 Mass. 70, 950, 75 Am. St. Rep. 580; Haley v. Kerni, 151 Pa. St. 117, 25 Atl. 98; Leneoski v. Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577; Hughes v. Leonard, 199 Pa. St. 123, 48 Atl. 862; Morgridge v. Providence Telephone Co., 20 R. I. 386, 39 Atl. 328, 78 Am. St. Rep. 879; Pintorelli v. Horton, 22 R. I. 374, 48 Atl. 142; Richmond Locomotive Works v. Ford, 94 Va. 627, 27 S. E. 509; Alaska Min. Co. v. Whelan, 168 U. S. 86, 18 S. C. Rep. 40, 42 L. Ed. 390; Balch v. Haas, 73 Fed. 974, 20 C. C. A. 151; McDonald v. Buckley, 109 Fed. 290, 48 C. C. A. 372. See Sullivan v. Hannibal, etc., R. R. Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. Rep. 388; Bane v. Irwin, 172 Mo. 306, 72 S. W. 522.

86—Brodeur v. Valley Falls Co., 16 R. I. 448, 17 Atl. 54.

87—Casey v. Pa. Asphalt Pav. Co., 198 Pa. St. 348, 47 Atl. 1128. The following are closely analogous cases in which the same holding was made: Prevost v. Citizens' Ice, etc., Co., 185 Pa. St. 617, 40 Atl. 88, 64 Am. St. Rep.

control of a work or plant and of the men there employed, and himself plans and directs the work and hires and discharges the men, he has been held to be a vice-principal, for whose negligence the employer is liable.⁸⁸ And where a foreman of whatever grade is discharging one of the positive duties of the master towards his servants, he represents the master in such matter and in respect thereto is not a fellow servant of those under him.⁸⁹

The engineer of a stationary engine at a mine used to operate a hoist or tram cars is a fellow servant of the miners.⁹⁰ So of a blacksmith whose duty it is to sharpen tools and take them to the miners.⁹¹ Those employed to prepare and fire blasts in a quarry are fellow servants of other workmen in the quarry.⁹² The same is true of a man whose duty it is to see that holes are properly made in stones to be moved, that the tongs for moving them are in good condition and properly adjusted and to give warning when a stone is about to be moved.⁹³ All employes of the same master engaged in the erection of a building are fellow servants, though they may be doing different lines of work, as carpentry, masonry, etc.⁹⁴ And so generally are all who are employed by the same master on any particular work

659; *Ricks v. Flynn*, 196 Pa. St. 263, 46 Atl. 360; *Mikolojczak v. North Am. Chemical Co.*, 129 Mich. 80, 88 N. W. 75.

88—Foreman of quarry, *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232. Of mine. *Cunningham v. Union Pac. Ry. Co.*, 4 Utah, 206, 7 Pac. 795. Of lumber yard. *Baldwin v. St. Louis, etc., Ry. Co.*, 75 Ia. 297, 39 N. W. 507; *Zintek v. Stinson Mill Co.*, 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055; *Zintek v. Stinson Mill Co.*, 9 Wash. 395, 37 Pac. 340.

89—*Nixon v. Selby Smelting Co.*, 102 Cal. 458, 36 Pac. 803; *Skelton v. Pacific Lumber Co.*, 140 Cal. 507, 74 Pac. 18; *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382, 50

Atl. 1030; *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627; *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244, 46 Pac. 334. *Ante*, pp. 1073, 1074.

90—*Whatley v. Zenida Coal Co.*, 122 Ala. 118, 26 So. 124; *Trewatha v. Buchanan Gold M. & M. Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561.

91—*Snyder v. Viola M. & S. Co.*, 3 Ida., 28, 26 Pac. 127.

92—*Kelly Island L. & T. Co. v. Pachuta*, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep. 706.

93—*O'Neal v. Clydesdale Stone Co.*, 207 Pa. St. 378, 56 Atl. 929.

94—*Enright v. Oliver*, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710; *Omstead v. Raleigh*, 130 N. C. 243, 41 S. E. 292.

or enterprise, although there may be gradations of rank, or different lines of work, or they may be divided into different squads or gangs.⁹⁵ But the workmen of different contractors or masters who are working on the same building or job, or otherwise for the same proprietor on the same premises, are not fellow servants.⁹⁶

In the following instances the employes named were held to be fellow servants: A lineman and an engineer at the power house;⁹⁷ an elevator conductor and the employes in a store or hotel,⁹⁸ or a carpenter repairing the shaft.⁹⁹ The mate and seaman of a vessel.¹ The captain of a steam dredge and the men under him.² The engineer of a steam roller and a flagman under his orders.³ Where the persons composing a ship's company

95—*World's Columbian Exposition v. Lehigh*, 196 Ill. 612, 63 N. E. 1089; *Ryan v. McCully*, 123 Mo. 636, 27 S. W. 533; *Pfeiffer v. Dialogue*, 64 N. J. L. 707, 46 Atl. 772; *Maher v. McGrath*, 58 N. J. L. 469, 33 Atl. 945; *Buck v. N. J. Zinc Co.*, 204 Pa. St. 132, 53 Atl. 740, 60 L. R. A. 453; *Neal v. Northern Pac. R. R. Co.*, 57 Minn. 365, 59 N. W. 312, 47 Am. St. Rep. 618.

96—*John Spry Lumber Co. v. Duggan*, 182 Ill. 218, 54 N. E. 1002; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Jansen v. Jersey City*, 61 N. J. L. 243, 39 Atl. 1025; *Sanford v. Standard Oil Co.*, 118 N. Y. 571, 24 N. E. 313, 16 Am. St. Rep. 787; *McCafferty v. Dock Co.*, 11 Ohio C. C. 457; *Johnson v. Lindsay*, (1891) A. C. 371; *Cameron v. Nystrom*, (1893) A. C. 308.

97—*Brush Elec. L. & P. Co. v. Wells*, 110 Ga. 192, 35 S. E. 365.

98—*Spees v. Boggs*, 198 Pa. St. 112, 47 Atl. 875, 82 St. Rep. 792, 52 L. R. A. 933; *Oriental Invest. Co. v. Sline*, 17 Tex. Civ. App. 692, 41 S. W. 130; *The Oriental v.*

Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

99—*Mann v. O'Sullivan*, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149; *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267.

1—*Benson v. Goodwin*, 147 Mass. 237, 17 N. E. 517; *Kalleck v. Deering*, 161 Mass. 469, 37 N. E. 450, 42 Am. St. Rep. 421; *Geoghegan v. Atlas S. S. Co.*, 6 Misc. 127, 25 N. Y. S. 1116; *The Miami*, 93 Fed. 218, 35 C. C. A. 281. *Contra*, *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224.

2—*O'Brien v. Am. Dredging Co.*, 53 N. J. L. 291, 21 Atl. 324.

3—*Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659. In this case the engineer, by his negligence in operating the roller, frightened a pair of horses which ran and injured the flagman. In holding that there was no liability the court says: "A servant is a vice principal only when he stands in place of the principal with reference to the principal's duty, or in the exercise of the principal's functions.

were divided into three classes called departments: (1) The deck department, comprising the first and second officers, the purser, the carpenter and the sailors; (2) the engineer's department, comprising the engineers, firemen and coal passers, and, (3) the steward's department, comprising the steward, stewardess, waiters, cooks and porter, it was held that the division was for convenience of administration merely, and that the members of all departments were fellow servants.⁴ A servant being sent home in the master's wagon was held to be a fellow servant of the driver, whether the transportation was gratuitous or a part of the contract of hiring.⁵ Where a servant of one person is loaned or hired to another, he becomes for the time being a fellow servant of the other employees of the latter.⁶

In the following cases the employes named were held not to be fellow servants: The gas inspector or tester of a mine and the miners.⁷ One whose duty it is to keep up a furnace fire in an

Anything beyond this is inconsistent with the well settled rule of the master's duty. It adds to and alters it in ways that cannot be foreseen nor guarded against, and makes a master liable, however great may have been his care and diligence in selecting his servants. But it may be said that the converse makes the servant suffer. So it may. Accidents are continually happening from somebody's carelessness. The law gives a remedy in damages against the guilty party, but not against an innocent one. As to strangers, on principles of public policy, it treats a master as guilty for the negligence of his servant, but public policy does not demand that he should be so treated as to his own servants, who have the option to examine their surroundings in his service and to receive pay according to the risk they incur. They may sue a fellow servant for his negligence, but to make the master liable for it, unless the servant is taking the place of the master, is contrary to reason and justice." pp. 511-12.

4—Quebec S. S. Co. v. Merchant, 133 U. S. 375, 10 S. C. Rep. 397, 33 L. Ed. 656. The stewardess was injured by the negligence of the carpenters and it was held there was no liability.

5—McGuirk v. Shattuck, 160 Mass. 45, 35 N. E. 110, 39 Am. St. Rep. 454.

6—Samullian v. Am. Tool & M. Co., 168 Mass. 12, 46 N. E. 98; Delaware, etc., Co. v. Hardy, 59 N. J. L. 35, 34 Atl. 986; Wischam v. Rickards, 136 Pa. St. 109, 20 Atl. 532, 20 Am. St. Rep. 900, 10 L. R. A. 97.

7—Coster v. Pacific Coast Co., 26 Wash. 138, 66 Pac. 398; Gowen v. Bush, 76 Fed. 349, 22 C. C. A. 196.

air shaft of a mine and those engaged in mining.⁸ One employed to repair a mill and those employed therein.⁹ Engineer in charge of factory and employes therein, where injury was caused by explosion of boiler.¹⁰ A sawyer having charge of saw and machinery for handling logs and the men working with him.¹¹ One employed to clean up about a saw mill and those who operate a saw.¹² One whose duty it is to inspect logs before they come to the carriage and to remove spikes driven in for rafting and those employed to fix the logs upon the carriage.¹³

The driver of a hose cart and a fireman riding thereon.¹⁴

[*643] ***Independent Contractors. General Rules.** It has

been decided in England that the master is not liable for an injury, caused by the negligence of one of his servants, to the servant of a sub-contractor who is engaged in the performance of a part of the same work. If the two

[*644] servants were at the time engaged *in doing the common work of the employer, they must be considered as for this purpose the servants of such employer while doing his work, "each directing and limiting his attention to the particular work necessary to the completion of the whole work," notwithstanding the one was employed by and responsible to the employer directly, and the other to one employed by him.¹⁵ But this rule can only apply where the sub-contractor is under the direction and control of his employer, so that his position as contractor differs from that of the other servants only in this: that he has some particular part of the work to do under a spe-

8—*Angel v. Jellico Coal Min.* 34 N. W. 765, 5 Am. St. Rep. 663. Co., 115 Ky. 728, 74 S. W. 714.

11—*Evans v. Louisiana Lumber*

9—*Hearn v. Quillan*, 94 Md. 39,

Co., 111 La. 534, 35 So. 736.

50 Atl. 402; *Hammarberg v. St. Paul*, etc., Lumber Co., 19 Wash. 537, 53 Pac. 727.

12—*Merritt v. Victoria Lumber*

Contra, Ingram v. Lehigh C. & N. Co., 148 Pa. St. 177, 23 Atl. 1001.

13—*Covington Saw Mill*, etc.,

Co. v. Clark, 116 Ky. 461, 76 S. W. 348.

10—*Mattise v. Consumers' Ice Mfg. Co.*, 46 La. Ann. 1535, 16 So. 400, 49 Am. St. Rep. 356. Engineer held fellow servant of one operating machine propelled by engine.

14—*Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365.

Thelcman v. Moeller, 73 Ia. 108,

15—*Wiggett v. Fox*, 36 E. L. &

Eq. 486; S. C. 11 Exch. 832. See

Schwartz v. Gilmore, 45 Ill. 455,

92 Am. Dec. 227.

cial arrangement, while the others work generally in the employment as directed.¹⁶ In general, it is entirely competent for one having any particular work to be performed, to enter into agreement with an independent contractor to take charge of and do the whole work, employing his own assistants, and being responsible only for the completion of the work as agreed. The exceptions to this statement are the following: He must not contract for that the necessary or probable effect of which would be to injure others,¹⁷ and he cannot, by any contract, relieve himself of duties resting upon him as owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance, and therefore an invasion of the rights of others.¹⁸

Observ*ing these rules, he may make contracts, under [*645] which the contractor, for the time being, becomes an independent principal, whose servants are exclusively his, and not those of the employer he contracts with; and the contractor is in no such sense the servant of his employer as to give to others rights against the employer growing out of the contractor's

16—Chicago *v.* Joney, 60 Ill. 383, 156 Mass. 471, 31 N. E. 640; Wetherbee *v.* Partridge, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486; Carrico *v.* W. Va. Cent. etc., Ry. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

17—Chicago *v.* Robbins, 2 Black, 418; Clark *v.* Fry, 8 Ohio St. 358; Hughes *v.* Railroad Co., 39 Ohio St. 461; Curtis *v.* Kiley, 153 Mass. 123, 26 N. E. 421; Thomas *v.* Harrington, 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742; Skelton *v.* Larkin, 82 Hun, 388, 31 N. Y. S. 234; Murphy *v.* Perlstein, 73 App. Div. 256, 76 N. Y. S. 657; Duer *v.* Consolidated Gas Co., 86 App. Div. 14, 83 N. Y. S. 714; Southern Ohio R. R. Co. *v.* Morey, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; Howver *v.* Whalen, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828; McCarrier *v.* Hollister, 15 S. D. 366, 89 N. W. 862, 91 Am. St. Rep.

18—Charles *v.* Taylor, L. R. 3 C. P. D. 492.

17—Evans *v.* Murphy, 87 Md. 498, 40 Atl. 109; Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482; Pye *v.* Faxon,

negligence.¹⁵ In one case the following rules have been laid down: "1. If a contractor faithfully performs his con- [*646] tract, and the third person is *injured by the contractor in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which

695; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Holliday v. National Telephone Co.*, (1899) 2 Q. B. 392. So if owners are charged with duty of keeping a mine safe, they are liable though independent contractors are to take out the ore. *Lake Sup., &c., Co. v. Erickson*, 39 Mich. 492, 33 Am. Rep. 423; *Kelly v. Howell*, 41 Ohio St. 438; responsible for negligent plan executed by independent contractor. *Lancaster v. Conn. Mut., &c., Co.*, 92 Mo. 460, 5 S. W. 23. See *Dorrit v. Rapp*, 72 N. Y. 307. A carrier cannot escape liability by contracting with a person to haul its cars in the ordinary business of the road. *Phila., &c., Ry. Co. v. Hahn*, 12 Atl. Rep. 479 (Penn.); and see *Burton v. Galveston, &c., Co.*, 61 Tex. 526.

19—*Cincinnati v. Stone*, 5 Ohio St. 38, 41; *McGuire v. Grant*, 25 N. J. 356, 67 Am. Dec. 49; *Hale v. Johnson*, 80 Ill. 185; *McCafferty v. Spuyten Duyvil, &c., R. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267; *King v. New York, &c., R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37; *Devlin v. Smith*, 89 N. Y. 470; *Ferguson v. Hubbell*, 87 N. Y. 507; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *McCarthy v. Sec. Parish*, 71 Me. 318, 36 Am. Rep. 320; *Carter v. Berlin Mills Co.*, 58 N. H. 52; *Bailey v. Troy, &c., Co.*, 57 Vt. 252, 52 Am. Rep. 129; *Edmundson v. Pittsburg, &c., Co.*, 111 Penn. St. 316; *Ryan v. Curran*, 64 Ind. 345; *Hitte v. Rep. Vall., &c., Co.*, 19 Neb. 620; *Myer v. Hobbs*, 57 Ala. 175; *Davie v. Levy*, 39 La. Ann. 551, 2 So. 395; *Bennett v. True body*, 66 Cal. 509, 56 Am. Rep. 117; *Gulzoni v. Tyler*, 64 Cal. 334; *Rome, etc., R. R. Co. v. Chasteen*, 88 Ala. 591, 7 So. 94; *Chattohoochee, etc., R. R. Co. v. Behrman*, 136 Ala. 508, 35 So. 132; *Barton v. McDonald*, 81 Cal. 265, 22 Pac. 855; *Louthan v. Hewes*, 138 Cal. 116, 71 Pac. 180; *Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320; *Fulton County St. R. R. Co. v. McConnell*, 87 Ga. 756, 13 S. E. 828; *Brunswick Grocery Co. v. Brunswick, etc., R. R. Co.*, 106 Ga. 270, 32 S. E. 92, 71 Am. St. Rep. 249; *Ridgeway v. Downing Co.*, 109 Ga. 591, 34 S. E. 1028; *Butler v. Lewman*, 115 Ga. 752, 42 S. E. 98; *Jefferson v. Chapman*, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136; *Jefferson v. Jameson, etc., Co.*, 165 Ill. 138, 46 N. E. 272; *Pioneer Fireproof Construction Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17; *Pioneer Fireproof Construction Co. v. Howell*, 189 Ill. 123, 59 N. E. 535; *Foster v. Chicago*, 197 Ill. 264, 64 N. E. 322; *Strauss v. Louisville*, 108 Ky. 155, 55 S. W. 1075; *Davie v. Levy*, 39 La. Ann. 551, 2 So. 395, 4 Am. St. Rep. 225; *Leavitt v. Bangor, etc., R. R. Co.*, 89 Me. 509, 36 Atl. 998, 36 L. R. A. 382; *Boardman v. Creighton*, 95 Me. 154, 49 Atl. 663; *Wilbur v. White*, 98 Me. 191, 56

occasions the injury; but for the negligence of the contractor not done *under* the contract, but in violation of it, the employer is in general not liable. * * 2. If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible on the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. * * 3. If I employ as contractor a person incompetent or untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. * * 4. The employer may be guilty of personal neglect, connecting itself with the negligence of the contractor in such manner as to

Atl. 657; City & Suburban Ry. Co. v. Morris, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345; Harding v. Boston, 163 Mass. 14, 39 N. E. 411; Boomer v. Wilbur, 176 Mass. 482, 67 N. E. 1004, 53 L. R. A. 172; Shute v. Princeton, 58 Minn. 337, 59 N. W. 1050; Long v. Moon, 107 Mo. 334, 17 S. W. 810; Jansen v. Jersey City, 61 N. J. L. 243, 39 Atl. 1025; Herrington v. Lansingburgh, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348; Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692; Roemer v. Striker, 142 N. Y. 134, 36 N. E. 808; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Burke v. Ireland, 166 N. Y. 305, 59 N. E. 914; Deyo v. Kingston Consolidated R. R. Co., 94 App. Div. 578, 88 N. Y. S. 487; Anderson v. Boyer, 156 N. Y. 93, 50 N. E. 976; Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391; Williams v. Tripp, 11 R. I. 454; Sandford v. Pawtucket St. Ry. Co., 19 R. I. 537, 35 Atl. 67; Benton v. Beattie, 63 Vt. 186, 22 Atl. 422; Bibb's Admr. v. Norfolk, etc., R. R. Co., 87 Va. 711, 14 S. E. 163; Emerson v. Fay, 94 Va. 60, 26 S. E. 386; Norfolk, etc., Ry. Co. v. Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367; Hackett v. Western Union Tel. Co., 80 Wis. 187, 49 N. W. 822; Smith v. Milwaukee, etc., Exchange, 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504. That the employer of an independent contractor is not master of the contractor's servants, see Hilliard v. Richardson, 3 Gray, 349; Boswell v. Laird, 8 Cal. 469, 68 Am. Rep. 345; Kellogg v. Payne, 21 Iowa, 575; Allen v. Willard, 57 Penn. St. 374; Hunt v. Pennsylvania R. R. Co., 51 Pa. St. 475; Clark v. Vermont, &c., R. R. Co., 28 Vt. 103; West v. St. Louis, &c., R. R. Co., 63 Ill. 545; Schwartz v. Gilmore, 45 Ill. 455, 92 Am. Dec. 227; Kelly v. New York, 11 N. Y. 432; Blake v. Ferris, 5 N. Y. 48; Robinson v. Webb, 11 Bush, 464. There is a careful examination of the whole subject in Eaton v. European, &c., R. R. Co., 59 Me. 520, 8 Am. Rep. 430, in which a railroad company was held not responsible for negligent fires set by contractors for building its road.

render both liable.²⁰ But where the contract is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control reserved either as respects the manner of doing the work or the agents to [647] be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the persons employed by the contractor, so as to be responsible to third persons for their negligence.²¹

Independent Contractors. Illustrations and Exceptions. The rule that the owner of land is not liable for the negligence of a servant of an independent contractor putting up a building on his land, does not apply if the performance of the contract will necessarily bring wrongful consequences unless guarded against.²² Thus if one makes an excavation on his land which will naturally damage his neighbor's he cannot relieve

20—SEYMOUR, J., in *Lawrence v. Shipman*, 39 Conn. 586, 589. And, see remarks by CLIFFORD, J., in *Water Co. v. Ware*, 16 Wall. 566, 576; also, *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Chicago v. Robbins*, 2 Black, 418; *Railroad Co. v. Hanning*, 15 Wall. 649; *Cuff v. Newark, &c.*, R. R. Co., 35 N. J. 17, 10 Am. Rep. 205, where the authorities are collated and examined. *Deford v. State*, 30 Md. 179; *Tibbetts v. Knox, &c.*, R. R. Co., 62 Me. 437; *Rourke v. White Moss Colliery Co.*, 1 C. P. Div. 556; 2 C. P. D. 305; while the owner is not liable for the contractor's negligence in a matter collateral to the contract, he is where the very thing contracted for is improperly done and causes mischief on the lands of another, at least where the injury is done after he has accepted the completed work. *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234, and cases cited; *Mulchey v. Meth. Soc.*, 125 Mass. 487. See *Sturgis v. Theol. Soc.*, 130 Mass. 414; *Khron v. Brock*, 144 Mass. 516; *Chartiers, &c., Co. v. Lynch*, 118 Pa. St. 362, 12 Atl. 435. If damage is caused by the fall of a wall in putting up a building forbidden by ordinance, both owners and contractor are liable. *Walker v. McMillan*, 6 Can. S. C. R. 241.

21—Shearm. & Redf. on Neg. § 73; Schouler, Dom. Rel. 644-5. And the contractor is not liable for the direct consequence of the employer's negligence. *Vanderslice v. Philadelphia*, 103 Penn. St. 102.

22—*Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Moore*

himself of responsibility by employing an independent contractor to do the work.²³ And where the walls of a building were left in a dangerous condition by fire and the owner employed a contractor to take them down and, in consequence of his negligence in doing the work, the walls fell on the adjoining property, the owner was held liable on the ground that "when a party is under a duty to the public, or a third person, to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another."²⁴ Where a contractor for the erection of a building contemplates blasting in close proximity to adjoining buildings, the work is intrinsically dangerous, and the rule of independent contractor does not apply.²⁵ But the contrary is held in New York.²⁶

Where an owner contracts for the erection or repair of a building upon his lot he is not liable for the acts or negligence of the contractor or his servants in obstructing the street or in permitting objects to fall into the street, whereby those lawfully using the street are injured.²⁷ But if the contract provides for doing work in the street itself, such as making water and sewer

v. Townsend, 76 Minn. 64, 78 N. St. Rep. 486; Brannock *v.* Elmore, W. 880; Cameron Mill & El. Co. *v.* 114 Mo. 55, 21 S. W. 451.

Anderson, 98 Tex. 156.

23—*Bower v. Peate*, L. R. 1 Q. B. D. 321; *Stevenson v. Wallace*, 27 Grat. 77; *Green v. Berge*, 105 Cal. 49, 38 Pac. 509; *Bonaparte v. Wiseman*, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482; *Larson v. Met. St. Ry. Co.*, 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330. *Contra*, *Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320.

24—*Covington, etc., Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 1223, 55 N. E. 618, 76 Am. St. Rep. 375. See *Duer v. Consolidated Gas Co.*, 86 App. Div. 14, 83 N. Y. S. 714.

25—*Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894, 78 Am.

26—*Roehm v. Striker*, 142 N. Y. 134, 36 N. E. 808; *French v. Vix*, 143 N. Y. 90, 37 N. E. 612; *Berg v. Parsons*, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391.

27—*Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139; *Hoff v. Shockley*, 122 Ia. 720, 98 N. W. 573, 101 Am. St. Rep. 289, 64 I. R. A. 538; *Strauss v. Louisville*, 108 Ky. 155, 55 S. W. 1075, where plaintiff was injured by the contractor's servant throwing a piece of lime into a mortar bed placed in the street; *Boomer v. Wilbur*, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172; *Emmerson v. Fay*,

connections and the like, then as to such work the rule is different.²⁸ A coal dealer made a contract for unloading a cargo of coal from a vessel to his yard, which was separated from the water by a public street. The contractor put up a trestle across the street about eight feet high, upon which the coal was wheeled in barrows. In the night time a fireman was knocked off his vehicle by this trestle and injured. The doctrine of independent contractor was applied.²⁹ So in case of a contract to move a building through the streets, the owner was held not liable for the negligence of the contractor in leaving a hook and chain ex-

94 Va. 60, 26 S. E. 386; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879, 65 L. R. A. 445 (which last reference has a note on the subject of independent contractors); *Smith v. Milwaukee, etc., Exchange*, 91 Wis. 360, 64 N. W. 1041, 51 Am. St. Rep. 912, 30 L. R. A. 504. The rule applies where the contract is to dig a ditch in a street for an individual who has municipal authority for the act; *Smith v. Simmons*, 103 Pa. St. 32. But the owner is liable for failure of contractor to put a light on a pile of brick left in the street at night, the ordinance requiring a light. *Wilson v. White*, 71 Ga. 506. In *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334, 438, WALKER, J., says: "The reason why the master is rendered liable for the negligent acts of the servant, resulting in injury to others, is because the servant, while he is engaged in the business of the master, is supposed to be acting under and in conformity to his directions, and to hold him to the employment of skillful and prudent servants. The presumption is one of law, and hence cannot be rebutted. But in this case

the reason fails, and the presumption must also fail. These contractors, as we have seen, were not working under the directions or control of appellants, but under their contract, and were in no sense their servants." And where the excavation for the building was made close to the street line and was left unguarded the owner was held liable. *Murphy v. Perlstein*, 73 App. Div. 256, 76 N. Y. S. 657. Compare *Rait v. New Eng. Furniture, etc., Co.*, 66 Minn. 76, 68 N. W. 729.

28—*Spence v. Schultz*, 103 Cal. 208, 37 Pac. 220; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Thomas v. Harrington*, 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742; *Southern Ohio R. R. Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; *Hawver v. Whalen*, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828; *McCarrier v. Hollister*, 15 S. D. 366, 89 N. W. 862, 91 Am. St. Rep. 695. And see *Skelton v. Larkin*, 82 Hun, 388, 31 N. Y. S. 234; *Independence v. Slack*, 134 Mo. 66, 34 S. W. 1094.

29—*Davie v. Levy*, 39 La. Ann. 551, 2 So. 395, 4 Am. St. Rep. 225.

posed, whereby the plaintiff was injured.³⁰ It has been held that a railroad company is not liable for the negligence of a contractor to construct its road in the street, whereby injury is done to a traveler or to abutting property.³¹ But it would seem that street work is intrinsically and necessarily dangerous to the traveling public and that a duty rests on the principal to see that due care is observed for their safety.³² Consequently a municipality is liable for injuries to travelers by reason of the negligence of a contractor to make repairs or improvements in the street.³³

Where a building is erected in a manner forbidden by ordinance or statute and in consequence it falls or collapses, the owner is liable for any damage or injury occasioned thereby.³⁴ So if the plans are defective or the materials directed to be used

30—*Wilbur v. White*, 98 Me. 191, 56 Atl. 657.

31—*Chattahoochee, etc., R. R. Co. v. Behrman*, 136 Ala. 508, 35 So. 132; *Fulton County St. R. R. Co. v. McConnell*, 87 Ga. 756, 13 S. E. 828; *Sandford v. Pawtucket St. Ry. Co.*, 19 R. I. 537, 35 Atl. 67.

32—*Colgrove v. Smith*, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590; *Donovan v. Oakland, etc., Rapid Transit Co.*, 102 Cal. 245, 36 Pac. 516; *Holliday v. National Tel. Co.*, (1899) 2 Q. B. 392.

33—*Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Jacksonville v. Drew*, 19 Fla. 106, 45 Am. Rep. 5; *Mayor, &c., of Baltimore v. O'Donnell*, 53 Md. 40; *Turner v. Newburgh*, 109 N. Y. 301, 16 N. E. 344; *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Jefferson v. Chapman*, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136. Compare *Herrington v. Lansingburgh*, 110 N. Y. 145, 17 N. E. 728. But a city is not liable for an injury to a servant of the contractor by the

caving of a sewer trench. *Foster v. Chicago*, 197 Ill. 264, 64 N. E. 322. Nor for dirt put on abutting property by such a contractor. *Harding v. Boston*, 163 Mass. 14, 39 N. E. 411. Where a town contracted with a party to grade a piece of new road and to burn the brush thereon, the rule of independent contractor was applied and the town held not liable for damage to the plaintiff's property by fire escaping from the roadway. *Shute v. Princeton*, 58 Minn. 337, 59 N. W. 1050.

34—*Walker v. McMillan*, 6 Can. S. C. R. 241; *Pitcher v. Lennon*, 16 Misc. 609, 38 N. Y. S. 1007. In the last case it is said: "Without regard to the form in which the question has come up, the courts have invariably held that every person violating a statute is a wrongdoer, negligent in the eyes of the law; and that any innocent person injured by such violation, if it be the proximate cause of the injury, may, in a proper case, recover damages from employer and

are unsuitable.³⁵ But where a person employs a competent architect and contractor and the plans are sufficient and approved by the building department of the municipality, he is not liable for an accident which happens by reason of the foreman of the contractor putting the foundation of a column on disturbed earth.³⁶

The doctrine of independent contractor was applied in the following cases and the employer held exempt: Where the defendant contracted with another to furnish and set off fire works and the plaintiff was injured by the negligence of the contractor's servant.³⁷ Where a railroad company made a contract for the sawing of the wood along its line and the plaintiff's property was fired by sparks from the contractor's cooking car.³⁸ Where the defendant contracted with another to cut and remove the timber from certain lands and the contractor cut over the line onto the plaintiff's land.³⁹ Where a railroad company contracted with a bridge company to substitute a new bridge for an old one, so as not to interrupt traffic, and a train was wrecked and fireman killed by the negligence of the contractor.⁴⁰

It is held in Illinois that, "Even though the person who causes the injury is a contractor, he will be regarded as the servant or agent of the corporation for whom he is doing the work, if he is exercising some chartered privilege or power of such corporation with its assent, which he could not have exercised independently of the charter of such corporation."⁴¹ And in Pennsylvania it is held that if the employer, at the time he resumes pos-

contractor, jointly or severally, it
not being in the power of an owner
to escape liability by making
a contract with another to commit
the wrong for him." p. 610.

35—*Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep.

39.

36—*Burke v. Ireland*, 166 N. Y. 305, 59 N. E. 914.

37—*Deyo v. Kingston Consolidated R. R. Co.*, 94 App. Div. 578, 88 N. Y. S. 487; *Heidenway v. Philadelphia*, 168 Pa. St. 72, 31 Atl. 1063. Compare *Wylie v.*

Palmer

137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285.

38—*Leavitt v. Bangor, etc., R. R. Co.*, 89 Me. 509, 36 Atl. 998, 36 L. R. A. 382.

39—*Benton v. Beattie*, 63 Vt. 186, 22 Atl. 422.

40—*Norfolk, etc., Ry. Co. v. Stevens*, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367.

41—*Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66; *Chicago v. Murdock*, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221.

session of the work, from an independent contractor, knew or ought to have known, or from a careful examination could have known, that there was any defect in the work, he is responsible for any injury caused to a third person by defective construction.⁴²

42—First Presb. Congregation *v.* Smith, 163 Pa. St. 561, 30 Atl. 279, 43 Am. St. Rep. 808, 26 L. R. A. 504. And see Berberich *v.* Beach, 131 Pa. St. 165, 18 Atl. 1008. In Atlanta, etc., R. R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. 277, the exceptions to the rule that an employer is not liable for the negligence of an independent contractor or of his servants, are stated as follows: “(1) When the work is wrongful in itself, or if done in the ordinary manner would result in a nuisance, the employer will be liable for injury resulting to third persons, although the work is done by an independent contractor.”

“(2) If, according to previous knowledge and experience the work to be done is in its nature dangerous to others, however carefully performed, the employer will be liable and not the contractors, because, it is said, it is incumbent on him to foresee such danger and take precautions against it. * * * And in this exception is included the principle that where the injury is caused by defective construction which was inherent in the original plan of the employer, the latter is liable.”

“(3) The next exception is where the wrongful act is the violation of a duty imposed by express contract upon the employer; for where a person contracts to do a certain thing, he cannot evade liability by employing another to

do that which he has agreed to perform.”

“(4) The next exception is where a duty is imposed by statute. The person upon whom a statutory obligation is imposed is liable for any injury that arises to others from its non-performance or in consequence of its having been negligently performed, either by himself or by a contractor employed by him.”

“(5) The employer may also make himself liable by retaining the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming control of the work, or of some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference. But merely taking steps to see that the contractor carries out his agreement, as having the work supervised by an architect or superintendent, does not make the employer liable; nor does reserving the right to dismiss incompetent workmen.”

“(6) The employer may also be held liable upon the ground that he has ratified or adopted the unauthorized wrong of the independent contractor.” pp. 165-168. For other statements of the exceptions see Birmingham *v.* McCary, 84 Ala. 469, 4 So. 630; Berg *v.* Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391. The following are additional cases in

Who Are Independent Contractors. "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work."⁴³ The term contractor is applicable to all persons following a regular, independent employment, in the course of which they offer their services to the public to accept orders and execute commissions for all who may employ them in a certain line of duty, using their own means for the purpose, and being accountable only for final performance. In every case the decisive question in determining whether the doctrine of respondent superior applies is, had the defendant the right to control in the given particular the conduct of the person doing the wrong?⁴⁴ Where a city contracted for the erection of a building and the contract provided that the work was to be done "under the direction of the committees of the fire department and public buildings, representing the City Council of said city, who shall have entire control over the manner of doing or shaping all and every part of said work," this clause was held to reserve such control to the city as to make it liable for the negligence of the contractor and his servants.⁴⁵ So of this provision in a contract for wrecking a building: "The whole of the work of demolition to be carried out according to the directions of the supervising architect, whose directions upon all points in dispute I agree to accept as final."⁴⁶ But where the which the rule of independent contractor was held not to apply. *Shea v. Pacific Power Co.*, 145 Cal. 680, 79 Pac. 373; *Mumby v. Bowden*, 25 Fla. 454, 6 So. 453; *Northern Trust Co. v. Palmer*, 70 Ill. App. 93; *Cameron v. Oberlin*, 19 Ind. App. 142, 48 N. E. 386; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421; *Corrigan v. Elsinger*, 81 Minn. 42, 83 N. W. 492; *Jacobs v. Fuller*, etc., Co., 67 Ohio St. 70, 65 N. E. 617.

43—*Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925. This definition is quoted in *Humpton v. Unterkircher*, 97 Ia. 509, 66 N. W. 776, and declared to be the best found by the court.

44—*Rait v. New Eng. Furniture, etc., Co.*, 66 Minn. 76, 68 N. W. 729.

45—*Covington v. Geyler*, 93 Ky. 275, 19 S. W. 741.

46—*Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256. The same conclusion was reached in the following cases: *Larson v. Met. St. Ry. Co.*, 110 Mo. 234, 19 S. W. 416, 33 Am. St.

only control reserved is to require the work to conform to the contract, or to some prescribed standard, or to be done to the satisfaction of the employer's engineer or architect, the doctrine of independent contractor applies.⁴⁷ So where the work was to be done "to the satisfaction and acceptance of the superintendent of sewers, and subject to his inspection and direction at all times."⁴⁸ It is immaterial that the right is reserved to make alterations, deviations and omissions.⁴⁹ So it is immaterial how

Rep. 439, 16 L. R. A. 330; Dublin v. Taylor, 92 Tex. 535, 50 S. W. 120; Atlantic Transport Co. v. Coneys, 82 Fed. 177, 28 C. C. A. 388.

47—Vincennes Water Supply Co. v. White, 124 Ind. 376, 24 N. E. 747; Hughbanks v. Boston Investment Co., 90 Ia. 267, 60 N. W. 640; Humpton v. Unterkircher, 97 Ia. 509, 66 N. W. 776; Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925; Green v. Soule, 145 Cal. 96, 78 Pac. 337; Pioneer Fireproof Construction Co. v. Hansen, 176 Ill. 100, 52 N. E. 17. In the last case it is said: "He is the master who has the choice, control and direction of the servants. The master remains liable to strangers for the negligence of his servants, unless he abandons their control to the hirer. Control of servants does not exist, unless the hirer has the right to discharge them and employ others in their places. The doctrine of *respondeat superior* is applicable, where the person sought to be charged has the right to control the action of the persons committing the injury. It follows, that the right to control the negligent servant is the test, by which is to be determined whether the relation of master and servant exists; and, inasmuch as the right to con-

trol involves the right to discharge, the relation of master and servant will not exist, unless the power to discharge exists." p. 108.

48—Harding v. Boston, 163 Mass. 14, 39 N. E. 411.

49—Green v. Soule, 145 Cal. 96, 78 Pac. 337. As to the right of supervision which will render the employer liable as master of the contractor, compare Pack v. New York, 8 N. Y. 222; Kelly v. New York, 11 N. Y. 432; Eaton v. European, &c., R. R. Co., 59 Me. 520, 8 Am. Rep. 430; Allen v. Willard, 57 Pa. St. 374, with Sadler v. Henlock, 4 E. & B. 570; Lowell v. Boston, &c., R. R. Co., 23 Pick. 24; Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; Schwartz v. Gilmore, 45 Ill. 455, 92 Am. Dec. 227; Morgan v. Bowman, 22 Mo. 538; St. Paul v. Seitz, 3 Minn. 297; Speed v. Atlantic, &c., R. R. Co., 71 Mo. 303; Fink v. Miss., &c., Co., 82 Mo. 276; Callahan v. Burlington, &c., R. R. Co., 23 Iowa, 562; Cincinnati v. Stone, 5 Ohio St. 38; Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; Brown v. Werner, 40 Md. 15; New Orleans, &c., Co. v. Norwood, 62 Miss. 565; Campbell v. Lunsford, 83 Ala. 512, 3 So. 522. The fact that the employer pays the contractor's servant does not conclusively determine that he is to be regarded as

the contractor is to be compensated, whether by a lump sum or a commission on the cost,⁵⁰ or a per diem.⁵¹

Where the owner of a shingle mill contracted with a third party to take charge of the mill and operate it, furnishing the labor and repairs and receiving so much per thousand for the shingles manufactured, such party was held to be an independent contractor and the owner was held not liable for an injury to an employe by reason of a machine being out of repair.⁵² But where the defendant contracted with another to manufacture furniture for it, the defendant furnishing the machinery, tools and materials, and the other party the labor, and among the machines was one safe to operate under proper instructions but dangerous otherwise, and an employe was injured by the machine because he had not been instructed, the defense of independent contractor was held not available, because the machine was dangerous unless due care was used.⁵³ A common carrier is an independent contractor, and so is a drayman;⁵⁴ and so is the master of a tugboat.⁵⁵ Where one contracts with a business house to do all its hauling and delivery work at a specified sum per week or year, the former furnishing teams, wagons and drivers and having full control thereof, he is an independent contractor and is alone liable for the negligence of his drivers.⁵⁶

their master. *Rourke v. White Moss Colliery Co.*, 1 C. P. Div. 556; 2 C. P. D. 305.

50—*Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Grace & Hyde Co. v. Probst*, 208 Ill. 147, 70 N. E. 12; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101.

51—*Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386.

52—*Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591, 74 Pac. 680. The following are very similar cases in which the same ruling was made. *Kelleher v. Schmitt, etc., Mfg. Co.*, 122 Ia. 635, 98 N. W. 482; *Central Coal & I. Co. v. Grider's Admr.*, 115 Ky. 745, 74 S. W. 1058.

53—*Jacobs v. Fuller, etc., Co.*, 67 Ohio St. 70, 65 N. E. 617.

54—*De Forrest v. Wright*, 2 Mich. 368; *McMullen v. Hoyt*, 2 Daly, 271. So where a city hired a cart, horse and driver, and directed driver to water certain streets, and had no other control of the driver, he is an independent contractor. *Jones v. Mayor, &c., of Liverpool*, L. R. 14 Q. B. D. 890.

55—*Sproul v. Hemmingway*, 14 Pick. 1. See *Milligan v. Wedge*, 12 Ad. & El. 737. A pilot, whom the master of a vessel is compelled by law to accept, is not his servant. *Steam Nav. Co. v. British, &c., Nav. Co.*, L. R. 3 Exch. 330.

56—*Foster v. Wadsworth-How-*

But one employed to deliver coal for the defendant at so much per load was held to be a servant of the defendant, though he furnished his own team.⁵⁷ Where the question of independent contractor depends upon a written contract it is one of law for the court.⁵⁸ But where the contract is oral and the evidence is conflicting, it is a question for the jury under proper instructions.⁵⁹

Master Responsible for His Own Negligence. Master's Duties in General. Undoubtedly as the general rule is that the master is not liable for an injury to the servant received in the execution of the master's business, there is nevertheless an exception to it, resting on reasons as conclusive as those which support the rule itself. The exception is this: That if the injury results from the negligence of the master himself, he is responsible on the same reasons which would render him responsible if the relation did not exist.⁶⁰

"Whatever the danger of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhance-

land Co., 168 Ill. 514, 48 N. E. 163; *John v. McKnight & Co.*, 117 Ky. 655; *Riedel v. Moran*, etc., Co., 103 Mich. 262, 61 N. W. 509; *Bentley v. Edwards*, 100 Md. 652. nolds *v. Braithwaite*, 131 Pa. St. 416, 18 Atl. 1110; *Flynn v. Arrott Steam Power Mills Co.*, 19 Phila. 492; *Wallace v. Southern Cotton Oil Co.*, 91 Tex. 18, 40 S. W. 399.

57—*Waters v. Pioneer Fuel Co.*, 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564. To same effect: *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 S. C. Rep. 175, 33 L. Ed. 440. As to who are independent contractors see further, *Green v. Sansom*, 41 Fla. 94, 25 So. 332; *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66; *Vosbeck v. Kellogg*, 78 Minn. 176, 80 N. W. 957; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077; *Duerr v. Consolidated Gas Co.*, 86 App. Div. 14, 83 N. Y. S. 714; *Gorney v. New York*, 102 App. Div. 259, 92 N. Y. S. 451; *Rey-*

58—*Hughbanks v. Boston Investment Co.*, 92 Ia. 267, 60 N. W. 640.

59—*Overhouser v. Am. Cereal Co.*, 118 Ia. 417, 92 N. W. 74; *Goyle v. Missouri Car*, etc., Co., 177 Mo. 427, 76 S. W. 987. As to who are independent contractors see further *Bennett v. Mt. Vernon*, 124 Ia. 537, 100 N. W. 349; *Francis v. Johnson*, 127 Ia. 391; *Lederink v. Rockford*, 135 Mich. 531, 98 N. W. 4; *Miller v. Merritt*, 211 Pa. St. 127.

60—*Rhoades v. Varney*, 91 Me. 222, 39 Atl. 552.

ment of danger thereby engendered."⁶¹ The servant cannot bind himself, even by an express agreement, to assume the consequences of the master's negligence, for such an agreement is held to be against public policy and void.⁶²

The principal duties of the master to his servant are to exercise reasonable care and diligence *first*, to afford him a reasonably safe place in which to work; *second*, to supply him with reasonably safe and suitable tools and appliances to work with; and, *third*, to select fit and competent fellow servants.⁶³ These duties have been very comprehensively stated in a recent case, as follows: "It is the personal and absolute duty of the master to exercise reasonable care and caution to provide his servants with a reasonably safe place to work, reasonably safe tools, ap-

61—Lord Herschell in *Smith v. Baker & Sons*, (1891) A. C. 325-362. "The master's own duty to the servant is always to be performed. The neglect of that duty is not a peril which the servant assumes, and where the performance of that duty is devolved upon a fellow servant the master's liability in respect thereof still remains." Chicago, etc., R. R. Co. *v. Maroney*, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396.

Cases under the English Employers' Liability Act of 1880. *Cox v. Gt. West. Ry. Co.*, 9 Q. B. D. 106; *Osborn v. Jackson*, 11 Q. B. D. 619; *Millward v. Midland Ry. Co.*, 14 Q. B. D. 68; *Heske v. Samuelson*, 12 Q. B. D. 30; *Cripps v. Judge*, 13 Q. B. D. 583; *Paley v. Garnett*, 16 Q. B. D. 52. A master may stipulate with the servant against liability under this act. *Griffiths v. Earl Dudley*, L. R. 9 Q. B. D. 357. But that a master may not by agreement at time of hiring relieve himself from a duty to the servant, see *Little Rock, &c., Co. v. Eubanks*, 48 Ark. 460, 3 S.

W. 808; *Kansas, &c., Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630. Nor from liability for negligence of a superior servant. *Lake Shore, &c., Ry. Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467.

62—*Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *post*, p. *825. This must be taken in connection with the doctrine of assumption of risk and, as thus qualified, would mean that the servant is not bound by an agreement to assume the risk of the master's negligence against which he has had no opportunity to protect himself.

63—*Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 423, 49 Pac. 559; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916; *Mullin v. California Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Camp v. Hall*, 39 Fla. 535, 22 So. 792; *Harvey v. Alturas Gold Min. Co.*, 3 Ida. 510, 31 Pac. 819; *Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Wendler v.*

pliances and instruments to work with, reasonably safe material to work upon, suitable and competent fellow servants to work with them, and to make needful rules and regulations for the safe conduct of the work; and he cannot delegate this duty to a servant of any grade so as to exempt himself from liability to a servant who has been injured by its non-performance. Whoever he intrusts with its performance. whatever his grade or rank, stands in place of the master, and he is liable for the negligence of such employe to the same extent as if he had himself performed the act, or been guilty of the negligence. But where the master has performed his duty in this regard, and provided competent employes, a reasonably safe place to work, suitable materials, tools and appliances to work with, and needful rules and regulations and the like, he has discharged his whole duty in the premises, and is not liable to a servant for the negligence of another servant while engaged as an operative.⁶⁴

Although it is a common form of expression to say that it is the master's duty to provide a reasonably safe place, reasonably safe tools and appliances, and reasonably fit and competent fellow servants, yet the true rule is that it is the master's duty *to exercise ordinary care and diligence* to make such provision for his servants,⁶⁵ and when the distinction is material the courts

- People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737; Goransson v. Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338; Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604; Comben v. Belleville Stone Co., 59 N. J. L. 226, 36 Atl. 473; McDonald v. Standard Oil Co., 69 N. J. L. 445, 55 Atl. 289; Mc-Govern v. Central Vt. R. R. Co., 123 N. Y. 280, 25 N. E. 373; Neily v. S. W. Cotton Seed Oil Co., 13 Okl. 356, 75 Pac. 537; Ross v. Walker, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160; Kehler v. Schwenk, 144 Pa. St. 348, 27 Am. St. Rep. 633, 13 L. R. A. 374; McDonald v. Postal Tel. Co., 22 R. I. 131, 46 Atl. 407; Sanders v. Aiken Mfg. Co., 71 S. C. 58, 50 S. E. 679; Morris Bros. v. Bowers, 105 Tenn. 59, 58 S. W. 328; Boyle v. Union Pac. R. R. Co., 25 Utah, 420, 71 Pac. 988; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342; Williams v. North Wis. Lumber Co., 124 Wis. 328, 102 N. W. 589; Baltimore, etc., R. R. Co. v. Baugh, 149 U. S. 368, 13 S. C. Rep. 914, 37 L. Ed. 772.
- 64—Mast v. Kern, 34 Ore. 247, 251, 54 Pac. 950, 75 Am. St. Rep. 580.
- 65—Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 48, 27 Pac. 590; Denver, etc., R. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093; Greeley v.

ordinarily make and enforce it. It has been held error to instruct the jury that the master was bound to furnish a reasonably safe place.⁶⁶ And in the same case it was held that the instruction should have been that he was bound to exercise ordinary and reasonable care to furnish a reasonably safe place. Before a master can be held responsible in damages for a default in respect to place, appliances, etc., it must appear that in some way, by the exercise of reasonable care and prudence on his part, he could have avoided the injury.⁶⁷

The standard of ordinary or reasonable care in such matters is such care as a man of ordinary prudence would exercise if he was making the provision for his own personal use.⁶⁸ In one

Foster, 32 Colo. 292, 75 Pac. 351; Allegheny Ore & Iron Co., 102 Va. 350, 46 S. E. 325; Hoffman *v.* Dickinson, 31 W. Va. 142, 6 S. E. 53; Washington, etc., R. R. Co. *v.* McDade, 135 U. S. 554, 10 S. C. Rep. 1044, 34 L. Ed. 235; Northern Pac. Ry. Co. *v.* Dixon, 194 U. S. 338, 24 S. C. Rep. 683, 48 L. Ed. 1006; Westinghouse, etc., Mfg. Co. *v.* Heinlich, 127 Fed. 92, 62 C. C. A. 92; National Biscuit Co. *v.* Nolan, 138 Fed. 6 (C. C. A.).
66—Louisville, etc., R. R. Co. *v.* Johnson, 81 Fed. 679, 27 C. C. A. 367.
67—Northern Pac. Ry. Co. *v.* Dixon, 194 U. S. 338, 24 S. C. Rep. 683, 48 L. Ed. 1006.
68—“He satisfies the requirements of the law if in the selection of the machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard for his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the master liable, not a mere error of judgment.” Harley *v.* Buffalo Car Mfg. Co., 142 N. Y. 31, 34, 36 N. E. 813. An instruction that the master’s duty in

case it is said that the ordinary care intended or required is "that degree of care which a man of ordinary prudence in the same line of business would be expected to exercise to secure his own safety were he doing the work."⁶⁹ In Pennsylvania and some other states the rule is that "whatever is, according to the general, usual and ordinary course, adopted by those in the same business, is reasonably safe within the law."⁷⁰ But the natural tendency is for men to take less care for the safety of others than they take for the safety of themselves. And if ordinary usage was made the test the tendency would be constantly towards a lower and lower standard, or towards a less and less safe practice. The law regards the life and safety of the servant as of equal importance with the life and safety of the master. Hence the law should require the master to take the same care for the life and safety of the servant that he would take for his own. And hence the master in making provision for his servant should be required to exercise the same degree of care that an ordinarily prudent man would exercise, if he was making that provision for himself. Ordinary usage may be important as tending to show ordinary care, and, standing alone, may be sufficient to show such care, but it is not conclusive.⁷¹

It is the duty of the master to warn the servant of latent defects furnishing safe machinery is such care as an ordinarily prudent man would exercise, having regard to his own safety "and the safety of those nearest and dearest to him," was held to be erroneous as calling for too high a degree of care. *Last Chance M. & M. Co. v. Ames*, 23 Colo. 167, 47 Pac. 382. See *International, etc., Ry. Co. v. Bell*, 75 Tex. 50, 12 S. W. 321.

69—*Westinghouse Elec. & Mfg. Co. v. Heinlich*, 127 Fed. 92, 94, 62 C. C. A. 92.

70—*Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. Rep. 633, 13 L. R. A. 374; *Higgins v. Fanning*, 195 Pa. St. 599, 46 Atl. 102; *Leonard v. Herrmann*, 195

Pa. St. 222, 45 Atl. 723; *Tompkins v. Marine Engine, etc., Co.*, 70 N. J. L. 330, 58 Atl. 393; *Benson v. New York, etc., R. R. Co.*, 23 R. I. 147, 49 Atl. 689; *Fritz v. Salt Lake, etc., Elec. Lt. Co.*, 18 Utah, 493, 56 Pac. 90; *Boyle v. Union Pac. R. R. Co.*, 25 Utah, 420, 71 Pac. 988; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Innes v. Milwaukee*, 96 Wis. 170, 70 N. W. 1064; *Miss. Riv. Logging Co. v. Schneider*, 74 Fed. 195, 20 C. C. A. 390; *Snowdate v. United Box, etc., Co.*, (Me.) 61 Atl. 683.

71—*Geno v. Fall Mt. Paper Co.*, 68 Vt. 568, 35 Atl. 475; *Nyback v. Champagne Lumber Co.*, 109 Fed. 732, 48 C. C. A. 632.

fects and dangers, which are or ought to be known to him but are not known to the servant,^{71a} and generally to observe such care as will not expose the servant to perils and dangers, which may be guarded against by the exercise of reasonable care and diligence on his part.^{71b} This is especially true of employments that are intrinsically dangerous. On this point the Supreme Court of the United States says: "We think it may be laid down as a legal principle that in all occupations that are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in

71a—*Gisson v. Schwabacher*, 99 Cal. 419, 34 Pac. 104; *Rhoades v. Varney*, 91 Me. 222, 39 Atl. 552; *Campbell & Zell Co. v. Roediger*, 78 Md. 601, 28 Atl. 901; *Ribich v. Lake Superior Smelting Co.*, 123 Mich. 401, 82 N. W. 279, 81 Am. St. Rep. 215, 48 L. R. A. 649; *Evans Laundry Co. v. Cranford*, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814; *Western Union Tel. Co. v. McMullen*, 58 N. J. L. 155, 33 Atl. 384, 32 L. R. A. 351; *Melchert v. Smith Brewing Co.*, 140 Pa. St. 448, 21 Atl. 755; *Johnson v. Tacoma Mill Co.*, 22 Wash. 88, 60 Pac. 53; *Collingwood v. Ill. & Ia. Fuel Co.*, 125 Ia. 537, 101 N. W. 283; *Carter v. Dubach Lumber Co.*, 113 La. 239, 36 So. 952; *Ingham v. Honor Co.*, 113 La. 1040, 37 So. 963; *Lebeau v. Dyerville Mfg. Co.*, 26 R. I. 34; *Yess v. Chicago Brass Co.*, 124 Wis. 406, 102 N. W. 932.

71b—*Schumaker v. St. Paul, etc., R. R. Co.*, 46 Minn. 39, 48 N. W. 559, 17 L. R. A. 257; *Morrison v. Burgess Sulphite Fibre Co.*, 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634; *Pool v. Southern Pac. Co.*, 20 Utah, 210, 58 Pac. 326; *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467; *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244, 46 Pac. 334; *Promer v. Milwaukee, etc., Ry. Co.*, 90 Wis. 215, 63 N. W. 90, 48 Am. St. Rep. 905; *Smith v. Baker & Sons*, (1891) A. C. 325. "The servant has a right to assume superior knowledge in the master, to

consequence, the employers will also be chargeable for the injuries sustained.'^{71c}

The duties of the master to the servant will be considered more in detail in the following pages. Whatever these duties are, all the authorities agree that he cannot delegate them so as to absolve himself for negligence in their performance.⁷² As already shown, whoever is set to perform them, no matter what be his rank or grade, represents the master and, in that particular, is not a fellow servant of those to whom the duty is owed.⁷³

rely on his prudence and judgment, and to believe that he will not unnecessarily jeopardize his person and life by avoidable risk." *Myhan v. Electric Lt. & P. Co.*, 41 La. Ann. 965, 6 So. 799, 17 Am. St. Rep. 436, 7 L. R. A. 172; *Carter v. Dubach Lumber Co.*, 113 La. 239, 36 So. 952.

71c—*Mather v. Rillston*, 156 U. S. 391, 399, 15 S. C. Rep. 464, 39 L. Ed. 464.

72—*Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *Denver*, etc., R. R. Co. v. *Sipes*, 26 Colo. 17, 55 Pac. 1093; *Hess v. Rosenthal*, 160 Ill. 620, 43 N. E. 743; *Chicago*, etc., R. R. Co. v. *Scanlon*, 170 Ill. 106, 48 N. E. 826; *Shickle & Harrison & H. Iron Co. v. Beck*, 212 Ill. 268, 72 N. E. 423; *Chicago Union Traction Co. v. Sawasch*, 218 Ill. 130; *Nall v. Louisville*, etc., Ry. Co., 129 Ind. 260, 28 N. E. 183; *Dill v. Marmon*, 164 Ind. 507; *Blazenic v. Iowa & Wis. Coal Co.*, 102 Ia. 706, 72 N. W. 292; *Collingwood v. Ill. & Ia. Fuel Co.*, 125 Ia. 537, 101 N. W. 283; *Fry v. Bath Gas & Elec. Co.*, 94 Me. 17, 46 Atl. 604; *Moynihan v. Hills Co.*, 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348; *Hopkins v. O'Leary*, 176 Mass. 258, 57 N. E. 342; *Morton v. Detroit*, etc., R. R. Co., 81 Mich. 423, 46 N.

W. 111; *Fox v. Spring Lake Iron Co.*, 89 Mich. 387, 50 N. W. 872; *Ashman v. Flint*, etc., R. R. Co., 90 Mich. 567, 51 N. W. 645; *McDonald v. Mich. Cent. R. R. Co.*, 108 Mich. 7, 65 N. W. 597; *Maher v. Thropp*, 59 N. J. L. 186, 35 Atl. 1057; *Brennan v. Gordon*, 118 N. Y. 489, 23 N. E. 810, 16 Am. St. Rep. 775, 8 L. R. A. 818; *Anderson v. Bennett*, 16 Ore. 515, 19 Pac. 765, 8 Am. St. Rep. 311; *Roth v. Northern Pac. Lumbering Co.*, 18 Ore. 205, 22 Pac. 842; *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160; *Lebbering v. Struthers*, 157 Pa. St. 312, 27 Atl. 720; *Smith v. Hillside C. & I. Co.*, 186 Pa. St. 28, 40 Atl. 287; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; *Missouri Pac. Ry. Co. v. McElyer*, 71 Tex. 386, 9 S. W. 73, 10 Am. St. Rep. 749; *International*, etc., Ry. Co. v. *Kernan*, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; *San Antonio Gas Co. v. Robertson*, 93 Tex. 503, 56 S. W. 323; *Chapman v. Southern Pac. Co.*, 12 Utah 30, 41 Pac. 551; *Western Coal & Min. Co.*, 70 Fed. 219, 17 C. C. A. 71. See *Essex County Elec. Co. v. Kelly*, 57 N. J. L. 100, 29 Atl. 427.

73—See *ante*, pp. 1073, 1074.

The servant may always assume that the master has done his duty and he is not chargeable with negligence for failure to make investigation in that regard.⁷⁴

Master's Duty and Liability as to Place. The master's negligence may consist in subjecting the servant to the dangers of unsafe buildings or machinery, or to other perils on his own premises, which the servant neither knew of nor had reason to anticipate or to provide against when he entered the employment, or subsequently.

The general rule is, that while the owner of real estate is not bound to provide safeguards for wrong-doers, he is bound to take care that those who come upon his premises by his express or implied invitation be protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited party had no reason to look for. Many cases in illustration of this rule are collected in another

74—*Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938; *Chicago, etc., R. R. Co. v. Maroney*, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396; *Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Ross v. Shanley*, 185 Ill. 390, 56 N. E. 1105; *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399, 73 N. E. 787; *Emporia v. Kowalski*, 66 Kan. 64, 71 Pac. 232; *Lawrence v. Hagemeyer*, 93 Ky. 591, 20 S. W. 704; *Henderson Tobacco Extracts Works v. Wheeler*, 116 Ky. 322, 76 S. W. 34; *Helm v. O'Rourke*, 46 La. Ann. 178, 15 So. 400; *Caven v. Bodwell Granite Co.*, 99 Me. 278, 59 Atl. 285; *Delude v. St. Paul City Ry. Co.*, 55 Minn. 63, 56 N. W. 461; *Carlson v. N. W. Tel. Exch. Co.*, 63 Minn. 428, 65 N. W. 914; *Thompson v. Bartlett*, 71 N. H. 174, 51 Atl. 633, 93 Am. St. Rep. 504; *Carroll v. Tide Water Oil Co.*, 67 N. J. L. 679, 52 Atl. 279; *Eastland v. Clark*, 165 N. Y. 420, 59 N. E. 202; *Wilkie v. Raleigh, etc., R. R. Co.*, 127 N. C. 203, 37 S. E. 204; *Davis v. Turner*, 69 Ohio St. 101, 68 N. E. 819; *Miller v. Inman*, 40 Ore. 161, 66 Pac. 713; *McDonald v. Postal Tel. Co.*, 22 R. I. 131, 46 Atl. 407; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; *Freeman v. Railroad Co.*, 107 Tenn. 340, 64 S. W. 1; *International, etc., Ry. Co. v. Kernan*, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; *Missouri, etc., Ry. Co. v. Haning*, 91 Tex. 347, 43 S. W. 508; *Chapman v. Southern Pac. Co.*, 12 Utah, 30, 41 Pac. 551; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Norfolk, etc., R. R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. 367; *Texas, etc., Ry. Co. v. Swearingen*, 196 U. S. 51, 25 S. C. 164; *New York, etc., R. R. Co. v. O'Leary*, 93 Fed. 737, 35 C. C. A. 562; *Texas, etc., Ry. Co. v. Archibald*, 170 U. S. 665, 18 S. C. Rep. 777. “An employee has the

place,⁷⁵ but it is sufficient here to mention the general rule, with some instances of its application to this particular class of persons.⁷⁶

The invitation to come upon dangerous premises without apprising him of the danger is just as culpable, and an injury resulting from it is just as deserving of compensation in the case of a servant as in any other case. Moreover, no reason of public policy, and none to be deduced from the contract of the parties, can be suggested, which would relieve the culpable master from responsibility. A man cannot be understood as contracting to take upon himself risks which he neither knows nor suspects, nor has reason to look for; and it would be more reasonable to imply a contract on the part of the master not to invite the servant into unknown dangers, than one on the part of the servant to run the *risk of them. But the question of contract may be put entirely aside from the case, and the responsibility of the master may be planted on the same ground which would render him responsible if the relation had not existed. Whether invited upon his premises by the contract of service, or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes a duty to the party accepting it to see that at least ordinary care and prudence is exercised to protect him against dangers not within his knowledge, and not open to observation. It is a rule of justice and right which compels the master to respond for a failure to exercise this care and prudence.⁷⁷

right to repose confidence in the prudence and caution of his employer, and reply upon the safety and suitableness of implements or appliances with or about which he is required to work, and that the place assigned him to work is safe from any hidden or undisclosed perils which are not open and obvious to his senses." Cincinnati, etc., Ry. Co. v. Roesch, 126 Ind. 445, 26 N. E. 171.

75—See *post*, pp. *718-*722.

76—The servant is entitled to

the protection of this rule, though he is leaving his work without cause or excuse. *Marshall v. Stewart*, 33 Eng. L. & Eq. 1.

77—*Marshall v. Stewart*, 2 Macq. H. L. 20; S. C. 33 Eng. L. & Eq. 1; *Indermaur v. Dames*, L. R. 2 C. P. 311; *Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Perry v. Marsh*, 25 Ala. 659; *Schooner Norway v. Jensen*, 52 Ill. 373; *Walsh*

[*650] *The terms in which the proposition has been stated will exempt the master from responsibility in all cases where the risks were apparent, and were voluntarily assumed by a person capable of understanding and appreciating them. No employer, by any implied contract, undertakes that his buildings are safe beyond a contingency, or even that they are as safe as those of his neighbors, or that accidents shall not result to those in his service from risks which perhaps others would guard against more effectually than it is done by him. Neither can a duty rest upon any one which can bind him to so extensive a responsibility. There are degrees of safety in buildings which differ in age, construction and state of repair, as there are also in the different methods of conducting business; and these, not the servant only, but any person doing business with the proprietor, is supposed to inform himself about and keep in mind when he enters upon the premises. Negligence does not consist in not putting one's buildings or machinery in the safest possible condition, or in not conducting one's business in the safest way; but there is negligence in not exercising ordinary care that

v. Peet Valve Co., 110 Mass. 23; *Akerson v. Dennison*, 117 Mass. 407; *Horner v. Nicholson*, 56 Mo. 220; *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160; *Holmes v. North-eastern Railway Co.*, L. R. 4 Exch. 254; S. C. affirmed, L. R. 6 Exch. 123; *Mellors v. Shaw*, 1 Best & S. 437; *Roberts v. Smith*, 2 H. & N. 213. The master must use ordinary care to provide a safe place for the servant to work in. *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294; *Pantzar v. Tilly Foster Min. Co.*, 99 N. Y. 368; *Bessex v. Chicago, &c., Co.*, 45 Wis. 477; *Luebke v. Chicago, &c., Co.*, 59 Wis. 127; *North Chicago, &c., Co. v. Johnson*, 114 Ill. 57. He is liable if he knew or ought to have known of the dangerous condition of the place and the servant did not and could not reasonably know of the danger. *Nason v. West*, 78 Me. 253; *Griffiths v. London, &c., Co.*, L. R. 12 Q. B. D. 435; 13 Id. 259. But he is not bound to provide for a mishap which can not reasonably be anticipated. *Wannemaker v. Burke*, 11 Pa. St. 423; *Koontz v. Chicago, &c., Co.*, 65 Ia. 224, 54 Am. Rep. 5. See *Tissue v. Balt., &c., R. R. Co.*, 112 Pa. St. 91, 56 Am. Rep. 310; *Murphy v. Greeley*, 146 Mass. 196, 15 N. E. 654; *Goodnow v. Walpole Mills*, 146 Mass. 261, 15 N. E. 576. A master is not bound to keep a building in process of construction safe at every moment for workmen. *Armour v. Hahn*, 111 U. S. 313. See *Diamond, &c., Co. v. Giles*, 7 Houst. (Del.) 557, 11 Atl. 189.

the buildings and machinery, such as they are, shall not cause injury, and that the business, as conducted, shall not inflict damage upon those who themselves are guilty of no neglect of prudence.

*The principle is well stated by the Supreme Court of [*651] Connecticut, in a case where the injury the servant complained of was caused by his coming accidentally in contact with machinery which, it was claimed, ought to have been covered so as to protect against such an accident. "The employee here was acquainted with the hazards of the business in which he was engaged, and with the kind of machinery made use of in carrying on the business. He must be held to have understood the ordinary hazards attending his employment, and therefore to have voluntarily taken upon himself this hazard when he entered into the defendant's service. Every manufacturer has a right to choose the machinery to be used in his business, and to control that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances, and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, occupy an old or new house, as he pleases. The employee having knowledge of the circumstances on entering his service for the stipulated reward, cannot complain of the peculiar taste and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service."⁷⁸

78—*Hayden v. Smithville Manf.* Co., 29 Conn. 548, 558, per ELLSWORTH, J., who, in citing authorities, refers, among others, to what is said by BRAMWELL, B., in *Williams v. Clough*, 3 H. & N. 258, 260. See, also, *Priestly v. Fowler*, 3 M. & W. 1; *Dynen v. Leach*, 26 L. J. Exch. 221; S. C. 40 Eng. L. & Eq. 491; *Seymour v. Maddox*, 16 Q. B. 326. This last case was thought by the Court of Appeals of New York to have gone too far. See *Ryman v. Fowler*, 24 N. Y. 410. A railway company is not bound to change its machinery in order to apply every new improvement or supposed improvement in appliances; and an employee who consents to operate the machinery already provided by the company, knowing its defects, does so at his own risk. *Wonder v. B. & O. R. R. Co.*, 32 Md. 411, 3 Am. Rep. 142. The case of *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; S. C. 3 Am. Rep. 506, was very similar in many respects to that of

All the authorities are agreed upon the general rule that the master must provide a reasonably safe place for the servant to work in, or, to state it more accurately, that he must exercise ordinary care and diligence to provide a reasonably safe place.⁷⁹

Hayden v. Smithville Manf. Co., *supra*, and the same general principle was laid down. The failure to employ sufficient assistance does not render the employer liable to a servant who, knowing the facts, had continued in the business without objection. *Skipp v. Eastern Counties R. R. Co.*, 9 Exch. 223; S. C. 24 Eng. L. & Eq. 396. But, see *Thorpe v. Miss., &c., Co.*, 89 Mo. 650, 58 Am. Rep. 120. In *Woodley v. Metropolitan R. R. Co.*, L. R. 2 Ex. D. 384, it is said by COCKBURN, Ch. J.: "It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it, with a full knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned." Again: "That which would be negligence in a company, with reference to the state of their premises, or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises, in ignorance of the existence of the danger, will give no such right to one who, being aware of the danger, voluntarily encounters it, and fails to take the extra care

necessary for avoiding it." See further, *Fort Wayne, &c., R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Ladd v. New Bedford, &c., R. R. Co.*, 119 Mass. 412, 20 Am. Rep. 331; *Gibson v. Erie R. Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *Belair v. Chicago, &c., R. R. Co.*, 43 Iowa, 662; *St. Louis, &c., R. R. Co. v. Britz*, 72 Ill. 256, and see cases cited, p. 1042, *supra*.

79—*Jackson Lumber Co. v. Cunningham*, 141 Ala. 206; *Davis v. Diamond C & L. Co.*, 146 Cal. 59, 79 Pac. 596; *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *Carleton M. & M. Co. v. Ryan*, 29 Colo. 401, 68 Pac. 279; *Diamond State Iron Co. v. Giles*, 7 Houst. 556, 11 Atl. 189; *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714; *National Syrup Co. v. Carlson*, 155 Ill. 210, 40 N. E. 492; *Hess v. Rosenthal*, 160 Ill. 620, 43 N. E. 743; *Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Ross v. Shandley*, 185 Ill. 390, 56 N. E. 1105; *Wells v. Bourdages*, 193 Ill. 328, 61 N. E. 1010; *Armour v. Golkowska*, 202 Ill. 144, 66 N. E. 1037; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. 12; *Cincinnati, etc. Ry. Co. v. Roesch*, 126 Ind. 445, 26 N. E. 171; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Republic I. & S. Co. v. Ohler*, 161 Ind. 393, 67 N. E. 535; *Foley v. Cudahy Packing Co.*, 119 Ia. 246, 93 N. W. 284; *Buehner v. Creamery Package Co.*, 124 Ia. 445, 100 N. W. 345, 104 Am. St. Rep. 354; *Henderson Tobacco Extracts*

It is equally the master's duty to use ordinary care and diligence to keep the place safe, except as the conditions may be changed by the very work which the servant is required to do, or by his manner of doing it.⁸⁰ To this end it is the duty of

Works *v. Wheeler*, 116 Ky. 322, 76 S. W. 34; *Clairain v. Western Union Tel. Co.*, 40 La. Ann. 178, 3 So. 625; *Powers v. Calcasien Sugar Co.*, 48 La. Ann. 483, 19 So. 455; *Bland v. Shreveport Belt Ry. Co.*, 48 La. Ann. 1057, 20 So. 284, 36 L. R. A. 114; *McGinn v. McCormick*, 109 La. 396, 33 So. 382; *Haggerty v. Hallowell Granite Co.*, 89 Me. 118, 35 Atl. 1029; *Frye v. Bath Gas & Elec. Co.*, 94 Me. 17, 46 Atl. 604; *American Tobacco Co. v. Strickling*, 88 Md. 500, 41 Atl. 1083; *Baltimore Boot & Shoe Mfg. Co. v. Jamar*, 93 Md. 404, 49 Atl. 847, 86 Am. St. Rep. 428; *Hearn v. Quillan*, 94 Md. 39, 50 Atl. 402; *Bowen v. Chicago, etc., Ry. Co.*, 95 Mo. 268, 8 S. W. 230; *Dayharsh v. Hannibal, etc., R. R. Co.*, 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; *Miller v. Missouri Pac. R. R. Co.*, 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673; *Hurst v. Kansas City, etc., R. R. Co.*, 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539; *Wojtylak v. Kan. & Tex. Coal Co.*, 188 Mo. 260, 87 S. W. 506; *McCabe v. Montana Cent. Ry. Co.*, 30 Mont. 323, — Pac —; *English v. Amidon*, 72 N. H. 301, 56 Atl. 548; *Burns v. Delaware, etc., Tel. Co.*, 70 N. J. L. 745, 59 Atl. 220, 67 L. R. A. 956; *Eastland v. Clark*, 165 N. Y. 420, 59 N. E. 202; *McGuire v. Bell Tel. Co.*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437; *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. C. 254, 42 S. E. 612; *Davis v. Turner*, 69 Ohio St. 101, 68 N. E. 819; *Butterman v. Mc- Clintic-Marshall Con. Co.*, 206 Pa. St. 82, 55 Atl. 839; *McDonald v. Postal Tel. Co.*, 22 R. I. 131, 46 Atl. 407; *Proffitt v. Missouri, etc., Ry. Co.*, 95 Tex. 593, 68 S. W. 979; *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah, 468, 11 Pac. 612; *Chapman v. Southern Pac. Co.*, 12 Utah, 30, 41 Pac. 551; *Johnson v. Bellingham Bay Imp. Co.*, 13 Wash. 455, 43 Pac. 370; *Nadan v. White Riv. Lumber Co.*, 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29; *Western Coal & Min. Co. v. Ingraham*, 70 Fed. 219, 17 C. C. A. 71; *Louisville, etc., R. R. Co. v. Johnson*, 81 Fed. 679, 27 C. C. A. 367. See *Finn v. Cassidy*, 165 N. Y. 584, 59 N. E. 311, 53 L. R. A. 877.

80—*Russell v. Pacific Can Co.*, 116 Cal. 527, 48 Pac. 616; *McDonnell v. Central of Ga. Ry. Co.*, 118 Ga. 86, 44 S. E. 840; *National Syrup Co. v. Carlson*, 155 Ill. 210, 40 N. E. 492; *Ashland Coal & I. Ry. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Essex County Elec. Co. v. Kelly*, 57 N. J. L. 100, 29 Atl. 427; *Chesson v. Roper Lumber Co.*, 118 N. C. 59, 23 S. E. 925; *Lillie v. Am. Car. etc., Co.*, 209 Pa. St. 161, 58 Atl. 272; *Knoxville Iron Co. v. Pace*, 101 Tenn. 476, 48 S. W. 232; *Morriss Bros. v. Bowers*, 105 Tenn. 59, 58 S. W. 328; *Freeman v. Railroad Co.*, 107 Tenn. 340, 64 S. W. 1; *Faulkner v. Mammouth Min. Co.*, 23 Utah, 437, 66 Pac. 799; *Garity v. Bullion, etc., Min. Co.*, 27 Utah, 534, 76 Pac. 556; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53.

the master to make inspections and tests at proper intervals and to make repairs as required.⁸¹ The master is presumed to have notice of any defect which he might have ascertained by ordinary care.⁸² The rule as to safe place does not apply where the servant prepares the place in which he is to work⁸³ or when he is set to ascertain and repair the defects that create the danger.⁸⁴ Nor when the servant is sent to make repairs or do work upon the premises of a third party.⁸⁵ Nor when the servant goes upon a part of the premises where his duties do not call him and where he is not invited by the master expressly or by implication, but

81—Ibid. “It is the master’s duty to exercise reasonable care in furnishing those things which go to make up the plant and appliances, so as to have them at the outset reasonably safe for the work of the servants who are engaged in the general employment; and further, to exercise reasonable care, by means of inspections and repairs when needed, to keep the plant and appliances reasonably safe. These duties the master cannot avoid by employing others for their performance.” *Smith v. Erie R. R. Co.*, 67 N. J. L. 636, 643, 52 Atl. 634, 59 L. R. A. 302. Compare *Essex County Elec. Co. v. Kelly*, 57 N. J. L. 100, 29 Atl. 427.

82—*Whitney & Starrett Co. v. O’Rourke*, 172 Ill. 177, 50 N. E. 242; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. 12; *Myhan v. La. Elec. L. & P. Co.*, 41 La. Ann. 964, 6 So. 799, 17 Am. St. Rep. 436, 7 L. R. A. 172.

83—*Thayer v. Smoky Hollow Coal Co.*, 121 Ia. 121, 96 N. W. 718.

84—*Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351; *McGorty v. Southern New Eng. Tel. Co.*, 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; *Bergin v. Southern New Eng. Tel. Co.*, 70 Conn. 54, 38 Atl. 888,

39 L. R. A. 192; *State v. Lazaretto Guano Co.*, 90 Md. 177, 44 Atl. 1017; *Saxton v. N. W. Tel. Exch. Co.*, 81 Minn. 314, 84 N. W. 109; *Broderick v. St. Paul City Ry. Co.*, 74 Minn. 163, 77 N. W. 28; *Butte v. Pleasant Val. Coal Co.*, 14 Utah, 282, 47 Pac. 77. When a servant “engages in the work of making a place that is known to be dangerous, safe, or in a work which in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them.” *Finlayson v. Utica Min. & M. Co.*, 67 Fed. 507, 14 C. C. A. 443.

85—*Roche v. Llewellyn*, 140 Cal. 563, 74 Pac. 147; *Channon v. Sandford Co.*, 70 Conn. 573, 40 Atl. 462, 66 Am. St. Rep. 133, 41 L. R. A. 200. The master is not relieved by the fact that the place is made unsafe by the negligence of an independent contractor. *Toledo Brewing & Malt Co. v. Bosch*, 101 Fed. 530, 41 C. C. A. 482.

is seeking to gratify his curiosity or pursue some purpose of his own.^{85a} The duty of the master is not confined to the hours of actual work but embraces a reasonable time before and after hours and intermissions for meals.^{85b}

Safe Place. Illustrations. The rule in regard to safe place has been applied in the case of railroad companies so as to require them to provide a reasonably safe and sufficient road-bed for those who operate their trains.⁸⁶ This duty includes keeping the space over or near the tracks clear of obstructions

85a—*Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153; *Knox v. Pioneer Coal Co.*, 90 Tenn. 546, 18 S. W. 255; *Ellsworth v. Metheney*, 104 Fed. 119, 44 C. C. A. 484. Where a lineman climbed a tree to prosecute his work in stringing wires and was injured by the breaking of a limb, the company was held not liable. *Yearsley v. Sunset T. & T. Co.*, 110 Cal. 236, 42 Pac. 638. See *Maltbie v. Belden*, 167 N. Y. 307, 60 N. E. 645, 54 L. R. A. 52; *Frank v. Bullion*, etc., Min. Co., 19 Utah, 35, 56 Pac. 419.

85b—*Heldemaier v. Cobbs*, 195 Ill. 172, 62 N. E. 853; *Cleveland*, etc., R. R. Co. v. *Martin*, 13 Ind. App. 485, 41 N. E. 1051; *Walbert v. Trexler*, 156 Pa. St. 112, 27 Atl. 65; *Bloevlt v. Sawyer*, (1904) 1 K. B. 271. "Where the employe eats his dinner in the place where he is engaged in his work, it is not necessary to show that he remained there by invitation of the master, for the reason that the right to remain grows out of the relation of master and servant, which continues during such cessation from actual labor. But where a servant goes to another part of the premises, under such circumstances, for the purpose of eating his dinner, it is incumbent on him to show an invitation, express or implied, by the master to go to such other place." *Cleveland*, etc., R. R. Co. v. *Martin*, 13 Ind. App. 485, 497, 498, 41 N. E. 1051.

86—*Snow v. Housatonic R. R. Co.*, 8 Allen 441, 85 Am. Dec. 720; *Paulmier v. Erie R. Co.*, 34 N. J. 151; *Lewis v. St. Louis*, etc., R. R. Co., 59 Mo. 495, 31 Am. Rep. 385; *Stoher v. St. Louis*, etc., Co., 91 Mo. 509; *Clapp v. Minn.*, etc., Co., 36 Minn. 6; *Trask v. Cal.*, etc., Co., 63 Cal. 96; *Davis v. Centr. Vt.* etc., Co., 55 Vt. 84, 45 Am. Rep. 590; *Elmer v. Locke*, 135 Mass. 575; *Colorado Midland Ry. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701; *Fluhrer v. Lake Shore*, etc., Ry. Co., 121 Mich. 212, 80 N. W. 23; *Smith v. Erie R. R. Co.*, 67 N. J. L. 636, 52 Atl. 634, 59 L. R. A. 302; *Wright v. Southern Ry. Co.*, 123 N. C. 280, 31 S. E. 652; *Wilkie v. Raleigh*, etc., R. R. Co., 127 N. C. 203, 37 S. E. 204; *Wright v. Southern Ry. Co.*, 128 N. C. 77, 38 S. E. 283; *Knahtla v. Oregon Short-Line*, 21 Ore. 136, 27 Pac. 91; *Wellman v. Oregon Short Line*, 21 Ore. 530, 28 Pac. 625; *Fisher v. Oregon Short Line*, 22 Ore. 533, 30 Pac. 425, 16 Am. St. Rep. 519; *Richey v. Southern Ry. Co.*, 69 S. C. 387, 48 S. E. 285; *Gulf*, etc., Ry. Co. v. *Donnelly*, 70 Tex. 371, 8 S. W.

which may endanger the trainmen while in the discharge of their duties.⁸⁷ The same rules apply to street railroads as to other

52, 8 Am. St. Rep. 608; St. Louis, etc., Ry. Co. v. George, 85 Tex. 150, 19 S. W. 1036; Union Pac. Ry. Co. v. O'Brien, 161 U. S. 451, 16 S. C. Rep. 618, 40 L. Ed. 766. "There is no rule better settled than this, that it is the duty of railroad companies to keep their road and works, and all portions of the track, in such repair and so watched and tended, as to insure the safety of all who may lawfully be upon them, whether passengers, or servants, or others. They are bound to furnish a safe road, and sufficient and safe machinery and cars." BREESE, Ch. J., in Chicago, &c., R. R. Co. v. Swett, 45 Ill. 197, 203. Track inspection is a master's duty. The careless performance of which by a competent inspector renders the master liable. Durkin v. Sharp, 85 N. Y. 225; Drymala v. Thompson, 26 Minn. 40; Calvo v. R. R. Co., 23 S. C. 526, 55 Am. Rep. 28. See Davis v. Centr. Vt., &c., Co., 55 Vt. 84, 45 Am. Rep. 590. If a track gets out of repair by accident, the master's duty to the servant is to give him timely notice thereof. He is not bound to repair within any definite time. Henry v. Lake Shore, &c., Co., 49 Mich. 495. The usual rule does not apply where one is employed to rebuild a partly abandoned track. Brick v. Rochester, &c., Co., 98 N. Y. 211. But, see Van Amburg v. Railroad Co., 37 La. Ann. 650, 55 Am. Rep. 517; Gulf, &c., Co. v. Redeker, 67 Tex. 181, 60 Am. Rep. 20; Bowen v. Chicago, &c., Ry. Co., 95 Mo. 268, 8 S. W. 230. But a railroad company is not liable to one of its em-

ployees for an injury occasioned by a latent defect in one of its bridges, where the company employed competent persons to supervise and inspect the bridge, by whom the defect was not discovered. Warner v. Erie Railway Co., 39 N. Y. 468. See Ladd v. New Bedford, &c., R. R. Co., 119 Mass. 112, 20 Am. Rep. 331; Cooper v. Hamilton Manuf. Co., 14 Allen, 193. But where a bridge, bought with a road, is from its plan obviously weak to a proper inspection, it is liable. Vosburgh v. Lake Shore, &c., Co., 94 N. Y. 374, 46 Am. Rep. 148. The roadbed should be immediately inspected after a violent storm. St. Louis, etc., Ry. Co. v. George, 85 Tex. 150, 19 S. W. 1036.

87—Mobile, etc., R. R. Co. v. Vallowe, 214 Ill. 124, 73 N. E. 416; Cincinnati, etc., R. R. Co. v. Sampson, 97 Ky. 65, 30 S. W. 12; Erslew v. New Orleans, etc., R. R. Co., 49 La. Ann. 86, 21 So. 153; Nugent v. Boston, etc., R. R. Co., 80 Me. 62, 12 Atl. 797; Phelps v. Chicago, etc., Ry. Co., 122 Mich. 171, 81 N. W. 101, 84 N. W. 66; Potter v. Detroit, etc., Ry. Co., 122 Mich. 179, 81 N. W. 80; Flanders v. Chicago, etc., Ry. Co., 51 Minn. 193, 53 N. W. 544; Johnston v. Oregon Short Line, 23 Ore. 94, 31 Pac. 283; Darling v. New York, etc., R. R. Co., 17 R. I. 708, 24 Atl. 462; Whipple v. New York, etc., R. R. Co. 19 R. I. 587, 35 Atl. 305, 61 Am. St. Rep. 796; Crandall v. New York, etc., R. R. Co., 19 R. I. 594, 35 Atl. 307; Gates v. Chicago, etc., Ry. Co., 2 S. D. 422, 50 N. W. 907; Gates v. Chicago, etc.,

roads.⁸⁸ But the employe, by becoming aware of the danger and continuing in the service may assume the risk.⁸⁹ Where employes are engaged in repairing cars while they stand on the tracks in a switch yard, it is the duty of the master to take such precautions as will render the place reasonably safe and prevent injury by cars being switched against those undergoing repairs without warning.⁹⁰

The general rule has been applied in case of mines to require the master to see that the place where the miner is put to work

Ry. Co., 4 S. D. 433, 57 N. W. 200; 466, 66 N. E. 121; Hafner *v.* Chesapeake, etc., Ry. Co., 96 Va. 528, 31 S. E. 899; Norfolk etc., R. R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462; Williamson *v.* Newport News, etc., R. R. Co., 34 W. Va. 657, 12 S. E. 824, 26 Am. St. Rep. 927, 12 L. R. A. 297; Kenney *v.* Meddaugh, 118 Fed. 209, 55 C. C. A. 115. See *ante*, p. 1042. As to danger from unblocked frog, see Williams *v.* Louisville, etc., R. R. Co., 111 Ky. 822, 64 S. W. 738; Wood *v.* Locke, 147 Mass. 604, 18 N. E. 578; Appel *v.* New York, etc., R. R. Co., 111 N. Y. 550, 19 N. E. 93; Seley *v.* Southern Pac. Co., 6 Utah, 319, 23 Pac. 751; Southern Pac. Co. *v.* Seley, 152 U. S. 145, 14 S. C. Rep. 530, 38 L. Ed. 391; *ante*, p. 1052.

90—Stucke *v.* Orleans R. R. Co., 50 La. Ann. 172, 23 So. 342; Doing *v.* New York, etc., R. R. Co., 151 N. Y. 579, 45 N. E. 1028; Dowd *v.* New York, etc., R. R. Co., 170 N. Y. 459, 63 N. E. 541; Missouri Pac. Ry. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867; International, etc., Ry. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Texas, etc., Ry. Co. *v.* Eberheart, 91 Tex. 321, 43 S. W. 510; Richmond, etc., R. R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

88—See Wither *v.* Somerset Traction Co., 98 Me. 61, 56 Atl. 204; Pikesville, etc., R. R. Co. *v.* Russell, 88 Md. 563, 42 Atl. 214; Pierce *v.* Camden, etc., Ry. Co., 58 N. J. L. 400, 35 Atl. 286.

89—Quinn *v.* New York, etc., R. R. Co., 175 Mass. 150, 55 N. E. 891; Ladd *v.* Brockton St. Ry. Co., 180 Mass. 454, 62 N. E. 730; Drake *v.* Auburn City Ry. Co., 173 N. Y.

is safe from loose rock in the roof or sides of the mine,⁹¹ or from the presence of dangerous gases.⁹² A frequent source of danger in mines, as well as in other enterprises carried on by blasting, is the presence of unexploded charges. The presence of such an unexploded charge in the place where the servant is required to work and which the prosecution of the work in the ordinary manner is liable to explode, and of which the servant is ignorant, very clearly renders the place an unsafe one. If the master knows or ought to know of the existence of such danger and fails to inform the servant thereof and injury results, he is liable.⁹³ The master should examine after a blast is fired to see if there are any unexploded charges.⁹⁴ And it is held to be his duty to use special care to minimize the risk from the use of such dangerous methods.⁹⁵ But where the servant injured is one of those engaged in doing the blasting and the fault is that of a fellow servant, though of superior rank, the master is not liable.⁹⁶

91—*Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627; *Marbach v. Home Min. Co.*, 53 Kan. 731, 37 Pac. 122; *Breckenridge Co. v. Hicks*, 94 Ky. 362, 22 S. W. 554, 42 Am. St. Rep. 361; *Ashland Coal & I. Ry. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207.

92—*Coster v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398; *Gowen v. Bush*, 76 Fed. 349, 22 C. C. A. 196.

93—*Welch v. Bath Iron Works*, 98 Me. 361, 57 Atl. 88; *Hopkins v. O'Leary*, 176 Mass. 258, 57 N. E. 342; *Hooe v. Boston, etc., St. Ry. Co.*, 187 Mass. 67, 72 N. E. 341; *Anderson v. Bennett*, 16 Ore. 515, 19 Pac. 765, 8 Am. St. Rep. 311; *Lane v. Bauserman*, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872; *Shannon v. Consolidated, etc., Min. Co.*, 24 Wash. 119, 64

Pac. 169; *McMillan v. North Star Min. Co.*, 32 Wash. 579, 73 Pac. 685, 98 Am. St. Rep. 908; *McMahon v. Ida Min. Co.*, 95 Wis. 308, 70 N. W. 478, 60 Am. St. Rep. 117; *Burke v. Anderson*, 69 Fed. 814, 16 C. C. A. 442.

94—*Hooe v. Boston, etc., St. Ry. Co.*, 187 Mass. 67, 72 N. E. 341; *Anderson v. Bennett*, 16 Ore. 515, 19 Pac. 765, 8 Am. St. Rep. 311.

95—*Welch v. Bath Iron Works*, 98 Me. 361, 57 Atl. 88.

96—*Liven v. Joplin-Galena, etc., Co.*, 179 Mo. 229, 77 S. W. 1077; *Johnson v. Portland Stone Co.*, 40 Ore. 436, 67 Pac. 1013, 68 Pac. 425; *Anderson v. Daly Min. Co.*, 16 Utah, 28, 50 Pac. 815; *Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344; *Davis v. Trade Dollar, etc., Co.*, 117 Fed. 122, 54 C. C. A. 636. See, further, *Deep Min. & Dr. Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210; *Wiskie v. Montello Granite*

Where the work consists in the digging of a trench or other excavation in the soil, it is the master's duty to protect the sides or walls from caving, or to provide suitable materials for that purpose, and a failure to do so, renders him liable for the con-

Co., 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885. So where plaintiff was injured by a piece of giant powder which had been dropped among the debris in a mine. *Kelly v. Cable Co.*, 8 Mont. 440, 20 Pac. 669; *S. C. Kelly v. Cable Co.*, 7 Mont. 70, 14 Pac. 633. So where an employee is sent to clean out an unexploded blast. *Vitto v. Keoghan*, 15 App. Div. 329, 44 N. Y. S. 1. To same effect, *Mast v. Kern*, 34 Ore. 247, 54 Pac. 950, 75 Am. St. Rep. 580. *Contra*: *Bane v. Irwin*, 172 Mo. 306, 72 S. W. 522. In *Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344, the city was digging a sewer through rock, and dynamite was used in making the excavation. The work was in immediate charge of a foreman who, however, was under the direction of the city engineer. A blast of five holes had been set off, which was ineffective. One of the holes did not explode and this was known to the foreman. He directed the plaintiff, one of those engaged in blasting, who did not know of the unexploded charge, to reload the holes. In doing so the charge was exploded and he was injured. The court held that the city was not liable, and says: "It was the duty of the master to use reasonable care and diligence to furnish a safe place for the defendant in error to perform his service in, and it is claimed that it was a breach of this duty for the foreman to send him to reload these holes without notifying him

that there was dynamite in one of them. But the duty of the master to furnish a safe place for the performance of work does not require it to keep that place safe under the constantly changing conditions which the performance of such a work as the construction of a sewer necessitates. The city furnished a street in which it was safe to construct a sewer. The comparative safety of the place where each man worked was necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at every moment of its progress. It was the duty of each workman to use reasonable care to so render his service that the place in which he and his fellow servants were required to labor should continue to be reasonably safe. It was the duty of the foreman to so direct the work of excavating, of laying the pipe, and of filling the trench that it would continue to be reasonably safe for every man in his crew to render the service assigned to him. But these were personal duties imposed upon the workmen and the foreman by their employment in the common service, and not by the delegation to them of the performance of any absolute duty of the master. The street originally furnished by the city was safe. The trench in which the rock was to be blasted was originally safe for the blasting of rock. If the

sequences.⁹⁷ If such materials are provided and the injury results from a failure to use them, the master is not liable.⁹⁸ Where the place was originally safe and only becomes unsafe as the work progresses and in consequence of the manner in which the

safe place originally furnished by the city became unsafe in the progress of the work, it was rendered so not by any negligence of the city or its superintendent in furnishing it, but by the acts or negligence of the foreman and his workmen in discharging the duties imposed upon them by their common employment, and for these acts and this negligence the city was not responsible. Each employee assumed the risk of this negligence of his fellow servants when he entered the common employment." p. 529.

97—*Fort Wayne v. Christie*, 156 Ind. 172, 59 N. E. 385; *Fort Wayne v. Patterson*, 25 Ind. App. 547, 58 N. E. 747; *La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72; *Bartolomeo v. McKnight*, 178 Mass. 242, 59 N. E. 804; *Donahoe v. Kansas City*, 136 Mo. 657, 38 S. W. 571; *Soyer v. Great Falls Water Co.*, 15 Mont. 1, 37 Pac. 838; *Van Steenburgh v. Thornton*, 58 N. J. L. 160, 33 Atl. 380; *Eicholz v. Niagara Falls, etc., Co.*, 68 App. Div. 441, 73 N. Y. S. 842; *Bertha Zinc Co. v. Black*, 88 Va. 303, 13 S. E. 452; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78; *Shea v. Manning*, 141 Ala. 628; *Kurstelska v. Jackson*, 93 Minn. 385, 101 N. W. 606. If a servant is ordered to do work in a trench with the digging of which he has had nothing to do but which has been dug as a preparation for his work, the general rule as to safe place

applies. *Kranz v. Long Island Ry. Co.*, 123 N. Y. 1, 25 N. E. 206, 20 Am. St. Rep. 716. Where the danger is obvious and the servant continues he takes the risk. *Vincennes Water Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747; *Regan v. Palo*, 62 N. J. L. 30, 41 Atl. 364; *Carlson v. Sioux Falls Water Co.*, 5 S. D. 402, 59 N. W. 217; S. C. on rehearing, *Carlson v. Sioux Falls Water Co.*, 8 S. D. 47, 65 N. W. 419; *Showalter v. Fairbanks*, 88 Wis. 376, 60 N. W. 257. And see, *Del Sejnoye v. Hallinan*, 153 N. Y. 274, 47 N. E. 308; *Farrell v. Middletown*, 56 App. Div. 525, 67 N. Y. S. 483; *Brown v. Electric Ry. Co.*, 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Ry. 666.

98—*Dube v. Lewiston*, 83 Me. 211, 22 Atl. 112; *Lederink v. Rockford*, 135 Mich. 531, 98 N. W. 4; *Bergquist v. Minneapolis*, 42 Minn. 471, 44 N. W. 530; *Litchfield v. Buffalo, etc., Ry. Co.*, 73 App. Div. 1, 76 N. Y. S. 80; *Reilly v. Troy Bridge Co.*, 47 Misc. 530; *Laporte v. Cook*, 22 R. I. 554, 48 Atl. 798; *Durst v. Carnegie Steel Co.*, 173 Pa. St. 162, 33 Atl. 1102. In the last case it is said: "It will be observed that the place as it stood when the work commenced was perfectly safe. The danger could only arise as the work progressed and be caused by the work done. In such a case we do not think it is the duty of the employer to stand by during the progress of the work to see when a danger

work is done, the master as a rule is not responsible.^{98a} Thus where the plaintiff was injured by the fall of a rock from the face of a ledge in a quarry in which he was working the master was held not liable and the court says: "The plaintiff and his fellow workmen were practically making the place in which they were to work. At each succeeding blast the conditions and surroundings were changed. The danger to which they were exposed was the direct result of their own operations. It was the result of their common labor, including that of the foreman. The work was of a hazardous character. The plaintiff was familiar with the work. He knew that the condition was constantly changing by reason of his own acts. He appreciated the danger because he knew that rocks were liable to fall. The negligence, if any, in this view of the case, would be that of the plaintiff and his fellow servants, and the risk of it must be regarded as assumed by the plaintiff as incident to his employ-

arises. It is sufficient if he provides against such dangers as may possibly or probably arise and to give the workmen the means of protecting themselves. They should look out for such dangers and use the means provided." p. 165.

98a—*Shaw v. New Year Gold Mines Co.*, 31 Mont. 138. Where a foundry became dangerous by reason of the failure of the employees to remove rubbish and waste. *Devlin v. Phoenix Iron Co.*, 182 Pa. St. 109, 37 Atl. 927. And see, *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Robinson v. Dininny*, 96 Va. 41, 30 S. E. 442; *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614. In *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017, the court says: "The rule which requires the master to provide a safe place and safe appliances for

the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation."

ment.¹⁹⁹ There are many similar cases where the work was in a gravel pit; sand bank or the like, and the danger arose from undermining the bank, which have been decided the same way.¹ But where the plaintiff was put to work at excavating a bank which was in a dangerous condition by reason of work previously done and the danger was not obvious, and injury resulted, the master was held liable.²

When the master undertakes to prepare a staging, platform or scaffold on which the servant is to work, or where he puts his servant to work upon such a staging, the rule as to safe place applies and the master must use due care and diligence to make it safe and sufficient, and a failure to do so is actionable negligence.³ But such appliances as are needed in the progress of

99—*Mielke v. Chicago, etc., Ry. Co.*, 103 Wis. 1, 78 N. W. 402, 74 Am. St. Rep. 834. N. E. 801; *Bradley v. Chicago, etc., Ry. Co.*, 138 Mo. 293, 39 S. W. 763.

3—*McNamara v. Macdonough*, 102 Cal. 575, 36 Pac. 941; *Blackman v. Thomson-Houston Elec. Co.*, 102 Ga. 64, 29 S. E. 120; *Chicago, etc., R. R. Co. v. Scanlan*, 170 Ill. 106, 48 N. E. 826; *Chicago, etc., R. R. Co. v. Maroney*, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396; *McBeath v. Rawle*, 192 Ill. 626, 61 N. E. 847; *Fink v. Des Moines Ice Co.*, 84 Ia. 321, 51 N. W. 155; *Haworth v. Seevers Mfg. Co.*, 87 Ia. 765, 51 N. W. 68; *Donnelly v. Granite Co.*, 90 Me. 110, 37 Atl. 874; *Hagerty v. Evans*, 87 Minn. 435, 92 N. W. 399; *Pfisterer v. Peter*, 117 Ky. 501, 78 S. W. 450; *Sullivan v. Hannibal*, etc., R. R. Co., 107 Mo. 66, 17 S. W. 748, 28 Am. St. Rep. 388; *Doyle v. Missouri, etc., Trust Co.*, 140 Mo. 1, 41 S. W. 255; *Stevens v. Howe*, 28 Neb. 547, 44 N. W. 865; *Murray v. Usher*, 117, N. Y. 542, 23 N. E. 564; *Kaspari v. Marsh*, 74 Wis. 562, 43 N. W. 368; *Caddon v. Am. Steel Barge Co.*, 88 Wis. 409, 60 N. W. 800; *F. C. Austin Mfg. Co.*

2—*Simone v. Kirk*, 173 N. Y. 7, 65 N. E. 739; *Thomas v. Ross*, 75 Fed. 552, 21 C. C. A. 444; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876. And see, *Libby v. Scherman*, 146 Ill. 540, 34

the work, the master may require his servants to construct as needed, and if he provides sufficient and proper materials for that purpose, he discharges his entire duty and will not be liable for defective construction.⁴

The rule as to safe place has been applied to a line of poles and wires upon which the servant is required to work, and it is the duty of the master to see that the poles, cross arms and wires are reasonably safe and free from latent defects and dangers, which ordinary care on his part might avoid.⁵ But the

v. Johnson, 89 Fed. 677, 32 C. C. A. Minn. 537, 50 N. W. 611; *Nathis* 309; *Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95; *Farrell v. Eastern Machinery Co.*, 77 Conn. 484, 107 Am. St. Rep. 46; *Ingham v. Honor Co.*, 113 La. 1040, 37 So. 963; *Richards v. Riverside Iron Works*, 56 W. Va. 510. Where plaintiff was injured because a skid or platform for unloading a steamer was improperly and insecurely attached the master was held not liable. *McCormick v. Cunard S. S. Co.*, 144 N. Y. 552, 39 N. E. 637. So if the defect and danger are obvious. *Daniel v. Forsythe*, 106 Ga. 568, 32 S. E. 621. Where a scaffold erected by the owner of a building in course of construction for the use of cornice men, was used by a servant of the roofing contractor without warrant and fell while he was on it, the owner was not responsible. *Brady v. Prettyman*, 193 Pa. St. 628, 44 Atl. 919; *Rowan v. Prettyman*, 194 Pa. St. 443, 45 Atl. 380.

4—*Pellerin v. International Paper Co.*, 96 Me. 388, 52 Atl. 842; *McCarthy v. Clafin*, 99 Me. 290, 59 Atl. 293; *O'Connor v. Rich*, 164 Mass. 560, 42 N. E. 111, 49 Am. St. Rep. 483; *Aduskin v. Gilbert*, 165 Mass. 443, 43 N. E. 199; *Hoar v. Merritt*, 62 Mich. 386, 29 N. W. 15; *Marsh v. Herman*, 47 v. Kansas City Stock Yards Co., 185 Mo. 434, 84 S. W. 66; *Enright v. Oliver*, 69 N. J. L. 357, 55 Atl. 277, 101 Am. St. Rep. 710; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Kimmer v. Weber*, 151 N. Y. 417, 45 N. E. 860, 56 Am. St. Rep. 630; *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160; *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278, 47 Atl. 1085; *Garrow v. Miller*, 72 Vt. 284, 47 Atl. 1087; *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114; *Peffer v. Cutler*, 83 Wis. 281, 53 N. W. 508; *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 178, 65 C. C. A. 481. If the master fails to provide proper materials and a servant, who had nothing to do with the construction and was ignorant of the insufficiency, is injured, he may recover. *Beal v. Bryant*, 99 Me. 112, 58 Atl. 428. Where ladders were not long enough for painting a house and the workmen rigged up a staging upon which the ladders were set and this gave way and injured the plaintiff, it was held he could not recover. *Noyes v. Wood*, 102 Cal. 389, 36 Pac. 766.

5—*Bland v. Shreveport Belt Ry. Co.*, 48 La. Ann. 1057, 20 So. 284, 36 L. R. A. 114; *McGuire v. Bell Tel. Co.*, 167 N. Y. 208, 60 N. E.

master may require the servant to inspect the sufficiency and safety of the line before venturing upon it and thus cast the burden upon the latter.⁶ But merely requiring a servant, whose duty is to clean lamps and put in new carbons, to report any defects he *saw*, does not have that effect, and such a one may assume the line is safe.⁷ And a servant whose duty it is to inspect and repair such lines, takes the risk of decayed and defective poles and cross arms, defective insulation and other like dangers.⁸

433, 52 L. R. A. 437; McDonald *v.* Union Tel. Co., 131 Fed. 844, 65 C. C. A. 598.

Atl. 407.

6—McGorty *v.* Southern New Eng. Tel. Co., 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; Bergin *v.* Southern New Eng. Tel. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192.

7—Emporia *v.* Kowalski, 66 Kan. 64, 71 Pac. 232. If the defect is latent and one that ordinary inspection would not reveal, the master is not liable. Maryland Tel. & Tel. Co. *v.* Cloman, 97 Md. 620, 55 Atl. 681.

8—McIsaac *v.* Northampton Elec. Lt. Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244; Chisholm *v.* New Eng. Tel. & Tel. Co., 176 Mass. 125, 57 N. E. 383; Broderick *v.* St. Paul City Ry. Co., 74 Minn. 163, 77 N. W. 28; Saxton *v.* Northwestern Tel. Exch. Co., 81 Minn. 314, 84 N. W. 109; Roberts *v.* Missouri & Kan. Tel. Co., 166 Mo. 370, 66 S. W. 155; Street R. R. & Tel. Co. *v.* Simmons, 107 Tenn. 392, 64 S. W. 705; Sias *v.* Consolidated Lighting Co., 73 Vt. 35, 50 Atl. 554; Bowers *v.* Bristol Gas & Elec. Co., 100 Va. 533, 42 S. E. 296; Anderson *v.* Inland Tel. & Tel. Co., 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; Britton *v.* Central

subject of safe place are referred to: Place made dangerous by exposed or unguarded machinery, Wells *v.* Bourdages, 193 Ill. 328, 61 N. E. 1010; Merritt *v.* Victoria Lumber Co., 111 La. 159, 35 So. 497; Cunningham *v.* Bath Iron Works, 92 Me. 501, 43 Atl. 106; Wuotilla *v.* Duluth Lumber Co., 37 Minn. 153, 33 N. W. 551, 5 Am. St. Rep. 832; Roth *v.* Northern Pac. Lumber Co., 18 Ore. 205, 22 Pac. 842; Miller *v.* Inman, 40 Ore. 161, 66 Pac. 713; French *v.* First Ave. Ry. Co., 24 Wash. 83, 63 Pac. 1108; Crooker *v.* Pacific L. & M. Co., 34 Wash. 191, 75 Pac. 632; Nadan *v.* White Riv. Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29; Jensen *v.* Hudson Sawmill Co., 98 Wis. 73, 73 N. W. 434. When artificial light is required to enable the servant to work in safety, the master must provide the means or facilities for lighting. National Syrup Co. *v.* Carlson, 155 Ill. 210, 40 N. E. 492; but the matter of lighting up may be delegated to servants, Madigan *v.* Oceanic Steam Nav. Co., 178 N. Y. 242, 70 N. E. 785, 102 Am. St. Rep. 495; Kaase *v.* Troy Steel & I. Co., 139

Where a new servant is employed upon a work wherein the conditions change as the work progresses, and the place has been made dangerous prior to his employment by the negligent manner of doing the work, does the new servant assume the risk of such dangers, the same as though he had been a fellow servant from the beginning, or does the master owe him the duty of seeing that the place is safe before he sets him to work? There are decisions both ways on this question. Thus in New York it is held that when the relation of master and servant first begins is the time when the law requires due diligence on the part of the master to furnish the servant a safe place to work, and that if the place has been made dangerous prior to the servant's employment by the negligence of those whom his employment makes fellow servants, he does not assume the risk of such negligence, if the danger is not obvious.^{8a} A different conclusion is

N. Y. 369, 34 N. E. 901. A master is not bound to protect his servants from violence by strikers. *Lewis v. Taylor Coal Co.*, 112 Ky. 845, 66 S. W. 1044, 57 L. R. A. 447. "The master who has furnished a place to work in, free from nonobvious or latent dangers, or has instructed his servant, upon entering his service, expressly as to these, if they exist, has used the due care which the law prescribes as his duty in the premises." *Bethlehem Iron Co. v. Weiss*, 100 Fed. 45, 40 C. C. A. 270. Master held responsible for exposing servant to poisonous exhalations. *West v. St. Louis, &c., R. R. Co.*, 63 Ill. 545; *Citizens' Gas Co. v. O'Brien*, 118 Ill. 174. In a packing house certain suspended rails used for conveying beeves on pulley wheels became gradually covered with organic matter in the form of a yellow dust, which was from time to time cleaned off by the use of steel brushes. The plaintiff while engaged in the process of cleaning

got some of this matter in his eyes and his sight was destroyed. Upon examination the dust was found to contain bacteria which made it poisonous. It was held that the accident was one not reasonably to be anticipated and that the defendant was not liable. *Hysell v. Swift*, 78 Mo. App. 39.

See generally on safe place: *Hanley v. California Bridge, etc., Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, 41 L. R. A. 793; *Carroll v. Tide Water Oil Co.*, 67 N. J. L. 679, 52 Atl. 279; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 556, 8 Am. St. Rep. 787, 3 L. R. A. 559; *Walton v. Bryn Mawr Hotel Co.*, 160 Pa. St. 3, 28 Atl. 438; *Virginia Iron, etc., Co. v. Hamilton*, 107 Tenn. 705, 65 S. W. 401; *Hammarberg v. St. Paul, etc., Lumber Co.*, 19 Wash. 537, 53 Pac. 727; *Nyback v. Champagne Lumber Co.*, 109 Fed. 732, 48 C. C. A. 632.

8a—*Simone v. Kirk*, 173 N. Y. 7,

reached in Massachusetts and Vermont. "We are of opinion," says the Supreme Court of the former State, "that an employer under such circumstances owes one who is about to enter his services no duty to inspect all the work which has been done by his servants previously, and which ordinarily may be intrusted to them without liability to their fellow servants for their negligence. If he owes no such duty, the risk of accident from previous negligence of servants in their own field is one of the ordinary risks of the business which the employee assumes by virtue of his contract on entering the service."^{8b}

Duty to Warn and Instruct the Young and Inexperienced. *The master may also be guilty of action-

[*652] able negligence in exposing persons to perils in his service which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in consequence of which they are injured. Such [*653] cases occur most frequently in the employment of infants. It has been repeatedly held that the case of an

65 N. E. 739. So, also, *Thomas v. Ross*, 75 Fed. 552, 21 C. C. A. 444.

8b—*O'Connor v. Rich*, 164 Mass. 560, 42 N. E. 111, 49 Am. St. Rep. 483. Also *Killea v. Faxon*, 125 Mass. 485; *McCormick v. Cunard S. S. Co.*, 144 N. Y. 552, 39 N. E. 637. In *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278, 47 Atl. 1085, the defendant company was erecting a building and the plaintiff, a carpenter, was injured by a defective staging built by other carpenter's before he was employed. The court says: "The case presents the further question whether a staging is within this rule as to a workman who comes upon the job after it is built. It is true that the plaintiff sustained no relations to the defendants or their workmen while the staging was being built, and that as far as his service, considered individually, was

concerned, he went to work upon it as a place prepared for his use. But the plaintiff's service involved no use of the staging that was independent of the work of construction, and it had been prepared, not by the master as something which he undertook to provide for the plaintiff, but by his workmen as a part of the general work which they had undertaken to do, and upon which plaintiff entered. We think that in associating himself with these workmen for the completion of the building by the use of the staging already erected, the plaintiff assumed the risks which attached to the workmen generally. The test of the master's liability is not whether the servant came before or after the staging was built; but the relation which the structure sustained to the relative duties of master and

infant is no exception to the general rule which exempts the master from responsibility for injuries arising from the hazards of his service.⁹ But while this is unquestionably true as a rule, it would be gross injustice, not to say absurdity, to apply in the case of infants the same tests of the master's culpable negligence which are applied in the case of persons of maturity and experience.¹⁰ It may be ordinary caution in one case to apprise the servant of the danger he must guard against, while in the case of another, not yet beyond the years of thoughtless childhood, it would be gross and most culpable, if not criminal, carelessness for the master to content himself with pointing out dangers which were not likely to be appreciated, or if appreciated, not likely to be kept with sufficient distinctness and caution in mind, and against which, therefore, effectual protections ought to be provided. The duty of the employer to take special preservant."

See also *Garrow v. Miller*, 72 Vt. 284, 47 Atl. 1087.

9—*King v. Boston, &c.*, R. R. Co., 9 Cush. 112; *Gartland v. Toledo, &c.*, R. R. Co., 67 Ill. 498; *Chicago Anderson P. B. Co. v. Reineiger*, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249. See a hard case in *Murphy v. Smith*, 19 C. B. (N. S.) 361. If he understands the risk he is held to accept it. *Hickey v. Taaffe*, 105 N. Y. 26; *McGinnis v. Can. Sou. Bridge Co.*, 49 Mich. 466; *Viets v. Toledo, &c., Ry. Co.*, 55 Mich. 120; *Brazil, &c., Co. v. Cain*, 98 Ind. 282; *Atlas Eng. Works v. Randall*, 100 Ind. 293; *Youll v. Sioux City, &c., Co.*, 66 Ia. 346; *Curran v. Merch, &c., Co.*, 130 Mass. 374; *Williams v. Churchill*, 137 Mass. 243, 50 Am. Rep. 304; *Rock v. Ind., &c., Mills*, 142 Mass. 22; *Northern Ala., etc., R. R. Co. v. Beacham*, 140 Ala. 422, 37 So. 227; *Michael v. Stanley*, 75 Md. 464, 23 Atl. 1094; *Williams v. Belmont Coal & C. Co.*, 55 W. Va. 84;

Groth v. Thomann, 110 Wis. 488, 86 N. W. 178; *Cudahy Packing Co. v. Marcan*, 106 Fed. 645, 45 C. C. A. 515; *Evans Laundry Co. v. Cranford*, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814. So a patent danger as from uncovered machinery. *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182, 15 N. E. 579; *Groth v. Thomann*, 110 Wis. 488, 86 N. W. 178; or from falling lumber. *East, &c., R. Co. v. Sims*, 80 Ga. 807, 6 S. E. 595; *Contra, Miss. Pac., &c., Co. v. Callbreath*, 66 Tex. 526. But whether a boy takes risk from fire when working on a fifth floor with no fire escape is for the jury to say. *Schwander v. Birge*, 33 Hun, 186.

10—"It is a general rule, that, when a contract of employment is made with a minor, he assumes the ordinary hazards of such employment in the same manner as an adult assumes them. But the rule is modified in case of young

cautions in such cases, has sometimes been very emphatically asserted by the courts.¹¹ The Supreme Court of Mas-[*654] sachu*setts has very properly said, in a case in which defendants relied for their protection upon a notice of danger which they had given to the party injured: "The notice

persons of inexperience and immature judgment, who are not capable of fully understanding and appreciating the perils to which they are exposed. They are entitled to recover for injuries which result from such perils, unless they have been instructed how to avoid them." Chicago Anderson P. B. Co. v. Reineiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249.

11—Arizona L. & T. Co. v. Monsey, 4 Ariz. 96, 33 Pac. 590; Emma Cotton Seed Oil Co. v. Hale, 56 Ark. 232, 19 S. W. 600; O'Connor v. Golden Gate, etc., Co., 135 Cal. 537, 67 Pac. 966, 87 Am. St. Rep. 127; Camp v. Hall, 39 Fla. 535, 22 S. 792; Hinckley v. Horazdowsky, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490; Standard Oil Co. v. Eiler, 110 Ky. 209, 61 S. W. 8; Lindsay v. Tioga Lumber Co., 108 La. 468, 32 So. 464, 92 Am. St. Rep. 384; American Tobacco Co. v. Strickling, 88 Md. 500, 41 Atl. 1083; Levy v. Clark, 90 Md. 146, 44 Atl. 990; Ciriack v. Merchants' Woolen Co., 151 Mass. 152, 23 N. E. 829, 21 Am. St. Rep. 438, 6 L. R. A. 733; Patnode v. Warren Cotton Mills, 157 Mass. 283, 32 N. E. 161, 34 Am. St. Rep. 275; Dowling v. Allen, 102 Mo. 213, 14 S. W. 751; Ithner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951; Smith v. Irwin, 51 N. J. L. 507, 18 Atl. 852, 14 Am. St. Rep. 699; Turner v. Goldsboro Lumber Co., 119 N. C. 387, 26 S. E.

23; Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 20 N. E. 466, 15 Am. St. Rep. 596, 3 L. R. A. 385; Rummel v. Dilworth, 131 Pa. St. 509, 19 Atl. 346, 17 Am. St. Rep. 827; Fisher v. Delaware, etc., Co., 153 Pa. St. 378, 26 Atl. 18; Neilson v. Hillside C. & I. Co., 168 Pa. St. 256, 31 Atl. 1091, 47 Am. St. Rep. 886; Gulf, etc., Ry. Co. v. Jones, 76 Tex. 350, 13 S. W. 374; Williamson v. Sheldon Marble Co., 66 Vt. 427, 29 Atl. 669; Hayes v. Colchester Mills, 69 Vt. 1, 37 Atl. 269, 60 Am. St. Rep. 915; Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 Am. St. Rep. 908; Turner v. Norfolk, etc., R. R. Co., 40 W. Va. 675, 22 S. E. 83; Nadan v. White Riv. Lumber Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29; Walski v. Knapp-Stout & Co., 90 Wis. 178, 62 N. W. 87; McDougall v. Ashland, etc., Co., 97 Wis. 382, 73 N. W. 327; Gracia v. Maestri Furniture Mfg. Co., 114 La. 371, 38 So. 275; Rudborg v. Bowden Belting Co., 188 Mass. 365; Noden v. Verlenden Bros., 211 Pa. St. 135; Horn v. La Crosse Box Co., 123 Wis. 399, 101 N. W. 935; Grizzle v. Frost, 3 Fost. & F. 622; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; O'Connor v. Adams, 120 Mass. 427. In Bartonhill Coal Co. v. McGuire, 3 Macq. H. L. 300, 311, Lord CHELMSFORD, in speaking of an injury to a young girl from exposure to machinery in the building

which the defendants were bound to give the plaintiff of the nature of the risks incident to the service which he undertook must be such as to enable a person of his youth and inexperience in the business intelligently to appreciate the nature of the danger attending its performance. The question, indeed, on this branch of the case is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences. But in determining this question it is proper and necessary to take into consideration not only the plaintiff's youth and inexperience, but also the nature of the service which he was to perform, and the degree to which his attention, while at work, would need to be devoted to its performance. The obligation of the defendants would not necessarily be discharged by merely informing the boy that the employment itself, or a particular place or machine in the building or room in which he was set to work, was dangerous. Mere representation in advance that the service generally, or a particular thing connected with it, was dangerous, might give him no adequate notice or understanding of the kind and degree of the danger which would necessarily attend the actual perform-

where she was employed, says: "It might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed." One who put a boy of fifteen in charge of a wild and fractious horse in a place where trains of cars, moved by steam, were approaching in opposite directions, was held liable for an injury to the boy in consequence of the horse being frightened and becoming unmanageable. *Hill v. Gust*, 55 Ind. 45. So it may be negligence to set a boy of

eighteen to drive a strange and high spirited horse without warning. *Hoffman v. Adams*, 106 Mich. 111, 64 N. W. 7. The general obligation of the master to give information to one who, from immaturity or otherwise, would not be likely to understand and appreciate it, is affirmed in *Sullivan v. India Manuf. Co.*, 113 Mass. 396, though it is said it would be sufficient if the servant had the proper information from some other source. And so in *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329, 33 N. E. 944.

ance of his work.''¹² In the case of an injury to a boy of twelve in a cotton factory, the Supreme Court of Virginia says: "If it is to the interests of manufacturing establishments to employ infants of such tender years, with their immature judgment and lack of experience, not only the dictates of humanity, but public policy, demands that they should be held to the highest degree of responsibility for their care and protection. They must take knowledge of their childish disposition to play, and to play with fire, and of their inability to recognize danger, although open and obvious to those of riper years. They must instruct them as to the many dangers with which they are surrounded, and the way to avoid such dangers; and they must continue to repeat such instruction until they know the danger is fully understood and appreciated. And, in view of the proneness of children to forget, they must from time to time renew these instructions, warnings and cautions."¹³ It is also negligence for the master,

12—GRAY, J., in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 596, 3 Am. Rep. 506. Where an inexperienced boy, was sent into a mine to bring out tools and was injured by falling rock negligently left by other workmen, the master was held liable for failure to inform him of the danger. *Jones v. Florence Min. Co.*, 66 Wis. 268, 57 Am. Rep. 269, citing many cases and see note to this case, 25 Am. L. Reg. (N. S.) 591. Where a minor was injured the day after he entered service as a brakeman by coupling a car, with a double deadwood it was held that the master would be liable though the danger could be seen, if as a matter of fact the minor did not know and was not chargeable with the duty to know the risk incurred in the coupling. *Louisville, &c., Co. v. Frawley*, 110 Ind. 18. See, also, *Miss. Pac., &c., Co. v. Callbreath*, 66 Tex. 526. A similar re-

quirement of extra caution and care in the case of small children received by carriers without attendants, was laid down in *East Saginaw City Railway Co. v. Bohn*, 27 Mich. 503. And see the well reasoned case of *Railroad Co. v. Fort*, 17 Wall. 553, in which the obligation to give to immature persons information of unknown or unappreciated perils is considered and insisted upon in an opinion by DAVIS, J.

13—*Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 596, 597, 46 S. E. 908. "In determining whether or not a work or place of work is dangerous to a boy under fourteen years of age, the natural instincts and dispositions of a boy of that age are to be considered; and if the work affords to such boy the temptation and opportunity by indulging these instincts to put himself in danger, the place

to put a child at work with or about dangerous machinery, who is so young and immature that he is incapable of appreciating the risk or of safely performing the work, though he is fully warned and instructed.¹⁴

The rule requiring the master to warn and instruct the young and inexperienced is not one which in its *application is confined exclusively to infants: the principle is a general one which requires good faith and reasonable prudence on the part of the employer, under the special circumstances of the particular case; of which infancy, if it exists, may be a very important one, but possibly not more so than some others.¹⁵ Where a master desired to qualify an ordinary la-

as to him is dangerous." Marbury Lumber Co. v. Wesbrook, 121 Ala. 179, 25 So. 914.

14—Brazil Block Coal Co. v. Gaffney, 119 Ind. 455, 21 N. E. 1102, 12 Am. St. Rep. 422, 4 L. R. A. 850; Williamson v. Sheldon Marble Co., 66 Vt. 427, 29 Atl. 669; Hayes v. Colchester Mills, 69 Vt. 1, 37 Atl. 269, 60 Am. St. Rep. 915. Whether a boy has capacity to appreciate the danger is a question of fact for the jury. McCarragher v. Rogers, 120 N. Y. 526, 24 N. E. 812; Chopin v. Badger Paper Co., 83 Wis. 192, 52 N. W. 452. It is negligence to put a boy at dangerous work for which he was not employed. Marbury Lumber Co. v. Wesbrook, 121 Ala. 179, 25 So. 914; Orman v. Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602; Camp v. Hall, 39 Fla. 535, 22 So. 792; Jones v. Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92; Northern Pac. Coal Co. v. Richmond, 58 Fed. 756, 7 C. C. A. 485.

15—See Chicago, &c., R. R. Co. v. Bayfield, 37 Mich. 205; Patterson v. Pittsburgh, &c., R. R. Co., 76

Penn. St. 389, 18 Am. Rep. 412. Cases of liability for failure to instruct inexperienced adult servants. Parkhurst v. Johnson, 50 Mich. 70; Smith v. Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535; Hawkins v. Johnson, 105 Ind. 29, 55 Am. Rep. 169; Smith v. Pen. Car Works, 60 Mich. 501; Miss. Pac., &c., Co. v. Watts, 64 Tex. 568; Ryan v. Los Angeles I. & C. S. Co., 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524; Tedford v. Los Angeles Elec. Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; May v. Smith, 92 Ga. 95, 18 S. E. 360, 44 Am. St. Rep. 84; Carter v. Dubach Lumber Co., 113 La. 239, 36 So. 952; Campbell v. Eveleth, 83 Me. 50, 21 Atl. 784; Welch v. Bath Iron Works, 98 Me. 361, 57 Atl. 88; Brennan v. Gordon, 118 N. Y. 489, 23 N. E. 810, 16 Am. St. Rep. 775, 8 L. R. A. 818; Lebbering v. Struthers, 157 Pa. St. 312, 27 Atl. 720; Smith v. Hillside C. & I. Co., 186 Pa. St. 28, 40 Atl. 287; Hightower v. Bamberg Cotton Mills, 48 S. C. 190, 26 S. E. 222; Tennessee Coal, etc., Co. v. Jarrett, 111 Tenn. 565, 82 S. W. 224; Anderson v.

borer to operate an elevator and directed a servant to instruct him to that end and the latter left him to run the elevator alone before he was qualified to do so and in consequence of his ignorance and inexperience he was injured, the master was held liable. As to the principles applicable in such cases the court says: "Those principles are, that a duty devolved upon the master of a servant hitherto in the capacity of a common laborer, before such laborer should be put in charge of dangerous machinery with which he is not acquainted, to instruct and qualify him for such new duty. That if the master selects a co-servant in his employment to instruct and qualify the servant for the new and more dangerous service, the master must select a competent instructor or be liable for his incompetency or his negligence while performing the duty of instructor, or for discontinuance of his instruction until it is completed, by which the promoted servant is injured, and if such is the case, the master will be liable for the injury, and it will be no defense that the injury was caused by one servant to his co-servant, for the servant whose negligence caused the injury stands for the master and the latter is liable in such case the same as if the injury was caused by the personal negligence of the master."¹⁶

The master may assume that an adult person has ordinary intelligence and capacity and, unless he has notice to the contrary, he is under no obligation to instruct or warn such a servant as

Daly Min. Co., 15 Utah, 22, 49 to know." *Drapeau v. International Paper Co.*, 96 Me. 299, 303, R. R. Co., 64 Vt. 66, 24 Atl. 134, 52 Atl. 647.
33 Am. St. Rep. 908; *Janecko v. West Coast, etc.*, Co., 34 Wash. 556, 76 Pac. 78. If the danger is obvious and familiar, a servant cannot demand instruction as to it. *Berger v. St. Paul, &c., Ry. Co.*, 39 Minn. 78, 38 N. W. 814. "The inexperienced laborer is held not to assume the risk of perils which are not called to his attention and of which he has no knowledge, but of such only as he knows, or by the exercise of ordinary care ought

16—*Brennan v. Gordon*, 118 N. Y. 489, 494, 23 N. E. 810, 16 Am. St. Rep. 775, 8 L. R. A. 818. That the duty to warn and instruct the young and inexperienced cannot be delegated, so as to absolve the master, see *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 232, 19 S. W. 600; *Lebbering v. Struthers*, 157 Pa. St. 312, 27 Atl. 720; *Smith v. Hillside C. & I. Co.*, 186 Pa. St. 28, 40 Atl. 287.

to dangers which the ordinary servant would understand and appreciate.¹⁷

Ordering Servant Into Dangerous Places. The master may also be negligent in commanding the servant to go into exceptionally dangerous places, or to subject himself to risks which, though he may be aware of the danger, are not such as he had reason to expect, or to consider as being within the employment.

It has been often—and very justly—remarked that a man may decline any exceptionally dangerous employment, but if he voluntarily engages in it he should not complain because it is dangerous.¹⁸ Nevertheless, where one has entered upon the em*ployment and assumed the incidental risks, it is not [*656] reasonable to hold that other risks which he is directed by the master to assume, are to be left to rest upon his shoulders, merely because he did not take upon himself the responsibility of throwing up the employment instead of obeying the order. Many considerations might resaonably induce the servant to hesitate

17—*Thompkins v. Marine Engine, etc., Co.*, 70 N. J. L. 330, 58 Atl. 393; *King v. Morgan*, 109 Fed. 446, 48 C. C. A. 507.

18—“A master cannot be held liable for an accident to his servant while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master.” BRAMWELL, B., in *Williams v. Clough*, 3 H. & N. 258, 260. See *Mad River, &c., R. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Smith v. Sellars*, 40 La. Ann. 527, 4 So. 333; *Cole v. Chicago, etc., R. R. Co.*, 71 Wis. 114, 37 N. W. 84, 5 Am. St. Rep. 201. An employee injured by the falling of a hoisting apparatus sued his employer. *Held*, that the liability of the defendant depended on three facts: 1. The defective and unsafe condition of the ap-

paratus and that the injury proceeded therefrom. 2. That defendant knew or ought to have known of the defect. 3. That plaintiff did not know of it and had not equal means of knowledge. *Malone v. Hawley*, 46 Cal. 409. If, in obedience to express orders, an engineer runs over a track known to him to be unsafe yet in daily use he is not necessarily guilty of contributory negligence. *Hawley v. Nor. Centr., &c., Co.*, 82 N. Y. 370. See *McGlynn v. Brodie*, 31 Cal. 376; *Baltimore, &c., R. R. Co. v. Woodward*, 41 Md. 268. Of extrinsic and extraordinary risks it is the duty of the master to notify the servant. *Perry v. Marsh*, 25 Ala. 659; *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160; *Strahendorf v. Rosenthal*, 30 Wis. 674; *West v. St. Louis, &c., R. R. Co.*, 63 Ill. 545; *Paulmier v. Erie Railway*, 34 N. J. 151.

under such circumstances. In many cases the consequences might be very serious should he refuse to obey a lawful command of the master; and any command may not be clearly and manifestly unlawful which directs the doing of nothing beyond the general scope of the business. The servant who refuses to obey must consequently expect to take upon himself the burden of showing a sufficient cause for the refusal. However clear the case might be to him, it might not be easy to make a showing satisfactory to third parties, who would naturally assume that the order was given in good faith, and that the master understood better than another the risks to be encountered in his business. The servant, also, it may reasonably be assumed, would, to some extent, have his fears allayed by the commands of a master, whose duty it would be not to send him into danger, and who might, therefore, be supposed to know, when he gave the command, that the dangers were not such or so great as the servant had apprehended.¹⁹ In these cases, also, the age [*657] and immaturity *of the child are of the highest importance; for a child, inexperienced in affairs and ignorant of the law, might well believe the obligation to obey was implicit,

19—*Anderson v. Seropian*, 147 Cal. 201. A boy hired for one service and sent upon another much more dangerous, was held entitled to recover for an injury suffered in the latter. *Railroad Co. v. Fort*, 17 Wall. 553. And see *Chicago, &c., R. R. Co. v. Bayfield*, 37 Mich. 205; *Orman v. Mannix*, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602.

In *Lalor v. Chicago, &c., R. R. Co.*, 52 Ill. 401, 4 Am. Rep. 616, the declaration averred an employment of the plaintiff's intestate as a common laborer in the business of loading and unloading cars, and for no other purpose; and that while he was engaged in loading a freight car with iron, the deceased was ordered by the super-

intendent or foreman of the company, employed to manage, direct and superintend the business of the company about the depot, to couple and connect a freight car with other cars, contrary to the special engagement of the deceased, &c., in doing which he was crushed to death. This was held to set out a good cause of action. "The company was constructively present, by and through this officer, and must be charged accordingly. It was, then, by the direct command of the company the deceased was exposed to this peril, and one out of the line of the business he had contracted to perform. He was killed by the negligence of the driver in charge of the locomotive while

and might do so, consequently, under a species of coercion to which the will was wholly subjected.²⁰

Where a servant is ordered to work in a particular place, or with a particular machine or appliance, or to do a particular piece of work, he has a right to assume that there are no unusual or concealed dangers or hazards connected with the work, and if such exist and he has not been warned or instructed in regard to them and is ignorant of their existence, and is injured in consequence, he may recover.²¹ "If the servant be of ma-

thus exposed. The law would be lamentably deficient did it furnish no remedy in such a case." BREESE, Ch. J., p. 404. See, also, Indianapolis, &c., R. R. Co. v. Love, 10 Ind. 554; Benzing v. Steinway, 101 N. Y. 547; Jones v. Lake Shore, &c., Co., 49 Mich. 573; Haley v. Case, 142 Mass. 316; Lee v. Woolsey, 109 Pa. St. 124; Lorentz v. Robinson, 61 Md. 64.

20—Fort v. Railway Co., 2 Dill. 259; Railroad Co. v. Fort, 17 Wall. 553. If one is called to do work outside his general duty, the question whether he knew or ought to have known the risk is one of fact. Ferren v. Old Colony R. R., 143 Mass. 197. But if a laborer is required to act as foreman a part of the time and after doing so for a time is injured he cannot recover. He accepts the risk. Leary v. Boston, &c., Co., 139 Mass. 580, 52 Am. Rep. 733. So if a mature and experienced servant consents to do work outside of that he engaged to do; Cole v. Chicago, &c., Co., 71 Wis. 114, 37 N. W. 84. Where a servant during his noon hour remained on the master's premises, and was called by the foreman to do dangerous work, the master is liable. Broderick v. Detroit, &c., Co., 56 Mich.

261. But not if called to do work for the personal benefit of his immediate superior. Hurst v. Chicago, &c., Co., 49 Ia. 76. Nor if asked to do work outside of his business by a fellow servant. Pittsburgh, &c., Ry. Co. v. Adams, 105 Ind. 151; Osborne v. Knox, &c., Co., 68 Me. 49. See Railroad Co. v. McDaniel, 12 Lea, 386.

21—Turner v. Southern Pac. Co., 142 Cal. 580, 76 Pac. 384; Hilton, etc., Lumber Co. v. Ingram, 119 Ga. 652, 46 S. E. 895, 100 Am. St. Rep. 204; Consolidated Coal Co. v. Wombacher, 134 Ill. 57, 24 N. E. 627; Consolidated Coal Co. v. Haenni, 146 Ill. 614, 35 N. E. 162; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N. E. 651; Western Stone Co. v. Muscial, 196 Ill. 382, 63 N. E. 664, Republic I. & S. Co. v. Berkes, 162 Ind. 517, 70 N. E. 815; Connors v. Morton, 160 Mass. 333, 35 N. E. 860; Brown v. Ann Arbor R. R. Co., 118 Mich. 205, 76 N. W. 407; Carlson v. N. W. Tel. Exch. Co., 63 Minn. 428, 65 N. W. 914; Holman v. Kempe, 70 Minn. 422, 73 N. W. 186; Sullivan, etc., R. R. Co., 107 Mo. 66; 17 S. W. 748, 28 Am. St. Rep. 388; Schroeder v. Chicago, etc., R. R.

ture years, and of ordinary intelligence and experience, he is presumed to know and comprehend obvious dangers. In such case the master is not liable for injury happening to the servant in the performance of dangerous work without the scope of his engagement for service, merely because he has been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and without objection undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment. The liability upon the master in cases of injury to the servant received in a dangerous employment outside of that for which he had engaged arises, therefore, not from the direction of the master to the servant to depart from the one service and to engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years, or unable to comprehend the danger.²²

If the servant knows the danger, or if it is obvious to him as

Co., 108 Mo. 322, 18 S. W. 1094, Fed. 186, 20 C. C. A. 381. And see 18 L. R. A. 827; *Steinhauser v. Spraul*, 114 Mo. 551, 21 S. W. 515, 859; *Foster v. Missouri Pac. R. R. Co.*, 115 Mo. 165, 21 S. W. 916; *Bane v. Irwin*, 172 Mo. 306, 72 S. W. 522; *Van Duzen Gas, etc., Co. v. Schelies*, 61 Ohio St. 298, 55 N. E. 998; *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959; *Michael v. Roanoke Machine Works*, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927. Where the servant is ordered to do a piece of work and is left to his own way of doing it and he adopts a dangerous mode and is injured, the rule does not apply and the master is not liable. *Northern Ohio R. R. Co. v. Rigby*, 69 Ohio St. 184, 68 N. E. 1046.

Fed. 186, 20 C. C. A. 381. And see *Sexton v. Turner*, 89 Va. 341, 15 S. E. 862. In some cases the foreman or superior giving the order is held to be a fellow servant of the workman and his negligence in giving the order, if any, is held to be the negligence of a fellow servant for which the master is not responsible. *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 34 N. E. 185, 38 Am. St. Rep. 396; *Randa v. Detroit Screw Works*, 134 Mich. 343, 94 N. W. 454; *Vitto v. Keegan*, 15 App. Div. 329, 44 N. Y. S. 1; *Stegman v. Humbers*, 2 Ohio C. C. 51; *Mast v. Kern*, 34 Ore. 247, 54 Pac. 950, 75 Am. St. Rep. 580; *Casey v. Pennsylvania Asphalt Pav. Co.*, 198 Pa. St. 348, 47 Atl. 1128; *Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344.

22—*Reed v. Stockmeyer*, 74

to any one else, he obeys at his peril. In such case by undertaking the work in obedience to the order, he assumes the risk, and the master is not liable if injury results.²³ But as the duty of the servant is instant obedience, the danger should be obvious at a glance to impose the risk upon him. He is justified in obeying, unless the risk is so great and so manifest that no reasonably prudent man would have done so under the circumstances.²⁴

23—*Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351; *Roul v. East Tenn., etc., Ry. Co.*, 85 Ga. 197, 11 S. E. 558; *World v. Georgia R. R. Co.*, 99 Ga. 283, 25 S. E. 646; *Of-futt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Western Stone Co. v. Muscial*, 196 Ill. 382, 63 N. E. 664; *Wells & French Co. v. Kapaczynski*, 218 Ill. 149; *Connors v. Morton*, 160 Mass. 333, 35 N. E. 860; *Truly v. North Lumber Co.*, 83 Miss. 430, 36 So. 4; *Harff v. Green*, 168 Mo. 308, 67 S. W. 576; *Ittner Brick Co. v. Killian*, 67 Neb. 589, 93 N. W. 951. In some of the cases obedience is regarded as contributory negligence. Fear of discharge for disobedience will not excuse the servant. *Russell v. Tillotson*, 140 Mass. 201; *Harff v. Green*, 168 Mo. 308, 67 S. W. 576. A seaman, who is liable to punishment for disobedience, is not necessarily precluded from recovering for an injury received in obeying an order which he knows to be attended with danger. *Eldridge v. Atlas S S. Co.*, 134 N. Y. 187, 32 N. E. 66; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224.

24—*Colorado Midland Ry. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701; *Connors v. Morton*, 160 Mass. 333, 35 N. E. 860; *Bartolomeo v. Mc-Knight*, 178 Mass. 242, 59 N. E. 804; *McKinnon v. Riter-Conley*

In determining the question much weight is due to the relative situation of the parties. It is said by the Supreme Court of Ohio: "There is much reason in the rule that allows a favorable construction to be placed on the act of the servant done in obedience to the order of his superior, though involving danger. Obedience to orders given by a master becomes a habit with the servant. He obeys without much questioning the prudence of the order. It is expected that he will do so, and without such obedience the business of the master could not be successfully conducted. It is then both reasonable and proper that the master should be held to a reasonable responsibility for what he orders his servants to do; and the conduct of a servant in obeying an order, under such circumstances, should not be too closely criticised by courts in administering the law. Whilst the law will not excuse the servant, where the thing ordered is plainly and manifestly perilous, it will do so where a man of ordinary prudence and care would, under the circumstances have obeyed the order, although involving danger."²⁵

Where a servant is ordered into a place which experience has shown may be dangerous under certain conditions, it is the duty of the master to see beforehand that the dangerous conditions do not exist. Where a servant was ordered into an elevator bin at the bottom when there was reason to believe the grain was not all out, without any attempt to ascertain its condition, and

edge of attendant danger will not defeat his right of recovery, if, in obeying the command, he acted with that degree of prudence that an ordinarily prudent man would have done under the circumstances." Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572. "The master and servant do not stand upon an equal footing, even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior

knowledge and skill of the master. The servant is not entirely free to act upon his own suspicions of danger. If, therefore, the master orders the servant into a place of danger, and the servant is injured, he is not guilty of contributory negligence, unless the danger was so glaring that a reasonably prudent person would not have entered into it." Shartel v. St. Joseph, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317.

25—Van Duzen Gas, etc., Co. v. Schelies, 61 Ohio St. 298, 310, 55 N. E. 998.

he was smothered by the grain coming down upon him, the question of the master's negligence was held to be for the jury.²⁶

Duty of Master as to Machinery, Tools, Appliances, etc.

The master may also be negligent in not exercising ordinary care to provide suitable and safe machinery or appliances, or in making use of those which he knows have become defective, but the defects in which he does not explain to the servant, or in continuing ignorantly to make use of those which are defective, where his ignorance is due to a neglect to use ordinary prudence and diligence to discover defects. The rule of law is that it is the duty of the master to exercise ordinary care and prudence to provide reasonably safe machinery, tools and appliances and to keep them so.²⁷ The point here is, not that the master warrants

- 26—McGovern *v.* Central Vt. R. well Granite Co., 99 Me. 278, 59
R. Co., 123 N. Y. 280, 25 N. E. 373. Atl. 285; Wagner *v.* Upshur, 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412; Moynihan *v.* Hills Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348; Morton *v.* Detroit, etc., R. R. Co., 81 Mich. 423, 46 N. W. 111; Fox *v.* Spring Lake Iron Co., 89 Mich. 387, 50 N. W. 872; McDonald *v.* Mich. Cent. R. R. Co., 108 Mich. 7, 65 N. W. 597; Noble *v.* Bessemer S. S. Co., 127 Mich. 103, 86 N. W. 520, 89 Am. St. Rep. 461, 54 L. R. A. 456; Eicheler *v.* Hanggi, 40 Minn. 263, 41 N. W. 975; Stiller *v.* Bohn Mfg. Co., 80 Minn. 1, 82 N. W. 981; Bohn *v.* Chicago, etc., Ry. Co., 106 Mo. 429, 17 S. W. 580; Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149; Nicholls *v.* Crystal Plate Glass Co., 126 Mo. 55, 28 S. W. 991; Goransson *v.* Riter-Conley Mfg. Co., 186 Mo. 300, 85 S. W. 338; Union Pac. R. R. Co. *v.* Broderick, 30 Neb. 735, 46 N. W. 1121; Leigh *v.* Omaha St. Ry. Co., 36 Neb. 131, 51 N. W. 134; Missouri Pac. R. R. Co. *v.* Baxter, 42 Neb. 793, 60 N. W. 1044; Chicago, etc., R. R. Co.

the strength or safety of his machinery or appliances, but that he is personally negligent in not taking proper precautions to

v. Kellogg, 54 Neb. 127, 74 N. W. 454; *Olney v. Boston, &c.*, R. R. Co., 71 N. H. 427, 52 Atl. 1097; *Fenderson v. Atlantic City R. R. Co.*, 56 N. J. L. 708, 31 Atl. 767; *Maher v. Thropp*, 59 N. J. L. 186, 35 Atl. 1057; *Flannigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647, 44 Atl. 762; *Kern v. De Castro, etc., Co.*, 125 N. Y. 50, 25 N. E. 1071; *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273, 30 N. E. 750; *Bailey v. Rome, etc., R. R. Co.*, 139 N. Y. 302, 34 N. E. 918; *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31, 36 N. E. 813; *Byrne v. Eastmans Co.*, 163 N. Y. 461, 57 N. E. 738; *Cameron v. Great Northern Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160; *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. Rep. 633, 13 L. R. A. 374; *Finnerty v. Burnham*, 205 Pa. St. 305, 54 Atl. 996; *Moran v. Corliss Steam Engine Co.*, 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267; *Benson v. New York, etc., R. R. Co.*, 23 R. I. 147, 49 Atl. 689; *McGarrity v. New York, etc., R. R. Co.*, 25 R. I. 269, 55 Atl. 718; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; *Price v. Richmond, etc., R. R. Co.*, 38 S. C. 199, 17 S. E. 732; *Evans v. Chamberlain*, 40 S. C. 104, 18 S. E. 213; *Sims v. Southern Ry. Co.*, 66 S. C. 520, 45 S. E. 90; *Koon v. Southern Ry. Co.*, 69 S. C. 101, 48 S. E. 86; *Record v. Cooperage Co.*, 108 Tenn. 657, 69 S. W. 334; *Gulf, etc., R. R. Co. v. Silliphant*, 70 Tex. 623, 8 S. W. 673; *International, etc., Ry. Co. v. Bell*, 75 Tex. 50, 12 S. W. 321; *International, etc., Ry. Co. v. Kernan*, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; *Allen v. Union Pac. Ry. Co.*, 7 Utah, 239, 26 Pac. 297; *Mangum v. Bullion, etc., Min. Co.*, 15 Utah, 534, 50 Pac. 834; *Fritz v. Salt Lake, etc., Elec. Lt. Co.*, 18 Utah, 493, 56 Pac. 90; *Boyle v. Union Pac. R. R. Co.*, 25 Utah, 420, 71 Pac. 988; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Norfolk, etc., R. R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370; *Norfolk, etc., R. R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. 367; *Norfolk, etc., R. R. Co. v. Ampley*, 93 Va. 108, 25 S. E. 226; *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Norfolk, etc., Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Norfolk, etc., Ry. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726; *Crooker v. Pacific, etc., R. R. Co.*, 29 Wash. 30, 69 Pac. 359; *Ralph v. Am. Bridge Co.*, 30 Wash. 500, 70 Pac. 1098; *Boelter v. Ross Lumber Co.*, 103 Wis. 324, 79 N. W. 243; *Going v. Ala. Steel & Wire Co.*, 141 Ala. 537; *Williams v. Levert L. & S. Co.*, 114 La. 805, 38 So. 567; *Smith v. Fordyce*, 190 Mo. 1; *Hicks v. Manufacturing Co.*, 138 N. C. 319; *Bartholomew v. Kemmerer*, 211 Pa. St. 277; *Wood v. Rio Grande W. R. R. Co.*, 28 Utah, 351, 79 Pac. 182; *Northern Pac. R. R. Co. v. Babcock*, 154 U. S. 190, 14 S. C. Rep. 978, 38 L. Ed. 958. "In order to recover from his master for injuries caused by defective machinery, the servant must show, first, that the appliance with which he was working was de-

see that they are reasonably strong and safe. The law does not require him to guaranty the prudence, skill or fidelity of those from whom he obtains his tools or machinery, or the *strength or fitness of the materials they make use of. [*658] If he employs reasonable care and prudence in selecting or ordering what he requires in his business, such as every prudent man is expected to employ in providing himself with the conveniences of his occupation, that is all that can be required of him;²⁸ but this at his peril he must employ, and the duty is not one he can delegate so as to relieve himself from the contingent liability in case of failure in performance.²⁹ If, therefore, an injury results to the servant, from a failure to exercise reasonable care and prudence in this regard, the master may be

fective; second, that the master had knowledge thereof, or ought to have had; and, third, that the servant did not know of the defect or did not have equal means of knowing with the master." *Mellott v. Louisville, etc., R. R. Co.*, 101 Ky. 212, 215, 40 S. W. 696.

28—It has been so often affirmed, and is so well established, that the master is not guarantor of the safety of machinery which he puts into the hands of his servants, and is responsible only where he has failed to employ reasonable care and skill in its selection, that we content ourselves here with a reference to a few cases recognizing the principle: *Readhead v. Midland R. Co.*, 2 Q. B. 412; *S. C. in Exch. Chamber, L. R.* 4 Q. B. 379; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412, 20 Am. Rep. 331; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, 14 Am. Rep. 598; *Indianapolis, &c., R. R. Co. v. Love*, 10 Ind. 554; *Fort Wayne, &c., R. R. Co. v. Gildersleeve*, 33 Mich. 134; *Toledo,*

&c., *R. R. Co. v. Fredericks*, 71 Ill. 294; *Camp Point Manuf. Co. v. Ballou*, 71 Ill. 417; *Indianapolis, &c., R. R. Co. v. Flanigan*, 77 Ill. 365; *Columbus, &c., R. R. Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 578; *Mobile, &c., R. R. Co. v. Thomas*, 42 Ala. 672; *Patterson v. Pittsburgh, &c., R. R. Co.*, 76 Pa. St. 389, 18 Am. Rep. 412; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163, 2 Am. Rep. 497; *Lewis v. St. Louis, &c., R. R. Co.*, 59 Mo. 495, 21 Am. Rep. 385; *Flike v. Boston, &c., R. R. Co.*, 53 N. Y. 549; *Kelley v. Norcross*, 121 Mass. 508; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Umback v. Lake Shore, &c., Co.*, 83 Ind. 191; *Painton v. Nor. Centr., &c., Co.*, 83 N. Y. 7; *Hobbs v. Stauer*, 62 Wis. 108. If the defect in an appliance could have been discovered by proper and careful inspection, the master is liable. *Spicer v. South Boston, &c., Co.*, 138 Mass. 426; *Covey v. Hannibal, &c., Co.*, 86 Mo. 635; *Chicago, &c., R. R. Co. v. Platt*, 89 Ill. 141.

29—See *post*, pp. 1161, 1162.

and ought to be held responsible.³⁰ In a case where a servant was killed by the breaking of a derrick chain owing to a latent

30—This paragraph quoted and approved: *Crocker v. Pacific, etc., Co.*, 29 Wash. 30, 69 Pac. 359. *Keegan v. Western R. R. Co.*, 8 N. Y. 175, 59 Am. Dec. 476, is a leading case. The injury occurred from continuing to use a defective and dangerous locomotive after notice to the company of its dangerous condition. And see *McGatrick v. Wason*, 4 Ohio St. 566; *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317; *Columbus, &c., R. R. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615; *Lewis v. St. Louis, &c., R. R. Co.*, 59 Mo. 495, 21 Am. Rep. 385; *Long v. Pacific R. R. Co.*, 65 Mo. 225; *Wedgewood v. Chicago, &c., R. R. Co.*, 41 Wis. 478; *Harper v. Indianapolis, &c., R. R. Co.*, 47 Mo. 567, 4 Am. Rep. 353; *Chicago, &c., R. R. Co. v. Taylor*, 69 Ill. 461, 18 Am. Rep. 626; *Mullan v. Philadelphia, &c., R. R. Co.*, 78 Pa. St. 25, 21 Am. Rep. 2; *Wonder v. Baltimore, &c., R. R. Co.*, 32 Md. 411, 3 Am. Rep. 143. In *Noyes v. Smith*, 28 Vt. 59, 65 Am. Dec. 222, a declaration was sustained which charged the defendants with negligence in putting the plaintiff, their servant, in charge of an insufficient engine, whose insufficiency was unknown to the plaintiff, and but for the want of care and diligence would have been known to the defendants. A similar doctrine is declared in *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Seaver v. Boston, &c., R. R. Co.*, 14 Gray, 466; *Hackett v. Middlesex Manuf. Co.*, 101 Mass. 101; *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 521; *Louisville, &c., R. R. Co. v. Caven*, 9 Bush, 559, 15 Am. Rep. 740; *Shanny v. Androscoggin Mills*, 66 Me. 420, and *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593. The peril in the case last cited was the projecting awning of the station house, which was liable to strike a passing car. Say the court: “The evidence shows that the peril had long before been observed by other employees, and the attention of both the division superintendent and division engineer called to it. This circumstance takes away all excuse from the company, and brings the case within the legal proposition of appellant’s counsel, since it was a peril known to the employer and not revealed to the employee.” The rule has been applied to the case of a railroad company which was charged with negligence in permitting its road to become blocked with snow and ice, and a car to be out of repair, by means whereof the plaintiff was injured. *Fifield v. Northern R. R. Co.*, 42 N. H. 225. Compare *Waller v. S. E. Railway Co.*, 2 H. & C. 102; *Columbus, &c., R. R. Co. v. Webb*, 12 Ohio St. 475; *Toledo, &c., R. R. Co. v. Conroy*, 61 Ill. 162; *Toledo, &c., R. R. Co. v. Ingraham*, 77 Ill. 309. A master is not liable to a servant if another servant injures him by using for one purpose a tool intended for another which breaks under the use, although the tool was defective. *Moran v. Brown*, 27 Mo. App. 487. Of course if the case rests upon a want of due care, the fact that the employer had no actual knowledge of the defect is no excuse. But to charge

defect, it appeared that the chain was purchased of a reputable manufacturer and was represented to be of the best workmanship and material, and that it had been frequently inspected for visible defects. The court held that the master was not liable and says: "The master is not a guarantor of the safety of machinery or implements furnished his employes, and is only bound to use ordinary care, diligence and skill for the purpose of protecting them, and it is not negligence to use and employ such machinery or implements as the experience of trade and manufacture sanction as reasonably safe. * * * In the selection of machinery, tools, or material the master is responsible to his servants for only ordinary care; that degree of care which a man of ordinary prudence in the same line of business would be expected to exercise to secure his own safety were he doing the work. * * * Ordinary care does not require such tests as are appropriate only to the process of manufacture. Nor does it require that the article shall be taken to pieces or subjected to any other test which is not shown to be practically efficient and in ordinary use by careful users. * * * A purchaser of such an article from a reputable manufacturer, with representations as to its tested strength and quality of material, is not responsible for hidden defects, which cannot be discovered by careful external examination."³¹

the master with notice that a tool is out of repair, knowledge of the defect must be brought home to a servant having some authority in the premises. *Solomon R. R. Co. v. Jones*, 30 Kan. 601. For a latent defect arising in a machine, originally sound, not discoverable by ordinary tests, the master is not liable. *Louisville, &c., Co. v. Allen*, 78 Ala. 494. But he is, if he has not used ordinary care to discover it. *Clowers v. Wabash, &c., Ry. Co.*, 21 Mo. App. 213; *Current v. Miss., &c., Co.*, 86 Mo. 62. See *Pittsburgh, &c., Co. v. Adams*, 105 Ind. 151. The master is not

liable if a rope breaks from a hidden original fault or an apparent one arising from use and not brought to his notice. He is, however, bound to know that a rope originally sound will wear out. *Baker v. Allegheny, &c., R. R. Co.*, 95 Pa. St. 211. See *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209, 46 Am. Rep. 458.

31—*Westinghouse Elec. & Mfg. Co. v. Heimlich*, 127 Fed. 92, 62 C. C. A. 92. To same effect: *Kansas City, etc., R. R. Co. v. Ryan*, 52 Kan. 637, 35 Pac. 292; *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273, 30 N. E. 750; *Service v. Shone-*

It is equally the duty of the master by inspection and repair to keep his machinery and appliances in a reasonably safe condition for use. This is the general rule.³² "The duty of inspection is affirmative and must be continually fulfilled and positively performed."³³ The duty of the master does not extend so far as to require him to attend to the proper regulation of those

man, 196 Pa. St. 63, 46 Atl. 292, 79 Am. St. Rep. 689; *Read v. New York, etc., R. R. Co.*, 20 R. I. 209, 37 Atl. 947. If the defect is discoverable by ordinary inspection the master is liable. *Finnerty v. Burnham*, 205 Pa. St. 305, 54 Atl. 996; *Jones v. New York, etc., R. R. Co.*, 20 R. I. 210, 37 Atl. 1033.

32—*Rincicotti v. O'Brien Contracting Co.*, 77 Conn. 617; *New York, etc., Co. v. Rogers*, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198; *Louisville, etc., R. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. 881; *Caven v. Bodwell Granite Co.*, 99 Me. 278, 59 Atl. 285; *McDonald v. Mich. Cent. R. R. Co.*, 108 Mich. 7, 65 N. W. 597; *Nichols v. Crystal Plate Glass Co.*, 126 Mo. 55, 28 S. W. 991; *Cole v. Warren Mfg. Co.*, 63 N. J. L. 626, 44 Atl. 647; *Hopwood v. Altha & I. Co.*, 68 N. J. L. 707, 54 Atl. 435; *McGrath v. Delaware, etc., R. R. Co.*, 69 N. J. L. 331, 55 Atl. 242; *Randolph v. New York Cent., etc., R. R. Co.*, 69 N. J. L. 420, 55 Atl. 240; *Bailey v. Rome, etc., R. R. Co.*, 139 N. Y. 302, 34 N. E. 918; *Byrne v. Eastmans Co.*, 163 N. Y. 461, 57 N. E. 738; *Cameron v. Great Northern Ry. Co.*, 8 N. D. 124, 77 N. W. 1016; *Finnerty v. Burnham*, 205 Pa. St. 305, 54 Atl. 996; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; *Record v. Cooperage Co.*, 108 Tenn. 657, 69 S. W. 334; *Gulf, etc.,*

Ry. Co. v. Silliphant, 70 Tex. 623, 8 S. W. 673; *International, etc., Ry. Co. v. Kernan*, 78 Tex. 294, 14 S. W. 668, 22 Am. St. Rep. 52, 9 L. R. A. 703; *Norfolk, etc., R. R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. 367; *Norfolk, etc., Ry. Co. v. Ampley*, 93 Va. 108, 25 S. E. 226; *Texas, etc., Ry. Co. v. Barrett*, 67 Fed. 214, 14 C. C. A. 373; *Texas, etc., Ry. Co. v. Thompson*, 70 Fed. 944, 17 C. C. A. 524; *Solomon R. R. Co. v. Jones*, 30 Kan. 601; *Richmond, etc., Co. v. Moore*, 78 Va. 93. Where a machine is changed so as to vary its mode of operation and greatly increase the risk, the servant who has been accustomed to operate it should be warned of the change. *Ryan v. Chelsea Paper Mfg. Co.*, 69 Conn. 454, 37 Atl. 1062. See, also, *Pullman Pal. Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215. The master's duty is satisfied by such inspections and tests as are reasonably practicable under the circumstances. *Randolph v. New York Central, etc., R. R. Co.*, 69 N. J. L. 420, 55 Atl. 240. And see, *Cowan v. Umbagog Pulp Co.*, 91 Me. 26, 39 Atl. 340. The duty to inspect is held not to apply to common tools which the servant understands as well as the master. *Gulf, etc., Ry. Co. v. Larkin*, 98 Tex. 225.

33—*Houston v. Brush*, 66 Vt. 331, 29 Atl. 380.

parts which necessarily have to be adjusted in the course of the use of the machine, with regard to the particular work to be done, and the adjustment of which is properly incident to the particular service which the servant himself is called upon to perform.³⁴ And the master may require the servant to make ordinary repairs on the machine or appliance, which are within the capacity of the servant, and the necessity for which arises from daily use, materials and tools for such repairs being supplied by the master, and this duty may be implied from the circumstances of the case.³⁵ Just where the line is to be drawn be-

34—*Eicheler v. Hanggi*, 40 Minn. 263, 41 N. W. 975. Nor to cleaning and oiling the machine. *Quigley v. Levering*, 167 N. Y. 58, 60 N. E. 276, 54 L. R. A. 62. But the master was held liable where he had made no provision for cleaning and oiling. *Prescott v. Ottman Lithograph Co.*, 20 App. Div. 397, 46 N. Y. S. 812.

35—*Cregan v. Marston*, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854. After referring to cases the court says: “The cases cited and their doctrine appear to be founded upon what is determined to be the implied contract relation between the master and servant. Their mutual duties grow out of that relation and change and vary as it is changed and varied by the facts which indicate and measure it. Where those facts show that in the understanding of both parties a class of ordinary repairs are to be made by the servants with materials furnished by the master for that express purpose; that they and he regard it as a detail of their own work; that it is something entirely within their capacity and not dependent upon the skill of a special expert; and that the necessity springs from

their daily use of the appliance, occurs at different and unknown periods in their service, and is open to their observation in the absence of the master; the inference is inevitable that the contract relation between the parties makes it a duty of the servants and a detail of their work to correct the defect when it arises with the materials furnished.” p. 573. And see *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824; *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, 57 N. J. L. 400, 31 Atl. 619, 51 Am. St. Rep. 604. The duty to repair is, like that to furnish originally safe machinery, a master’s duty not escaped by delegation. *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575. See *Penn. Co. v. Mason*, 109 Pa. St. 296; *Wilson v. Willimantic, &c., Co.*, 50 Conn. 433; *Nor. Pac., &c., Co. v. Herbert*, 116 U. S. 642. While the master performs his whole duty by furnishing suitable means and competent men for the keeping of a machine in ordinary repair and running order, *McGee v. Boston Cordage Co.*, 139 Mass. 445; *Daley v. Boston, &c., Co.*, 147 Mass. 101, 16 Atl. 690, yet, if the defect is substantial and

tween what the master may devolve upon his servants in the way of inspection and repairs and what he must remain responsible for himself, it is difficult to say. Upon this point the Supreme Court of New Hampshire says: "In many kinds of service the care and keeping of tools and machinery in a condition of safety require merely the attention and repairs occasioned by ordinary use and wear, and are properly a part of the regular business of the servant engaged in the use of such tools and machinery. In such cases the duty of the employer is performed by furnishing safe tools and machinery and the means of making needed repairs, and the duty of making repairs may be entrusted to servants, and any neglect in the performance of this service is the negligence of a servant. But in cases where skill and practical knowledge are required in keeping machinery in a reasonable condition as to safety, beyond what is needed in operating it, it is the duty of the employer to supply the necessary intelligence, skill, and experience in the care and inspection of the machinery to protect the servant from injury; and for any failure to exercise proper care and skill the employer is accountable."³⁶

renders the machine unfit for use and dangerous, he is not relieved by showing that he has furnished such means and men. *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198, 59 Am. Rep. 68; *Rice v. King Philip Mills*, Id. 229, 59 Am. Rep. 80. In New York where the negligence charged was a failure to sharpen and reset saws, it is held that the master's duty is performed when he has furnished suitable saws and means for keeping them sharp and properly set and that the setting and sharpening is a servant's duty. *Webber v. Piper*, 109 N. Y. 496, 17 N. E. 216.

Cars coming from another road need not be inspected for hidden defects. *Gutridge v. Miss., &c.*,

Co., 94 Mo. 468, 7 S. W. 476; *Bal-lou v. Chicago, &c., Ry. Co.*, 54 Wis. 257, 41 Am. Rep. 31. See, further, on this, *Mackin v. Boston, &c., Co.*, 135 Mass. 201, 46 Am. Rep. 456; *Mich. Centr., &c., Co. v. Smithson*, 45 Mich. 212; *Brann v. Chicago, &c., Co.*, 53 Ia. 595, 36 Am. Rep. 243; *Chicago, &c., Co. v. Avery*, 109 Ill. 314; *Fay v. Minn., &c., Co.*, 30 Minn. 231. But the owner of a car used without his permission on another road in its business owes no duty to the latter's servant. *Sawyer v. Minn., &c., Ry. Co.*, 38 Minn. 103, 35 N. W. 671.

36—*Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482, 484, 22 Atl. 552, 13 L. R. A. 824. To the same effect is *Nord Deutscher Lloyd S. S. Co.*

The general rule is that the master cannot delegate his duties as to machinery and appliances so as to absolve himself from responsibility for their performance, or in other words, whoever is entrusted with the performance of these duties represents the master and the latter is responsible for his negligence in their performance.³⁷ The servant has a right to assume that the master has done his duty.³⁸

The master is not bound to furnish the newest, safest or best machines and appliances, but only such as are reasonably safe and fit for the purpose.³⁹ As a general rule the master dis-

- v. Ingebregsten, 57 N. J. L. 400, 278, 59 Atl. 285; Delude *v.* St. Paul City Ry. Co., 55 Minn. 63, 56 N. W. 461; Carter *v.* Oliver Oil Co., 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; Missouri, etc., Ry. Co. *v.* Haning, 91 Tex. 347, 43 S. W. 508; Norfolk, etc., R. R. Co. *v.* Nunnally, 88 Va. 546, 14 S. E. 367; Texas, etc., Ry. Co. *v.* Archibald, 170 U. S. 665, 18 S. C. Rep. 777; New York, etc., R. R. Co. *v.* O'Leary, 93 Fed. 737, 35 C. C. A. 562; Silveira *v.* Iverson, 128 Cal. 187, 60 Pac. 687; Steinhauser *v.* Spraul, 114 Mo. 551, 21 S. W. 515, 859.
- 39—Hull *v.* Hall, 78 Me. 114; Probst *v.* Delamater, 100 N. Y. 266; Sweeney *v.* Berlin, &c., Co., 101 N. Y. 520, 54 Am. Rep. 722; Bajus *v.* Syracuse, &c., Co., 103 N. Y. 312, 57 Am. Rep. 723; Hickey *v.* Taaffe, 105 N. Y. 26; Allerton, &c., Co. *v.* Egan, 86 Ill. 253; Simmons *v.* Chicago, &c., Co., 110 Ill. 340; Smith *v.* St. Louis, &c., Co., 69 Mo. 32; Siela *v.* Hannibal, &c., Co., 82 Mo. 430; Huhn *v.* Miss., &c., Co., 92 Mo. 440; Mich. Centr., &c., Co. *v.* Smithson, 45 Mich. 212; Guthrie *v.* Louisville, &c., Co., 11 Lea, 372, 47 Am. Rep. 286; Tabler *v.* Hannibal, &c., Co., 5 S. W. Rep. 810 (Mo.); Miss., &c., Co. *v.* Lyde, 57

charges his duty, if he furnishes such tools and appliances as are in common and ordinary use for the same purpose.⁴⁰ It is

Tex. 505; *Burns v. Chicago, &c., Co.*, 69 Ia. 450, 58 Am. Rep. 227; *Louisville, &c., Co. v. Orr*, 84 Ind. 50; *Arizona L. & T. Co. v. Mooney*, 4 Ariz. 366, 42 Pac. 952; *Philadelphia Lumber Co. v. Bethea*, 57 Ark. 76, 20 S. W. 808; *Sappenfield v. Main St., etc., R. R. Co.*, 91 Cal. 48, 27 Pac. 590; *Davis v. Augusta Factory*, 92 Ga. 712, 18 S. E. 974; *Lamotte v. Boyce*, 105 Mich. 545, 63 N. W. 517; *Stiller v. Bohn Mfg. Co.*, 80 Minn. 1, 82 N. W. 981; *Missouri Pac. Ry. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044; *Kern v. De Castro, etc., Co.*, 125 N. Y. 50, 25 N. E. 1071; *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31, 36 N. E. 813; *Augerstein v. Jones*, 139 Pa. St. 183, 21 Atl. 24, 23 Am. St. Rep. 174; *Carr v. Am. Locomotive Co.*, 26 R. I. 180; *Norfolk, etc., Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Seldomridge v. Chesapeake, etc., Ry. Co.*, 46 W. Va. 569, 33 S. E. 293. "The test is not whether the master omitted to do something he could have done, but whether, in selecting tools and machinery for their use, he was reasonably prudent and careful; not whether better machinery might not have been obtained, but whether that provided was adequate and proper for the use to which it was to be applied." *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483. See *Bradbury v. Goodwin*, 108 Ind. 286. A master is not liable for using an appliance of a kind which has long been safely used and from the use of which an injury could not reasonably be anticipated. *Burke v. Witherbee*, 98 N. Y. 562; *Kitteringham v. Sioux*

City, &c., Co., 62 Ia. 285; *Sjogren v. Hall*, 53 Mich. 274; *Richards v. Rough*, Id. 212. Where the master furnished suitable windlass, ropes, &c., for building a windmill, he was held not liable for negligence of the men in guying the windlass. That is a servant's duty. *Peschel v. Chicago, &c., Co.*, 62 Wis. 338, and see *Floyd v. Sugden*, 134 Mass. 563; *Robinson v. Blake Mfg. Co.*, 143 Mass. 528. He is liable for using a safe machine in an unusual and dangerous way without warning servant. *White v. Nonantum, &c., Co.*, 144 Mass. 276.

40—*Tompkins v. Marine Engine etc., Co.*, 70 N. J. L. 330, 58 Atl. 393; *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. Rep. 633, 13 L. R. A. 374; *Leonard v. Herrmann*, 195 Pa. St. 222, 45 Atl. 723; *Benson v. New York, etc., R. R. Co.*, 23 R. I. 147, 49 Atl. 689; *Chattanooga Machinery Co. v. Hargraves*, 111 Tenn. 476, 78 S. W. 105; *Geno v. Fall Mt. Paper Co.*, 68 Vt. 568, 35 Atl. 475; *Fritz v. Salt Lake, etc., Elec. Lt. Co.*, 18 Utah, 493, 56 Pac. 90; *Boyle v. Union Pac. R. R. Co.*, 25 Utah, 420, 71 Pac. 988; *Innes v. Milwaukee*, 96 Wis. 170, 70 N. W. 1064; *Mississippi Riv. Logging Co. v. Schneider*, 74 Fed. 195, 20 C. C. A. 390; *Nyback v. Champagne Lumber Co.*, 109 Fed. 732, 48 C. C. A. 632. If there are several appliances in common use for the same purpose, the employer is held to have an absolute discretion in selecting according to his own judgment. *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910, 27 Am. St. Rep. 633, 13 L. R. A. 374.

said to be sufficient if he furnishes such as, by ordinary care, may be used without danger.⁴¹ If the master uses the appliance of another in his business he is under the same duty to see that it is in proper condition as though it was his own.⁴² In any case if the master neglects his duty and the servant is injured as a consequence of such neglect, the master is liable.⁴³

If a servant is injured by reason of an improper use by himself or his fellow servant of a machine or appliance,⁴⁴ or by reason of selecting and using a defective or improper tool or appliance where the master has provided sound and suitable ones,⁴⁵ he cannot recover against the master.

41—Lehigh, etc., Coal Co. v. Hayes, 128 Pa. St. 294, 18 Atl. 387, 15 Am. St. Rep. 680, 5 L. R. A. 441.

42—Frolich v. Cranker, 21 Ohio C. C. 615; Sharpley v. Wright, 205 Pa. St. 253, 54 Atl. 896; Baltimore, etc., R. R. Co. v. Mackey, 157 U. S. 72, 15 S. C. Rep. 491, 39 L. Ed. 624.

43—Louisville, etc., R. R. Co. v. Coulton, 86 Ala. 129, 5 So. 459; Nixon v. Selby Smelting Co., 102 Cal. 458, 36 Pac. 803; Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788; Monmouth M. & M. Co. v. Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187; Orr v. Southern Bell Tel. Co., 130 N. C. 627, 41 S. E. 880; Geldard v. Marshall, 43 Ore. 438, 73 Pac. 330; Bowers v. Union Pac. R. R. Co., 4 Utah, 215, 7 Pac. 251; Richmond, etc., R. R. Co. v. George, 88 Va. 223, 13 S. E. 429; Virginia, etc., Wheel Co. v. Chalkley, 98 Va. 62, 34 S. E. 976; and cases cited in preceding notes.

44—Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Gribben v. Yellow Aster M. & M. Co., 142 Cal. 248, 75 Pac. 839; Helling v. Schindler, 145 Cal. 303,

78 Pac. 710; Small v. Allington, etc., Mfg. Co., 94 Me. 551, 48 Atl. 177; South Baltimore Car Works v. Schaeffer, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560; Gittens v. Wm. Porten Co., 90 Minn. 512, 97 N. W. 378; McLaughlin v. Camden Iron Works, 60 N. J. L. 557, 38 Atl. 677; Prescott v. Ball Engine Co., 176 Pa. St. 459, 35 Atl. 224, 53 Am. St. Rep. 683. If a servant is injured in an attempt to repair a machine when it is his duty to report the trouble to a mechanic, he cannot recover. McCue v. National Starch Mfg. Co., 142 N. Y. 106, 36 N. E. 809. So where he violates positive directions as to the use of a machine. Card v. Wilkins, 61 N. J. L. 296, 39 Atl. 676. And where a servant patched up a ladder in a negligent way and a fellow servant was injured thereby, the master was held not liable. Higgins v. Higgins, 188 Mass. 113.

45—Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Towne v. United Elec., etc., Co., 146 Cal. 766, 81 Pac. 124; Green v. Sansom, 41 Fla. 94, 25 So. 332; Bolton v. Georgia Pac. Ry. Co., 83 Ga. 659, 10 S. E. 197; East Tenn., etc., Ry. Co. v.

The rule in regard to tools and appliances embraces the materials with which the servant is to work. It is the duty of the master to exercise reasonable care to furnish reasonably safe and suitable materials.⁴⁶ Animals, such as horses, mules, etc., are appliances within the rule. If they are vicious and the servant is not warned of their propensities, the master will be liable for resulting injuries.⁴⁷ So it is held that "the duty to provide reasonably safe instrumentalities embraces the obligation to provide a sufficient number of servants to perform the work safely. Proper and sufficient help and assistance are as essential in the performance of the servant's duty, where not safely performed alone, as safe instrumentalities, and the law enjoins upon the master the duty of providing them."⁴⁸

Perkins, 88 Ga. 1, 13 S. E. 952; Snyder *v.* Viola M. & S. Co., 3 Idaho, 28, 26 Pac. 127; Rawley *v.* Collian, 90 Mich. 31, 51 N. W. 350; Thomas *v.* Ann Arbor R. R. Co., 114 Mich. 59, 72 N. W. 40; Hefner *v.* Northern Pac. R. R. Co., 45 Minn. 471, 48 N. W. 1, 526; Maher *v.* Thropp, 59 N. J. L. 186, 35 Atl. 1057; Guggenheim Smelting Co. *v.* Flanigan, 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145; Campbell *v.* Gillespie Co., 69 N. J. L. 279, 55 Atl. 276; Vogel *v.* Am. Bridge Co., 180 N. Y. 373, 73 N. E. 1; Prescott *v.* Ball Engine Co., 176 Pa. St. 459, 35 Atl. 224, 53 Am. St. Rep. 683; Higgins *v.* Southern Pac. Co., 26 Utah, 164, 72 Pac. 690.

46—Currelli *v.* Jackson, 77 Conn. 115; Treka *v.* Burlington, etc., Ry. Co., 100 Ia. 205, 69 N. W. 422; Neven *v.* Sears, 155 Mass. 303, 29 N. E. 472; Van den Heurel *v.* National Furnace Co., 84 Wis. 636, 54 N. W. 1016.

47—Farmer *v.* Cumberland Tel. & Tel. Co., 86 Miss. 55; Leigh *v.* Omaha St. Ry. Co., 36 Neb. 131, 54 N. W. 134; George H. Ham-

mond Co. *v.* Johnson, 38 Neb. 244, 56 N. W. 967; Helmke *v.* Stetler, 69 Hun, 107, 23 N. Y. S. 392; Donahue *v.* Enterprise R. R. Co., 32 S. C. 299, 11 S. E. 95, 17 Am. St. Rep. 854; Wilson *v.* Sioux Consolidated Min. Co., 16 Utah, 392, 52 Pac. 626; Wysocki *v.* Wisconsin, etc., Co., 121 Wis. 96, 98 N. W. 950.

48—Peterson *v.* Am. Grass Twine Co., 90 Minn. 343, 96 N. W. 913. So, also, Illinois Cent. R. R. Co. *v.* Langan, 116 Ky. 318, 76 S. W. 32; Hill *v.* Big Creek Lumber Co., 108 La. 162, 32 So. 372, 58 L. R. A. 346; Haviland *v.* Kansas City, etc., R. R. Co., 172 Mo. 106, 72 S. W. 515; Wright *v.* Southern Pac. Co., 14 Utah, 383, 46 Pac. 374; Johnson *v.* Ashland Water Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243; Bodie *v.* Charleston, etc., Ry. Co., 66 S. C. 302, 44 S. E. 943. In Texas, etc., Ry. Co. *v.* Rogers, 57 Fed. 378, 6 C. C. A. 403, an insufficiency of men is held to be a patent defect, the risk of which the servant assumes if he enters or continues in the em-

Duty of Master as to Supervision and Regulation. Where the business of the master is of such a nature as to require supervision and direction it is his duty to provide therefor, and he may be liable for a neglect so to do.⁴⁹ So where the business is dangerous and complicated it is the duty of the master to make and enforce such reasonable rules and regulations for the government of the men in his employ and the conduct of the business, as may be necessary to insure the safety of his servants, in so far as that is reasonable and practicable.⁵⁰ Where a ser-

ployment. And so in *Grout v. Tacoma Eastern R. R. Co.*, 33 Wash. 524, 74 Pac. 665; *Skiff v. Eastern Counties R. R. Co.*, 9 Exch. 233, 24 Eng. L. & Eq. 396; *World v. Georgia R. R. Co.*, 99 Ga. 283, 25 S. E. 646; *Mayott v. Norcross Bros.*, 24 R. I. 187, 52 Atl. 889.

49—*McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; *Schroeder v. Chicago*, etc., R. R. Co., 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; *Carlson v. N. W. Tel. Exch. Co.*, 63 Minn. 428, 65 N. W. 914; *Trainor v. Philadelphia*, etc., R. R. Co., 137 Pa. St. 148, 20 Atl. 632; *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160.

50—*Dowd v. New York*, etc., R. R. Co., 170 N. Y. 459, 63 N. E. 541; *Moran v. Rockland*, etc., St. Ry. Co., 99 Me. 127, 58 Atl. 676; *Abel v. Delaware*, etc., Canal Co., 128 N. Y. 662, 28 N. E. 663; *Francis v. Kansas City*, etc., R. R. Co., 110 Mo. 387, 19 S. W. 935; *Boyle v. Union Pac. R. R. Co.*, 25 Utah, 420, 71 Pac. 988; *Johnson v. Union Pac. Coal Co.*, 28 Utah, 46, 76 Pac. 1089; *Regan v. St. Louis, &c., Co.*, 93 Mo. 348, 6 S. W. 371; *Sheehan v. New York, &c., Co.*, 91 N. Y. 332; *Abel v. Pres., &c., Del., &c., Co.*, 103 N. Y. 581. But he need not adopt the safest system. *Hannibal, &c., Co. v. Kanaley*, 39 Kan.

1, 17 Pac. 324. The servant takes the risk of his fellow servant's failure to obey the rules. *Slater v. Jewett*, 85 N. Y. 61. And see generally on the subject of rules and regulations. *McQueen v. Mechanics Institute*, 107 Cal. 163, 40 Pac. 114; *Brush Elec. L. & P. Co. v. Wells*, 110 Ga. 192, 35 S. E. 365; *Stucke v. Orleans R. R. Co.*, 50 La. Ann. 172, 23 So. 342; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 556, 8 Am. St. Rep. 787, 3 L. R. A. 559; *Byrnes v. New York*, etc., R. R. Co., 113 N. Y. 251, 21 N. E. 50, 4 Am. St. Rep. 151; *McGovern v. Central Vt. R. R. Co.*, 123 N. Y. 280, 25 N. E. 373; *Doing v. New York*, etc., R. R. Co., 151 N. Y. 579, 45 N. E. 1028; *Kelly Island L. & T. Co. v. Pachuter*, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep. 706; *Hartvig v. Northern Pac. Lumber Co.*, 19 Ore. 522, 25 Pac. 358; *Wild v. Oregon Short Line*, 21 Ore. 159, 27 Pac. 954; *Hough v. Grant's Pass Power Co.*, 41 Ore. 531, 69 Pac. 655; *Virginia Iron, etc., Co. v. Hamilton*, 107 Tenn. 705, 65 S. W. 401; *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867; *Galveston, etc., Ry. Co. v. Smith*, 76 Tex. 611, 13 S. W. 562, 18 Am. St. Rep. 78; *International, etc., Ry. Co. v. Hinzie*, 82 Tex. 623, 18 S. W. 681; *Texas, etc., Ry. Co. v.*

vant is set to work in a place where he is exposed to danger from the doing of work by other servants not connected with his own, all the authorities agree that it is the duty of the master to provide for giving warning of the danger, if it is reasonably practicable to do so.^{50a} Some of the authorities and the majority hold that if the master provides a reasonably competent person to give such warning, he has discharged his whole duty in the premises and that the neglect of such person to give the warning is the neglect of a fellow servant for which he is not responsible.⁵¹ Other cases hold that the negligence of such person is the negligence of the master.⁵²

Echols, 87 Tex. 339, 27 S. W. 60, 28 S. W. 517; Texas, etc., Ry. Co. v. Eberheart, 91 Tex. 321, 43 S. W. 510; Houston, etc., R. R. Co. v. Stewart, 92 Tex. 540, 50 S. W. 333; Richmond, etc., R. R. Co. v. Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827; Smith v. Chicago, etc., Ry. Co., 91 Wis. 503, 65 N. W. 183.

50a—*Railway Co. v. Murphy*, 50 Ohio St. 135, 33 N. E. 403, and cases cited in next two notes.

51—*Donovan v. Ferris*, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25; *State v. South Baltimore Car Works*, 99 Md. 461, 58 Atl. 447; *Galvin v. Pierce*, 72 N. H. 79, 54 Atl. 1014; *MERCHANTS, etc., OIL CO. v. Burns*, 96 Tex. 573, 74 S. W. 758; *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; *Portance v. Lehigh Val. Coal Co.*, 101 Wis. 574, 77 N. W. 875, 70 Am. St. Rep. 932; *Little Rock, etc., R. R. Co. v. Barry*, 84 Fed. 944, 28 C. C. A. 644. In *McLaine v. Head, etc., Co.*, 71 N. H. 294, 52 Atl. 545, 93 Am. St. Rep. 522, 58 L. R. A. 462, the court says: “The individual who employs two laborers to dig a ditch is not required to stand over them to give warning, or to pre-

vent one from throwing earth upon another. Neither is he required to employ a watchman to give warning to the one when the other is about to throw a shovelful of earth into or out of the trench. There is no occasion for such a precaution, not because the rule of law is different, but because ordinary care does not demand it in such a case. As the number of servants is enlarged and the work extended, the probability of injury of one by the other is increased. When the nature of the work reasonably demands rules or precautions, the master's duty arises. The master's duty is performed by the adoption of a reasonably suitable method. If ordinary care requires that a warning of dangers arising from the work should from time to time be given to his servants as the work progresses, it is the master's duty to provide for such a warning. Having made provision for the warning by entrusting the duty to a competent person, he is not liable for the negligence of the person entrusted with the duty.”

52—*Nelson v. Willey S. S. & Nav. Co.*, 26 Wash. 548, 67 Pac.

***Negligence in Employing or retaining Fellow Servants.** The master's negligence may also consist in employing servants who are wanting in the requisite care, skill or prudence for the business entrusted to them, or in continuing such persons in his employ after their un-fitness has become known to him, or when, by the exercise of ordinary care, it would have been known. "The servant when he engages to run the risks of the service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care."⁵³ But if an employe knows that his

237; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. Rep. 847, 58 L. R. A. 313; *Western Elec. Co. v. Hanselman*, 136 Fed. 564, — C. C. A. —. In a New Jersey case the plaintiff worked in a stone quarry but not at blasting. His place was a dangerous one unless warning was given when a blast was fired. It was the foreman's duty who fired the blasts to give warning, which he did by shouting fire. The men were to keep at work until the word was given and then to seek safety. The neglect of the foreman to give the warning was held to be the neglect of the master. *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 38 Atl. 835; affirmed in *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253, 39 Atl. 764, 39 L. R. A. 834. In the latter case the court of errors and appeals says: "The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by the workmen scattered about the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen and proper warning given, the quarry became an unsafe place for the workmen, but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place should be kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast. In selecting the person who was to fire the blast as the person to give the warning, the defendant probably chose the man best able to perform that duty, but as the defendant's responsibility extended beyond the selection of an agent and included the warning itself, it must answer for negligence in the giving of warning, no matter how fit was the chosen agent." p. 255.

53—ALDERSON, B., in *Hutchinson v. Railway Co.*, 5 Exch. 343. See Alabama, &c., *R. R. Co. v. Waller*, 48 Ala. 459; *New Orleans, &c., R. R. Co. v. Hughes*, 49 Miss. 258; *Moss v. Pacific R. R. Co.*, 49 Mo. 167, 8 Am. Rep. 126; *Mich. Cent. R. R. Co. v. Dolan*, 32 Mich.

fellow servant is incompetent and continues in the employment without objection, he takes the risk of such incompetency.⁵⁴ If the master promises to discharge the incompetent servant, he may continue in the employment a reasonable time at the master's risk.⁵⁵

The obligation to employ suitable servants is precisely the same as that to provide suitable machinery and appliances for the business. It has been thus stated in a railroad case: "A railroad corporation is bound to provide proper road, machinery and equipment, and proper servants. It must do this through appropriate officers. If acting through appropriate officers it knowingly and negligently employs incompetent servants, it is liable for an injury occasioned to a fellow servant by their incompetency. If it continues in its employment an incompetent servant after his incompetency is known to *its officers, [*661] or is so manifest that its officers, using due care, would have known it, such continuance in employment is as much a breach of duty and a ground of liability as the original employment of an incompetent servant."⁵⁶ The care to be exer-

510; Columbus, &c., R. R. Co. v. Troesch, 68 Ill. 545, 18 Am. Rep. 578; Hogan v. Cent. Pacific R. R. Co., 49 Cal. 128; Memphis, &c., R. R. Co. v. Thomas, 51 Miss. 637; United States, &c., Co. v. Wilder, 116 Ill. 100.

54—Latremoile v. Bennington, etc., R. R. Co., 63 Vt. 336, 22 Atl. 656; McCharles v. Horn Silver Min., etc., Co., 10 Utah, 470, 37 Pac. 733. Otherwise if he does not know, Hicks v. Southern Ry. Co., 63 S. C. 559, 41 S. E. 753.

55—Lyberg v. Northern Pac. R. R. Co., 39 Minn. 15, 38 N. W. 632; Gray v. Red Lake Falls Lumber Co., 85 Minn. 24, 88 N. W. 24; Wust v. Erie City Iron Works, 149 Pa. St. 263, 24 Atl. 291; Maitland v. Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137.

56—GRAY, J., in Gilman v. East-

ern R. R. Co., 13 Allen, 433. The same point is strongly put by FOLGER, J., in Laning v. N. Y. Cent. R. R. Co., 49 N. Y. 521, 533. See, also, Tarrant v. Webb, 18 C. B. 797; S. C. 37 E. L. & Eq. 281; Illinois Cent. R. R. Co. v. Jewell, 46 Ill. 99, 92 Am. Dec. 240; Harper v. Indianapolis, &c., R. R. Co., 47 Mo. 567, 4 Am. Rep. 353, and cases cited; Moss v. Pacific R. R. Co., 49 Mo. 167; Pittsburgh, &c., R. R. Co. v. Ruby, 33 Ind. 294, 10 Am. Rep. 111; Davis v. Detroit, &c., R. R. Co., 20 Mich. 105, 4 Am. Rep. 364; McMahon v. Davidson, 12 Minn. 357; Weger v. Pennsylvania R. R. Co., 55 Pa. St. 460; Huntingdon, &c., R. R. Co. v. Decker, 82 Pa. St. 119; S. C. 84 Pa. St. 419; Chapman v. Erie R. Co., 55 N. Y. 579; Blake v. Maine Centr. R. R. Co., 70 Me. 60, 35 Am. Rep. 297;

cised by the master in employing a servant is in proportion to the danger arising from incompetence and unskillfulness. "Where the service in which the servant is employed is such as to endanger the life and persons of co-employes, upon the plainest principles of justice and good faith, the master, upon engaging such servant, should be required to make reasonable investigation into his character, skill and habits of life."⁵⁷

The burden is on the plaintiff to show that the master has been negligent in employing or retaining the servant whose act or omission caused the injury.⁵⁸

Maxwell v. Hannibal, &c., Co., 85 Mo. 95; *Ind. Mfg. Co. v. Millican*, 87 Ind. 87; *Nordyke, &c., Co. v. Van Sant*, 99 Ind. 188; *Gier v. Los Angeles C. E. Ry. Co.*, 108 Cal. 129, 41 Pac. 22; *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; *Scott v. Iowa Tel. Co.*, 126 Ia. 524, 102 N. W. 432; *Norfolk, etc., R. R. Co. v. Hoover*, 79 Md. 253, 29 Atl. 994, 47 Am. St. Rep. 392, 25 L. R. A. 710; *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842; *Smith v. Backus Lumber Co.*, 64 Minn. 447, 67 N. W. 358; *Williams v. Missouri Pac. Ry. Co.*, 109 Mo. 475, 18 S. W. 1098; *Whittaker v. Delaware, etc., Canal Co.*, 126 N. Y. 544, 27 N. E. 1042; *Mexican Nat. Ry. Co. v. Mussette*, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642; *Texas, etc., Ry. Co. v. Johnson*, 89 Tex. 519, 35 S. W. 1042; *Handley v. Daly Min. Co.*, 15 Utah, 176, 49 Pac. 295, 62 Am. St. Rep. 916; *Kamp v. Coxe Bros. & Co.*, 122 Wis. 206, 99 N. W. 366; *Baltimore, etc., R. R. Co. v. Henthorne*, 73 Fed. 634, 19 C. C. A. 623. In *McDermott v. Hannibal, &c., Co.*, 87 Mo. 285, it is held that the master is liable whether he knew the un-

fitness or not, if the servant injured did not. The duty cannot be escaped by delegation. *Fay v. Minn., &c., Co.*, 30 Minn. 231; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Mann v. Pres., &c., Del., &c., Co.*, 91 N. Y. 495. As to the degree of care required in the selection of servants, see *Mobile, &c., R. R. Co. v. Thomas*, 42 Ala. 672, 715; *Alabama, &c., R. R. Co. v. Waller*, 48 Ala. 459. It is not enough that such care as is ordinary is used if that is not reasonable under all the circumstances. *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454. If a servant, originally fit, is retained after the master might, with reasonable care, know he has become unfit, the master is liable. *Mich. Centr., &c., Co. v. Gilbert*, 46 Mich. 176; *Hilts v. Chicago, &c., Ry. Co.*, 55 Mich. 437. See *Neilon v. Kansas, &c., Ry. Co.*, 85 Mo. 599.

57—*Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244.

58—*Gier v. Los Angeles C. E. Ry. Co.*, 108 Cal. 129, 41 Pac. 22; *Beasley v. San Jose Fruit Packing Co.*, 92 Cal. 388, 28 Pac. 485; *National Fertilizer Co. v. Travis*, 102 Tenn. 16, 49 S. W. 832; *Weeks*

Effect of Master's Promise to Repair or Remove Defect or Danger. It is also negligence for which the master may be held responsible, if knowing of any peril which is known to the

v. Scharer, 111 Fed. 330, 49 C. C. A. 372. It must appear that the master had notice or knowledge of the incompetency or that he might have had it by the exercise of ordinary care. *Whittaker v. Delaware, etc., Canal Co.*, 126 N. Y. 544, 27 N. E. 1042; *National Fertilizer Co. v. Travis*, 102 Tenn. 16, 49 S. W. 832; *Klieforth v. Northwestern Iron Co.*, 98 Wis. 495, 74 N. W. 356. Notice to one who has power to hire and discharge or suspend is notice to the master. *Baltimore, etc., R. R. Co. v. Henthorne*, 73 Fed. 634, 19 C. C. A. 623; *Weeks v. Scharer*, 111 Fed. 330, 49 C. C. A. 372. But notice to one who merely directs or supervises is held not sufficient. *Ibid.* The mere proof of specific careless acts is not enough to charge the master with knowledge of his incompetence. *Huffman v. Chicago, &c., Ry. Co.*, 78 Mo. 50; *Cameron v. New York, etc., R. R. Co.*, 145 N. Y. 400, 40 N. E. 1. Nor is a single negligent act of a servant enough to show him incompetent. *Balt., &c., Co. v. Neal*, 65 Md. 438. Nor is his laziness. *Corson v. Maine Centr., &c., Co.*, 76 Me. 244. As to proof of general reputation for incompetency, see *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; *Park v. New York, etc., R. R. Co.*, 155 N. Y. 215, 49 N. E. 674, 63 Am. St. Rep. 663. The whole matter is ably summed up in *Southern Pac. Co. v. Hetzer*, 135 Fed. 272, — C. C. A. —, as follows: "It is the duty of the master

to exercise reasonable care to employ competent servants, and, when he has exercised this care, this duty is fully discharged. Another duty of the master is to discharge a servant whom he has employed with due care, when he knows, or by the exercise of reasonable care would have known, that the servant has contracted the habit or character of negligence or of lack of skill, so that he has become incompetent. The diligence or care required of the master to learn the habits or characters of servants whom he has employed with due care is not of that degree which is required in the employment of servants or in his inspection of machinery that deteriorates with its use, for the reason that careful and skillful men grow more careful and skillful, in the practice of their occupation, and the legal presumption is that servants once competent continue to be so. Servants assume the risk of the occasional acts of negligence of their fellow servants, and the master is not liable for them. The servants may by notice to the master cast upon him the risk of the habitual negligence of their co-employes. Evidence of specific acts of negligence known to the master, and acts of negligence, like those which cause the death of passengers, so notorious that the master must have known of them if he exercised reasonable diligence, is admissible to prove the habit or character of a servant, who was employed with due

servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover the assurances remove all ground

*for the argument that the servant, by continuing the [*662] employment, engages to assume its risks. So far as the particular peril is concerned the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature.⁵⁹

If the master promises to repair the defect or remove the danger he thereby assumes the risk arising therefrom, and the servant may continue for a reasonable time at the master's risk.⁶⁰

care, for incompetence. But specific acts of negligence, of lack of skill, or of incompetence, of which the master had no notice or knowledge prior to the alleged accident, are inadmissible to establish the incompetence of a servant who was employed with due care." p. 280.

59—See *Patterson v. Wallace*, 1 Macq. H. L. 748, S. C. 28 Eng. L. & Eq. 48; *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 521; *Patterson v. Pittsburgh, &c., R. R. Co.*, 76 Penn. St. 389, 18 Am. Rep. 412; *Conroy v. Vulcan Iron Works*, 6 Mo. App. 102. The master is liable if the defect or danger is such that an ordinarily prudent servant would continue at the work after promise. *Hough v. Railway Co.*, 100 U. S. 213. Otherwise not. Dist. of

Col. *v. McElligott*, 117 U. S. 621. If in the particular case the business of the master is entrusted to another, his assurance must be taken as that of the master himself, but the assurance of any subordinate servant could not be so taken. *Fort Wayne, &c., R. R. Co. v. Gildersleeve*, 33 Mich. 133. See *Wilson v. Winona, &c., Co.*, 37 Minn. 326, 33 N. W. 908; *Indiana, &c., Co., v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824. It is sufficient if the promise is made not to plaintiff individually but to his gang of workmen in his presence. *Atchison, &c., Co. v. Sadler*, 38 Kan. 128, 16 Pac. 46.

60—*Anderson v. Seropian*, 147 Cal. 201; *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714; *Chicago, etc., Co. v. Van Dam*, 149

As to what is a reasonable time is a question of fact for the

Ill. 337, 36 N. E. 1024; *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161; *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Foster v. Chicago, etc., Ry. Co.*, 127 Ia. 84; *Southern Kansas Ry. Co. v. Croker*, 41 Kan. 747, 21 Pac. 785, 13 Am. St. Rep. 320; *Missouri, etc., Ry. Co. v. Puckett*, 62 Kan. 770, 64 Pac. 631; *Atchison, etc., Ry. Co. v. Sledge*, 68 Kan. 321, 74 Pac. 1111; *Breckenridge Co. v. Hicks*, 94 Ky. 362, 22 S. W. 554, 42 Am. St. Rep. 361; *Brown v. Levy*, 108 Ky. 163, 55 S. W. 1079; *Roux v. Blodgett, etc., Co.*, 85 Mich. 519, 48 N. W. 1092, 24 Am. St. Rep. 102, 13 L. R. A. 728; *Lyberg v. Northern Pac. R. R. Co.*, 39 Minn. 15, 38 N. W. 632; *Smith v. Backus Lumber Co.*, 64 Minn. 447, 67 N. W. 358; *Gray v. Red Lake Falls Lumber Co.*, 85 Minn. 24, 88 N. W. 24; *Taylor v. Nevada, etc., Ry. Co.*, 26 Nev. 415, 55 Pac. 828; *Dunkerly v. Webendorfer Machine Co.*, 71 N. J. L. 160; *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 66 N. E. 979, 95 Am. St. Rep. 585; *Jones v. New Am. File Co.*, 21 R. I. 125, 42 Atl. 509; *Collins v. Harrison*, 25 R. I. 489, 56 Atl. 678, 64 L. R. A. 156; *Bodie v. Charleston, etc., Ry. Co.*, 61 S. C. 468, 39 S. E. 715; *Powers v. Standard Oil Co.*, 53 S. C. 358, 31 S. E. 276; *Railroad Co. v. Kenley*, 92 Tex. 207, 21 S. W. 326; *Texas, etc., R. R. Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971; *Hilje v. Hettich*, 95 Tex. 321, 67 S. W. 90; *Virginia, etc., Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Newport News Pub. Co. v. Beau-meister*, 102 Va. 677, 47 S. E. 821; *Virginia, etc., Co. v. Harris*, 103 Va. 708, 49 S. E. 991; *Crooker v. Pacific, etc., Co.*, 29 Wash. 30, 69 Pac. 359; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 447, 9 Am. St. Rep. 806; *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 66; *Maitland v. Gilbert Paper Co.*, 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137; *Yerkes v. Northern Pac. Ry. Co.*, 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961; *New Jersey, etc., R. R. Co. v. Young*, 49 Fed. 723, 1 C. C. A. 428. "There can be no question that, when a master has expressly promised to repair or remedy a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or within any period which would not preclude all reasonable expectation that the promise might be kept." *Rothenberger v. N. W. Consolidated Milling Co.*, 57 Minn. 461, 59 N. W. 531. "The assurance of the master that the defect shall be remedied is an agreement by him that he will assume the risk for a reasonable time. This promise will be implied to continue only a reasonable time, and the injury must have occurred within the time within which the defects were promised to be removed." *Trotter v. Furniture Co.*, 101 Tenn. 257, 47 S. W. 425. In *Dempsey v. Sawyer*, 95 Me. 295, 49 Atl. 103, it is held that the master does not necessarily assume the risk by making the promise but that it is a question of fact as to which assumes the risk in such cases. The rule does not apply to a servant who is to execute the repairs.

jury.⁶¹ After a reasonable time has elapsed, or, if a definite time is fixed, then after that has expired, the risk is again upon the servant.⁶² Though the risk is on the master, the servant must exercise a reasonable degree of care in view of the danger to which he is exposed.⁶³ If the danger is obvious and such that

Shackleton v. Manistee, etc., R. R. Co., 107 Mich. 16, 64 N. W. 728. The promise need not be made to plaintiff in person but, if made to others and communicated to plaintiff it is sufficient. *Odin Coal Co. v. Tadlock*, 216 Ill. 624, 75 N. E. 322.

61—*Rothenberger v. N. W. Consolidated Milling Co.*, 57 Minn. 461, 59 N. W. 531; *Smith v. Backus Lumber Co.*, 64 Minn. 447, 67 N. W. 358; *Taylor v. Nevada, etc., Ry. Co.*, 26 Nev. 415, 55 Pac. 828; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 447, 9 Am. St. Rep. 806.

62—*Rice v. Eureka Paper Co.*, 174 N. Y. 385, 66 N. E. 979, 95 Am. St. Rep. 585; *Jones v. New Am. File Co.*, 21 R. I. 125, 42 Atl. 509; *Trotter v. Furniture Co.*, 101 Tenn. 257, 47 S. W. 425; *Texas, etc., R. R. Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971; *Hilje v. Hettich*, 95 Tex. 321, 67 S. W. 90; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 447, 9 Am. St. Rep. 806. Where the repairs could be made in two or three hours and the plaintiff was injured on the fourth day, the reasonable time was held to have expired. *Gunning System v. LaPointe*, 212 Ill. 274, 72 N. E. 393. In this case the court says: "From a careful review of the authorities, we are disposed to the view that where the servant finds that the machinery with which he is to work is out of repair and dangerous to work with, or that the

place in which he is to work is dangerous, he may complain to the master and exact from him a promise to repair and if the defect is not such as to so endanger the person of the servant that a reasonably prudent man would not continue to work with the machinery or in the place assigned the servant may continue the work under the promise to repair, without being held, as a matter of law, to have assumed the risk. If the promise is to repair by a fixed time, then after the expiration of the time fixed the servant assumes the risk of the defects complained of. If the promise to repair is without fixing the time within which the repairs shall be made, the servant may continue the work for a reasonable time, taking the character of the defect into consideration, within which the repairs could or ought to be made, and at and after the expiration of such reasonable time within which to make the repairs, if they are not made and if the defects are open and known to the servant and no new promise to repair is made and the servant continues the work, he assumes the risks incident to the defects, of which he complained." pp. 279, 280.

63—*Jones v. New Am. File Co.*, 21 R. I. 125, 42 Atl. 509; *Collins v. Harrison*, 25 R. I. 489, 56 Atl. 678, 64 L. R. A. 156; *Gulf, etc., Ry. Co. v. Brentford*, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377;

a reasonably prudent man would not incur it the rule does not apply and the servant continues at his own risk.⁶⁴

Negligence of Master and Fellow Servant Combined. If a servant is injured by the negligence of a fellow servant and that of the master combined, he may recover of the master for the injury,⁶⁵ for the master is at least one of two joint wrong-

Johnson v. Anderson, etc., Co., 31 Wash. 554, 72 Pac. 107. See *Missouri, etc., Ry. Co. v. Puckett*, 62 Kan. 770, 64 Pac. 631. Where the promise is to repair at a definite time the servant may assume that the repairs have been made as promised. *Olney v. Boston, etc., R. R. Co.*, 71 N. H. 427, 52 Atl. 1097; *Nelson v. Shaw*, 102 Wis. 274, 78 N. W. 417. *Contra Schultz v. Rohe*, 149 N. Y. 132, 43 N. E. 420. If the repairer assures the servant that the repairs are made and that the machine is all right he may rely upon the assurance. *Lawrence v. Hagemeyer*, 93 Ky. 591, 20 S. W. 704.

64—*Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161; *Indianapolis, etc., Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 5 Am. St. Rep. 578; *Meador v. Lake Shore, etc., Ry. Co.*, 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384; *Atchison, etc., Ry. Co. v. Sledge*, 68 Kan. 321, 74 Pac. 1111; *Shemwell v. Owensboro, etc., R. R. Co.*, 117 Ky. 556; *Newport News Pub. Co. v. Beau-meister*, 102 Va. 677, 47 S. E. 821; *Virginia, etc., Co. v. Harris*, 103 Va. 708, 49 S. E. 991; *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 66. In *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393, the supreme court of Illinois says: “It is not in all cases that the servant may

believe himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended and the servant exempted from its application under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and the danger incident thereto or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor or the tools used are only those of simple construction, with which the servant is as familiar and as fully understands as the master.” p. 279.

65—*Paulmier v. Erie R. R. Co.*, 34 N. J. 151; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700; *Pittsburgh, &c., Co. v. Henderson*, 37 Ohio St. 549; *Cone v. Del., &c., Co.*, 81 N. Y. 206, 37 Am. Rep. 491; *Ellis v. New York, &c., Co.*, 95 N. Y. 546; *Stringham v. Stewart*, 100 N. Y. 516; *Booth v. Boston, &c., Co.*, 73 N. Y. 38; *Elmer v. Locke*, 135 Mass. 575; *Tanner v. Harper*, 32 Colo. 156, 75 Pac. 404; *Colley v. Southern Cotton Oil Co.*, 120 Ga. 258, 47 S. E. 932; *Armour v. Golkowska*, 202 Ill. 144, 66 N. E.

doers in such a case, and as such is responsible under rules heretofore given.

Negligence of Servant in Distinct Business. As the servant only undertakes to assume the hazards of his own employment, it must follow that if the master carries on another and wholly distinct business, an injury occasioned by the negligence of a servant in such other business, not being within the contemplation of the employment, will give ground for an action under the same circumstances which would render liable any stranger who might have been the employer of the negligent servant.

Liability Where the Master Delegates His Superintendence. The foregoing enumeration of cases is sufficient to show that the master is liable in all cases where the injury has resulted *from his own negligence, and not from any of [*663] the customary risks of the employment.⁶⁶ But there

- 1037; Missouri Malleable Iron Co. 557, 25 N. E. 915, 19 Am. St. Rep. v. Dillon, 206 Ill. 145, 69 N. E. 12; Siegel, Cooper & Co. v. Treka, 218 Ill. 559; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Buehner v. Creamery Package Co., 124 Ia. 445, 100 N. W. 345, 104 Am. St. Rep. 354; Schwarzschild v. Drysdale, 69 Kan. 119, 76 Pac. 441; McGinn v. McCormick, 109 La. 396, 33 So. 382; Fuller v. Tremont Lumber Co., 114 La. 266, 38 So. 164; McDonald v. Mich. Cent. R. R. Co., 108 Mich. 7, 65 N. W. 597; Noble v. Bessemer S. S. Co., 127 Mich. 103, 86 N. W. 520, 89 Am. St. Rep. 461, 54 L. R. A. 456; Young v. Shickle, etc., Co., 103 Mo. 324, 15 S. W. 771; Cole v. St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Freeman v. Sand Couler Coal Co., 25 Mont. 194, 64 Pac. 347; Matthews v. Clough, 70 N. H. 600, 49 Atl. 637; Campbell v. Gillespie Co., 69 N. J. L. 279, 55 Atl. 276; Coppins v. New York Central, etc., R. R. Co., 122 N. Y. 523; Kaiser v. Flaccus, 138 Pa. St. 332, 22 Atl. 88; St. Louis, etc., Ry. Co. v. McClain, 80 Tex. 85, 15 S. W. 789; Wright v. Southern Pac. Co., 14 Utah 383, 46 Pac. 374; Jenkins v. Mammoth Min. Co., 24 Utah, 513, 68 Pac. 845; Norfolk, etc., R. R. Co. v. Nuckol's Admr., 91 Va. 193, 21 S. E. 342; Norfolk, etc., R. R. Co. v. Ampley, 93 Va. 108, 25 S. E. 226; Sherman v. Lumber Co., 72 Wis. 122, 39 N. W. 365, 1 L. R. A. 173.

66—For this general rule the following additional cases may be cited: Roberts v. Smith, 2 H. & N. 213; Mellors v. Shaw, 1 Best & S. 437; Ashworth v. Stanwix, 3 El. & El. Q. B. 701; Columbus, &c., R. R. Co. v. Webb, 12 Ohio St. 475; O'Donnell v. Allegheny Valley R. R. Co., 59 Pa. St. 239, 98 Am. Dec. 336; Johnson v. Bruner, 61 Pa. St. 58, 100 Am. Dec. 613; Harrison v. Central R. R. Co., 31 N. J. 293; Paulmier v. Erie R. R.

still remains the very serious difficulty of determining what, in particular cases, is fairly imputable to the master as a neglect of personal duty, or on the other hand, is to be regarded as neglect on the part of one of his subordinates, who, though vested with a special authority in the case, and therefore representing the master more directly and specially than do servants generally, is still, for all the purposes of the rules so far given, to be looked upon only as a servant whose negligence is within the ordinary risks of other servants in the same general employment.

We have seen that in some cases the master is charged with a duty to those serving him of which he cannot divest himself by any delegation to others. He is charged with such a duty as regards the safety of his premises, the suitableness of the tools, implements, machinery or materials he procures or employs, and the servants he engages or makes use of. Whoever is permitted to exercise the master's authority in respect to these matters is charged with the master's duty, and the latter is responsible for a want of proper caution on the part of the agent, as for his own personal negligence.⁶⁷

Co., 34 N. J. 151; Chicago, &c., R. R. Co. v. Harney, 28 Ind. 28; Mc-Glynn v. Brodie, 31 Cal. 376; Chicago, &c., R. R. Co. v. Jackson, 55 Ill. 492; Huddleston v. Lowell Machine Shop, 106 Mass. 282. In Flike v. Boston, &c., R. R. Co., 53 N. Y. 549, and Booth v. Boston, &c., R. R. Co., 73 N. Y. 38, 29 Am. Rep. 97, a railroad company was held liable as for its own negligence for the act of a subordinate in sending out a train insufficiently supplied with brakemen. But compare Mad River, &c., R. R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Skipp v. Eastern Counties R., 9 Exch. 223.

67—Ford v. Fitchburg R. R. Co., 110 Mass. 240, 14 Am. Rep. 598; Wright v. N. Y. Cent. R. R. Co., 25 N. Y. 562; Laning v. N. Y. Cent. R. R. Co., 49 N. Y. 521; Chicago, &c., R. R. Co. v. Jackson, 55 Ill. 492; Denver, etc., R. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093; Mattise v. Consumers' Ice Mfg. Co., 46 La. Ann. 1535, 16 So. 400, 49 Am. St. Rep. 356; Carlson v. N. W. Tel. Exch. Co., 63 Minn. 428, 65 N. W. 914; Ross v. Walker, 139 Pa. St. 42, 21 Atl. 159, 23 Am. St. Rep. 160; Allen v. Goodwin, 92 Tenn. 385, 21 S. W. 760; *ante*, p. 1074. “As to acts which a master or principal is bound as such to perform toward his employes, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present and liable for the manner

*But these are not the only cases in which the master [*664] is to be considered as represented by an agent, who for the time being is charged with his duty. A corporation can only manage its affairs through officers and agents, and if it is to be held responsible to its servants for negligence in any case, it must be because some of these are negligent. But whose negligence shall be imputed to the corporation as the negligence of the principal itself? Certainly not that of all its officers and agents, for this would be to abolish wholly, in its application to the case of corporations. a rule alike reasonable and of high importance.

in which they are performed." See *Brick v. Rochester &c., Co.*, 98 N. Y. 211; *Willis v. Oreg., &c., Co.*, 11 Oreg. 257; *Quinn v. New Jersey, &c., Co.*, 23 Fed. Rep. 363; *Peterson v. Whitebreast, &c., Co.*, 50 Ia. 673; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 49 Pac. 559; *Skelton v. Pacific Lumber Co.*, 140 Cal. 507, 74 Pac. 13; *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124, 22 N. E. 876, 16 Am. St. Rep. 372; *Cashman v. Chase*, 156 Mass. 342, 31 N. E. 4; *Union Pac. R. R. Co. v. Doyle*, 50 Neb. 555, 70 N. W. 43; *Ricks v. Flynn*, 196 Pa. St. 263, 46 Atl. 360; *Casey v. Pennsylvania Asphalt Pav. Co.*, 198 Pa. St. 348, 47 Atl. 1128; *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659. *Contra*, *Berea Stone Co. v. Kraft*, 31 Ohio St. 287. In Chicago, &c., Co. v. May, 108 Ill. 288, a foreman in ordering the pushing of a car in a yard was held to be performing a master's duty; and see *Wabash, &c., Ry. Co. v. Hawk*, 121 Ill. 259, 12 N. E. 253; *Baldwin v. St. Louis, &c., Co.*, 68 Ia. 37; *Hoke v. St. Louis, &c., Co.*, 88 Mo. 360; *Criswell v. Pittsburgh, &c., Ry. Co.*, 30 W. Va. 798, 6 S. E. 31.

So far as the corporate directors are concerned, no question can be made that for any such purpose they represent the corporation, and their acts, as a board, are the acts of a principal. They constitute the highest and most authoritative expression of corporate volition, and the corporate duties are duties to be performed by the board. But such board holds only periodical meetings, and at other times the powers of the corporation are usually expected to be, and actually are, exercised by some officer or general superintendent with large discretionary powers. Unless such officer or superintendent is to be considered as occupying, for all the purposes of the [*665] *rule now under consideration, the position of the principal itself, it is obvious that there must be assumed in the case of corporations, and indeed in other cases where the whole charge of the business is delegated to another, some risks which the servant does not assume where the master himself takes general charge in person.

It has been seen that the superior position of the negligent servant, as that of a foreman, conductor, etc., is not regarded as affecting the case. But a foreman is not necessarily, or usually perhaps, entrusted with any large share of the master's discretionary authority. Neither is the conductor of a train of cars, except as to the particular duty of taking it safely to its destination. His duty may be and probably is less responsible than that of the telegraph operator who directs his movements and those of others in charge of trains on the line; and if the conductor is to be regarded as principal for some purposes, so should the operator be for others. But this would suggest questions and distinctions that could only be confusing, and would preclude the possibility of any settled rule whatsoever. It would seem that the law could go no further than to hold the corporation liable for the acts and neglects of the officer exercising the powers and authority of general superintendent; but that for these it ought to respond to its servants, as for its own acts or neglects. As is said in one case: "When the servant by whose negligence or want of skill other servants of the common employer have received injury is the '*alter ego*' of the master, to whom the

employer has left everything, then the middleman's negligence is the negligence of the employer, for which the latter is liable. The servant in such case represents the master, and is charged with the master's duty. When the middleman or superior servant employs and discharges the subalterns, and the principal withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents as in the case of corporations, the principal is liable for the neglects and omissions of the one charged with the selection of other servants in employing and selecting such servants, and in the general conduct of the business committed to his care."⁶⁸

68—ALLEN, J., in *Malone v. Hathaway*, 64 N. Y. 5, 9, 21 Am. Rep. 573. A foreman or superior servant, with power to hire and discharge the men under him is such an *alter ego*. *Stephens v. Hannibal, &c., Ry. Co.*, 86 Mo. 221; *Texas, &c., R. R. Co. v. Whitmore*, 58 Tex. 276; *Gunter v. Graniteville, &c., Co.*, 18 S. C. 262, 44 Am. Rep. 573; *Patton v. West, &c., R. R. Co.*, 96 N. C. 455, 1 S. E. 863; *Hussey v. Coger*, 39 Hun, 639. See *Tyson v. South., &c., R. R. Co.*, 61 Ala. 554; *Brown v. Sennett*, 68 Cal. 225, 58 Am. Rep. 8; *Slater v. Chapman*, 67 Mich. 523, 35 N. W. 106. So is the superintendent of a mine; *Mayhew v. Sullivan Min. Co.*, 76 Me. 100; *Beeson v. Green Mt., &c., Co.*, 57 Cal. 20; *Ryan v. Bagaley*, 50 Mich. 179, 45 Am. Rep. 35. A master mechanic of a railroad; *Ohio, &c., Ry. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134. A conductor as to the engineer of his train; *Chicago, &c., Ry. Co. v. Ross*, 112 U. S. 377, and see cases note 37, p. 1062, *supra*. If the master places the entire charge of his business, or a distinct branch of it, in the hands of an agent, exercising no discretion and no oversight, the neglect by the agent of ordinary care in supplying proper machinery, is a breach of duty for which the master is liable. *Mullan v. Philadelphia, &c., R. R. Co.*, 78 Penn. St. 25, 21 Am. Rep. 2. See *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573; *Hofnagle v. N. Y. Cent. R. R. Co.*, 55 N. Y. 608. That the duty to furnish safe appliances or place to work cannot be escaped by delegation, see also *Wilson v. Willimantic, &c., Co.*, 50 Conn. 433; *Krueger v. Louisville, &c., Co.*, 111 Ind. 51; *Sanborn v. Madura, &c., Co.*, 70 Cal. 261; *Fay v. Minn., &c., Ry. Co.*, 30 Minn. 231; *Kelly v. Erie, &c., Co.*, 34 Minn. 321; *St. Louis, &c., Ry. Co. v. Harper*, 44 Ark. 524; *Ind. Car Co. v. Parker*, 100 Ind. 181; *Moore v. Wabash, &c., Ry. Co.*, 85 Mo. 588. So as to the duty to keep appliances in repair. *Hough v. Railway Co.*, 100 U. S. 213; *North. Pac. R. R. Co. v. Herbert*, 116 U. S. 642. Where a master gave proper orders and employed a competent master mechanic but the workmen failed to repair properly an engine boiler which exploded and injured the engineer, the master was held lia-

[*666] It is the personal duty of the master to see that suitable servants are employed, that his tools, machinery, etc., are reasonably safe, or at least, to see that there is no negligence

in employing or procuring them; and the delegate *to

[*667] whom he entrusts the duty, stands, in respect thereto, in the master's place.⁶⁹

It is also, as has been shown, the duty of the master not to send the servant upon dangerous service which he has not undertaken for; and if he places the servant under the orders of another who requires him to perform such dangerous service, whereby he is injured, the wrongful act is properly attributable to the master himself.⁷⁰

ble. *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Penn., &c., Co. v. Mason*, 109 Penn. St. 296. Otherwise, if after the boilermakers had finished work it explodes and injures machinists at work at it while still in the shop. *Murphy v. Boston, &c., Co.*, 88 N. Y. 146, 42 Am. Rep. 240. Where a foreman, ordered to replace a rope when worn out, neglected to do so, and a workman was hurt, the master was held not liable. His duty is to furnish suitable means and competent men to keep his appliances in order when the defect is one that must frequently arise from use. The servants who use the appliances and those whose duty it is to maintain them in order are fellow servants. *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209, 46 Am. Rep. 458; *McGee v. Boston Cordage Co.*, 139 Mass. 445.

See *Daley v. Boston, &c., R. R. Co.*, 147 Mass. 101, 16 N. E. 690. A similar ruling has been made as to a miner and a servant employed to repair the timber work in the mine. *Quincy Min. Co. v. Kitts*, 42 Mich. 34. But if a machine is dangerous from lack of repair and

the machinists repair it only when it ceases to do good work without regard to its condition as a dangerous machine, the master is not necessarily relieved by showing that he has employed competent machinists and furnished suitable means for repair. *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198, 59 Am. Rep. 68. *Rice v. King Philip Mills*, 144 Mass. 229, 59 Am. Rep. 80. Notice of want of repair to foreman in charge of such work is notice to the master; *Brabbitts v. Chicago, &c., R. R. Co.*, 38 Wis. 289; *Schultz v. Chicago, &c., Co.*, 48 Wis. 375. This duty applies to keeping a railway track safe; *Elmer v. Locke*, 135 Mass. 575; *Davis v. Cent. Vt., &c., Co.*, 55 Vt. 84, 45 Am. Rep. 590; *Calvo v. Railroad Co.*, 23 S. C. 526, 55 Am. Rep. 28, and cases in note 77, p. 1109, *supra*.

69—*Ante*, p. 1074.

70—This is well shown by PORTER, J., in *Mann v. Oriental Print Works*, 11 R. I. 152. And, see *Chicago, &c., R. R. Co. v. Bayfield*, 37 Mich. 205; *Frandsen v. Chicago, &c., R. R. Co.*, 36 Iowa, 372; *Cook v. St. Paul, &c., Co.*, 34 Minn. 45;

The question as to who are vice principals is very completely and accurately answered by the court in *Minneapolis v. Lundin*, as follows: "A vice principal is the representative of the master, and for his acts and negligence the master is responsible. An employee of a corporation may become such a representative in two ways:

"First. He may be entrusted with the entire management and supervision of all the business of the corporation, or with the entire management and supervision of a distinct and separate department of its business, and in such case he may be termed a general vice principal, because in all his acts relative to the business of the corporation he stands in place of the master, and the latter is liable for his negligence in their performance.

"Second. One who has not the authority of a general vice principal may be intrusted by the master with the discharge of absolute personal duties that rest upon it, such as the duty to use reasonable care to employ competent and careful fellow servants, and in such a case he may be termed a special vice principal. He stands in place of the master when he is discharging one of these personal duties of the master, and the latter is liable for his negligence in the discharge of it; but in the performance of his other services as a general employee he is not the representative of the master, nor is the master liable for his negligence in the performance of them. Whether or not the master is liable for the negligence of such a servant in a given case must be determined by the nature of the duty in the performance of which he was guilty of the negligence. If he was engaged in discharging an absolute duty of the master, the latter is liable; otherwise not."⁷¹

Douglas *v.* Texas, &c., Co., 63 Tex. 564; Atlanta, &c., Co. *v.* Speer, 69 Ga. 137, 47 Am. Rep. 750. Compare Allen *v.* New Gas Co., 1 Exch. Div. 251. So the master is liable, if a foreman, knowing its condition, orders a workman to use a defective machine. Ind. Car Co. *v.* Parker, 100 Ind. 181. Where a child was employed to work under a "boss" in a certain room and was sent by the boss to work elsewhere and was there injured, the master was held not liable on the ground that the sending him elsewhere was beyond the boss' power. Fisk *v.* Cent. Pac., &c., Co., 72 Cal. 38, 13 Pac. 144. See *ante*, p. 1133.

71—*Minneapolis v. Lundin*, 58 Fed. 525, 527, 7 C. C. A. 344. And

Contributory Negligence. Where the master is sued by his servant for an injury which it is claimed has been occasioned by his negligence, it is very properly and justly held that the plaintiff is not to recover if his own negligence contributed with that of the defendant in producing the injury.⁷² The rules

see Northern Pac. R. R. Co. v. Peterson, 162 U. S. 346, 16 S. C. Rep. 843, 40 L. Ed. 994; Northern Pac. R. R. Co. v. Charliss, 162 U. S. 359, 16 S. E. Rep. 848, 40 L. Ed. 999; Clarke v. Pennsylvania Co., 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811; Denver, etc., R. R. Co. v. Driscoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243; Palmer v. Mich. Cent. R. R. Co., 93 Mich. 363, 53 N. W. 397, 32 Am. St. Rep. 507, 17 L. R. A. 636; Buttermann v. McClintic-Marshall Construction Co., 206 Pa. St. 82, 55 Atl. 839; Reddon v. Union Pac. Ry. Co., 5 Utah, 344, 15 Pac. 262; Richmond Granite Co. v. Bailey, 92 Va. 554, 24 S. E. 232; Woods v. Lindvall, 48 Fed. 62, 1 C. C. A. 34; Chicago House Wrecking Co. v. Birney, 117 Fed. 72, 54 C. C. A. 458; *ante*, p. 1074.

72—Thompson v. Central R. R. Co., 54 Ga. 509; Johnson v. Western, &c., R. R. Co., 55 Ga. 133; Western, &c., R. R. Co. v. Adams, 55 Ga. 279; Hayden v. Smithville Manuf. Co., 29 Conn. 548; Mulherin v. Delaware, &c., R. R. Co., 81 Pa. St. 366; Cooper v. Butler, 103 Pa. St. 412; Lyon v. Detroit, &c., R. R. Co., 31 Mich. 429; Brewer v. Flint, &c., Ry. Co., 56 Mich. 620; Chicago, &c., R. R. Co. v. Donahue, 75 Ill. 106; Illinois Cent. R. R. Co. v. Patterson, 69 Ill. 650; Chicago, &c., R. R. Co. v. Bragonier, 119 Ill. 51; Burns v. Boston, &c., R. R. Co., 101 Mass. 50; Pittsburgh, &c., R. R. Co. v. Wilkins, 47 Miss. 404; Hulett v. Kansas, &c., Co., 67 Mo. 239; Rasmussen v. Chicago, &c., Co., 65 Ia. 236; Wormell v. Maine Centr., &c., Co., 79 Me. 397, 10 Atl. 49; Judkins v. Maine Centr. R. R. Co., 80 Me. 417, 14 Atl. 735; Columbus, etc., Ry. Co. v. Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58; Columbus, etc., Ry. Co. v. Bradford, 86 Ala. 574, 6 So. 90; Louisville, etc., R. R. Co. v. Banks, 104 Ala. 508, 16 So. 547; George v. Mobile, etc., R. R. Co., 109 Ala. 245, 19 So. 784; St. Louis, etc., Ry. Co. v. Rice, 51 Ark. 467, 11 S. W. 639, 4 L. R. A. 173; Long v. Coronado R. R. Co., 96 Cal. 269, 31 Pac. 170; Illinois Central R. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737; Diamond Plate Glass Co. v. Dehoritz, 143 Ind. 381, 40 N. E. 681; Harff v. Green, 168 Mo. 308, 67 S. W. 576; Haviland v. Kansas City, etc., R. R. Co., 172 Mo. 106, 72 S. W. 515; McMahon v. O'Donnell, 32 Neb. 27, 48 N. W. 824; Gillen v. Rowley, 134 Pa. St. 209, 19 Atl. 504; Norfolk, etc., Ry. Co. v. Cromer, 99 Va. 763, 40 S. E. 54; Larson v. Knapp, Stout & Co., 98 Wis. 178, 73 N. W. 992. It is such negligence if the servant is injured from disobedience of the rules or orders of the master. Penn., &c., Co. v. Whitcomb, 111 Ind. 212; Deeds v. Chicago, &c., Co., 74 Ia. 154, 37 N. W. 124; North. Centr. Ry. Co. v. Husson, 101 Pa. St. 1; Pilkenton v. Gulf, &c., Ry. Co., 70 Tex. 226, 7 S. W. 805; Daley v. Haller Mfg. Co., 48

here are *the same that are applied in other cases of [*668] contributory negligence; and all that is special in their application springs from the obligation that may, under some circumstances, rest upon the servant to report dangers to the master. It has often been held that if a servant sues the master for an injury which has resulted from a peril which had come to the knowledge of the plaintiff and ought to have been known to the master, it may justly be held to be contributory negligence on the plaintiff's part if he failed to report it.⁷³ To be a

La. Ann. 214, 19 So. 116; Fickett &c., R. R. Co. v. Barber, 5 Ohio v. Lisbon Falls Fibre Co., 91 Me. St. 541, 67 Am. Dec. 312; St. 268, 39 Atl. 996; Johnson v. Chesapeake, etc., Ry. Co., 38 W. Va. Ill. 256; Louisville, etc., R. R. Co. v. Stutts, 105 Ala. 368, 17 So. 29, 53 Am. St. Rep. 127; Mangum v. Bullion, etc., Min. Co., 15 Utah, 534, 50 Pac. 834. It has been held that an instruction that a railroad company would not be liable notwithstanding the unsafe condition of the track if plaintiff, a servant, knew, or could by ordinary diligence have known, the state of the track, was properly refused; that it was not the business of the servant to ascertain whether the machinery and structure of the road are defective; but that the duty of the company is to keep them in a safe condition, and it is responsible for a failure to do so. Porter v. Hannibal, &c., R. R. Co., 60 Mo. 160. But if the servant has full knowledge and makes no report or objection, he takes the risk. Kroy v. Chicago, &c., R. R. Co., 32 Iowa, 357; McGlynn v. Brodie, 31 Cal. 376. So if he knows of his fellow servant's habit of doing business contrary to the rules or in an improper way and acquiesces in it. Youll v. Sioux City, &c., Co., 66 Ia. 346; Lake Shore, &c., Ry. Co. v. Knittal, 105, 4 Am. Rep. 364; Mad River,

73—Ladd v. New Bedford, &c., R. R. Co., 119 Mass. 412, 20 Am. Rep. 331; LeClair v. St. Paul, &c., R. R. Co., 20 Minn. 9; Sullivan v. Louisville Bridge Co., 9 Bush, 81; Patterson v. Pittsburgh, &c., R. R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Malone v. Hawley, 46 Cal. 409; Dillon v. Union Pacific R. R. Co., 3 Dill. 319; Belair v. Chicago, &c., R. R. Co., 43 Iowa, 662; Davis v. Detroit, &c., R. R. Co., 20 Mich. 105, 4 Am. Rep. 364; Mad River,

bar to recovery the servant's negligence must be the proximate cause of the injury, and if it is merely a condition of the accident and not a cause it is no bar.⁷⁴

Burden of Proof. It may also be remarked that in all cases where the servant claims to recover on the ground of the master's negligence, the burden of proof will be upon [*669] him, not only because as a plain*tiff he must make out his case, but also because all presumptions will favor the proper performance of duty.⁷⁵ "If the accident might have re-

74—Certain repairs were being made in a mill at night and plaintiff was injured by reason of the defendant's negligence. The plaintiff had been told to go home prior to the accident. Held his remaining was not contributory negligence. *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181. So where a workman was going from one part of a mill to another and stopped for a moment to talk with another workman and just then was hit by the breaking of a defective belt. *Moore v. Pickering Lumber Co.*, 105 La. 504, 29 So. 990. It is not necessarily contributory negligence for a servant to expose himself to danger in an attempt to save his master's property or to rescue a fellow servant put in peril by the master's negligence. *Bessemer L. & I. Co. v. Campbell*, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 15; *Pullman Pal. Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Saylor v. Parsons*, 122 Ia. 679, 98 N. W. 500, 101 Am. St. Rep. 283, 64 L. R. A. 542; *Frank v. Bullion*, etc., Min. Co., 19 Utah, 35, 56 Pac. 419. See *Malbie v. Belden*, 167 N. Y. 307, 60 N. E. 645, 54 L. R. A. 52.

75—See *Gilman v. Eastern R. R. Co.*, 10 Allen 233; *Wright v. N. Y.*

Central R. R. Co., 25 N. Y. 562; *Hildebrand v. Toledo*, etc., R. R. Co., 47 Ind. 399; *Crandall v. McIlrath*, 24 Minn. 127; *Stafford v. Chicago*, etc., R. R. Co., 114 Ill. 244; *Pingree v. Leyland*, 135 Mass. 398; *Heath v. Whitebreast Coal*, etc., Co., 65 Ia. 747; *Louisville*, etc., Co. v. *Allen*, 78 Ala. 494; *Painton v. Nor. Centr. Ry. Co.*, 83 N. Y. 7; *Murphy v. St. Louis*, etc., Co., 71 Mo. 202; *St. Louis*, etc., Ry. Co. v. *Harper*, 44 Ark. 524; *East Tenn.*, etc., Co. v. *Stewart*, 13 Lea, 432; *Madden v. Occidental*, etc., S. S. Co., 86 Cal. 445, 25 Pac. 5; *Murray v. Denver*, etc., R. R. Co., 11 Colo. 124, 17 Pac. 484; *Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351; *Western*, etc., R. R. Co. v. *Bradford*, 113 Ga. 276, 38 S. E. 823; *Minty v. Union Pac. Ry. Co.*, 2 Idaho, 471, 21 Pac. 660; *Sack v. Dolese*, 137 Ill. 129, 27 N. E. 62; *Kansas City*, etc., R. R. Co. v. *Ryan*, 52 Kan. 637, 35 Pac. 292; *South Baltimore Car Works v. Schaeffer*, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560; *Essex County Elec. Co. v. Kelly*, 57 N. J. L. 100, 29 Atl. 427; *Baldwin v. Atlantic City*, etc., R. R. Co., 64 N. J. L. 232, 45 Atl. 810; *Potter v. New York Central*, etc., R. R. Co., 136 N. Y. 77, 32 N. E. 603; *Welsh v. Cornell*, 168 N. Y. 508, 61 N. E. 891; *Neely v. S. W. Cotton Seed*

sulted from more than one cause, for one of which the master is liable and for the other he is not liable, it is necessary for the plaintiff to prove, in the first instance, that the injury arose from the cause for which the master is liable, for it is not the province of a court or jury to speculate or guess from which cause the accident happened.”⁷⁶

Liability of Servant. If a servant by his negligence in the master’s business injures a fellow servant, the former is liable to the latter for the damages sustained.⁷⁹ So a servant is liable to a third party injured by his negligence.⁸⁰ According to some authorities the servant is liable to his fellow servants or third parties for misfeasance but not for non-feasance. “If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and

Oil Co., 13 Okl. 356, 75 Pac. 537; ter.” Montgomery Coal Co. v. Kincaid *v.* Oregon Short Line, 22

Barringer, 218 Ill. 327.

Ore. 35, 29 Pac. 3; Duntley *v.* Inman, 42 Ore. 334, 70 Pac. 529, 59 L. R. A. 785; Higgins *v.* Fanning, 195 Pa. St. 599, 46 Atl. 102; Johnson *v.* Chesapeake, etc., Ry. Co., 36 W. Va. 73, 14 S. E. 432; Knight *v.* Cooper, 36 W. Va. 232, 14 S. E. 999; Cochran *v.* Shanahan, 51 W. Va. 137, 41 S. E. 140; Pierce *v.* Kile, 80 Fed. 865, 26 C. C. A. 201; Weeks *v.* Scharer, 111 Fed. 330, 49 C. C. A. 372. Where the servant was injured by the fall of a scaffold provided by the master, negligence was presumed. Steward *v.* Ferguson, 164 N. Y. 553, 58 N. E. 662. “The burden of proof is upon the servant to establish, first, that the appliance or place was defective; second, that the master had notice thereof, or knowledge, or ought to have had; and third, that the servant did not know of the defect and had not equal means of knowing with the mas-

ter.” Montgomery Coal Co. v. Barringer, 218 Ill. 327.

76—Goranson *v.* Riter-Conley Mfg. Co., 186 Mo. 300, 307, 85 S. W. 338; Trigg *v.* Ozark L. & L. Co., 187 Mo. 227, 86 S. W. 222; Moore Lime Co. *v.* Johnston, 103 Va. 84, 48 S. E. 557.

79—Rogers *v.* Overton, 87 Ind. 410; Hare *v.* McIntire, 82 Me. 240, 19 Atl. 453, 17 Am. St. Rep. 476, 8 L. R. A. 450; Atkins *v.* Field, 89 Me. 281, 36 Atl. 375, 56 Am. St. Rep. 424; Osborne *v.* Morgan, 130 Mass. 102, 39 Am. Rep. 437; Osborne *v.* Morgan, 137 Mass. 1; Griffiths *v.* Woolfram, 22 Minn. 185; O’Brien *v.* Traynor, 69 N. J. L. 239, 55 Atl. 307; Lawton *v.* Waite, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616.

80—Stiewell *v.* Borman, 63 Ark. 30, 37 S. W. 404; Baird *v.* Shipman, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128; Lough *v.* Davis, 30 Wash. 204, 70 Pac. 491, 94 Am. St. Rep. 848, 59 L. R. A. 802; Lough

was one that the law imposed upon him independently of his agency or employment; then he is liable."⁸¹ But this distinction is repudiated in some cases.⁸² The servant is liable over to the

v. Davis, 35 Wash. 449, 77 Pac. 732. A superior servant is not liable to a third party for the negligence of a servant under him. Bilen *v.* Paisley, 18 Ore. 47, 21 Pac. 934, 4 L. R. A. 840.

81—Burns *v.* Pethcal, 75 Hun, 437, 26 N. Y. S. 700. See also Murray *v.* Usher, 117 N. Y. 542, 23 N. E. 564 where it is said: "The distinction is between misfeasance and non-feasance. For the former the servant is, in general, liable; for the latter, not. The servant, as between himself and his master, is bound to serve him with fidelity and to perform the duties committed to him. An omission to perform them may subject third persons to harm, and the master to damages. But the breach of the contract of service is a matter between the master and servant alone, and the non-feasance of the servant causing injury to third persons is not, in general, at least, a ground for a civil action against the servant in their favor." p. 547. And see opinion by TAFT, J., in Warax *v.* Cincinnati, etc., Ry. Co., 72 Fed. 637.

82—See cases cited above. p. 1171, n. 80. The liability of the servant for both misfeasance and non-feasance is ably sustained in Lough *v.* Davis, 30 Wash. 204, 70 Pac. 491, 94 Am. St. Rep. 848, 59 L. R. A. 802, wherein the court says: "The reason assigned to sustain this rule is that the responsibility must arise from some express or implied obligation between the particular parties stand-

ing in privity of law or contract with each other. If this be true, it is difficult to see what difference there is in the obligation to their principal between the commission of an act by the agents, which they are bound to their principal not to do and the omission of an act which they have obligated themselves to their principal to do. They certainly stand in privity of law or contract with their principal exactly as much in the one instance as in the other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference; and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of an-

master for damages he has been compelled to pay by reason of the servant's negligence.⁸³

General Summary. Perhaps this whole subject may be accurately summed up in a single sentence as follows: The rule that the master is responsible to persons who are injured by the negligence of those in his service, is subject to this general exception: that he is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally or in respect of the particular duty then resting upon the negligent employee, the latter so far occupied the position of his principal as to render the principal chargeable for his negligence as for personal fault.

other. There is certainly no difference in moral responsibility; there should be none in legal responsibility. Of course, if the omission of the act or the non-feasance does not involve a non-performance of duty, then the responsibility would not attach. If it does involve a non-performance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such practice is less circuitous than that which necessitates first the suing of the master by the party injured, and a suit by the master against the servant to recoup the damages." pp. 208-210. S. C. Lough *v.* Davis, 35 Wash. 449, 77 Pac. 732. And see Hare *v.* McIntire, 82 Me. 240, 19 Atl. 453, 17 Am. St. Rep. 476, 8 L. R. A. 450.

83—Georgia Southern, etc., Ry. Co. *v.* Jossey, 105 Ga. 271, 31 S. E. 179; Costa *v.* Yochini, 104 La. 170, 28 So. 992; Memphis, etc., R. R. Co. *v.* Greer, 87 Tenn. 698, 11 S. W. 931, 4 L. R. A. 858. See *ante*, pp. 255, 256. Master and servant held jointly liable. Schumpert *v.* Southern Ry. Co., 65 S. C. 322, 43 S. E. 813, 95 Am. St. Rep. 802; Gardner *v.* Southern Ry. Co., 65 S. C. 341, 43 S. E. 816; Riser *v.* Southern Ry. Co., 67 S. C. 419, 46 S. E. 47; Carson *v.* Southern Ry. Co., 68 S. C. 55, 46 S. E. 525; Bedenbaugh *v.* Southern Ry. Co., 69 S. C. 1, 48 S. E. 53.

*CHAPTER XIX.

NUISANCES.

In the Commentaries of Mr. Justice BLACKSTONE a nuisance is defined as being anything done to the hurt or annoyance of the lands, tenements or hereditaments of another.¹ By hurt or annoyance here is meant, not a physical injury necessarily, but an injury to the owner or possessor thereof, as respects his dealing with, possessing or enjoying them. Strictly construed the definition would include those injuries done by the direct application of force, and which are known in the law as trespasses; but these were not meant to be embraced, although some of them may be treated either as trespasses or nuisances, at the option of the party injured. For example, to keep a vicious animal after notice of his vicious propensity, is to maintain a nuisance;² but when the vicious beast attacks and injures an individual, the party injured may treat this violence as the unlawful violence of the owner and bring suit in trespass.³

It should be observed also that a nuisance which will support a private action may consist in such interference with a public easement or with any other public right as specially annoys or injures an individual; such, for instance, as the blocking up of a public way of any sort when one is endeavoring to make use of it. In these cases the public nuisance becomes a private nuisance also, and any sufficient definition must include cases of this nature. An actionable nuisance may, therefore, be said to be

1—3 Bl. Com. 215. The intention is immaterial to the inquiry whether an act is a nuisance. Bonnell *v.* Smith, 53 Ja. 281.

2—Brown *v.* Hoburger, 52 Barb. 15; Milman *v.* Shockley, 1 Houst. 444; Meibus *v.* Dodge, 38 Wis. 300, 20 Am. Rep. 6.

3—Van Leuven *v.* Lyke, 1 N. Y. 515, 516, 49 Am. Dec. 346; Wales *v.* Ford, 8 N. J. 267; Dolph *v.* Ferris, 7 W. & S. 367, 42 Am. Dec.

246; Morse *v.* Nixon, 6 Jones, (N. C.) 293; Coggswell *v.* Baldwin, 15 Vt. 404.

anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.⁴

***Annoyances Without Fault.** As the definition assumes the existence of wrong, those things which may be annoying and damaging, but for which no one is in fault, are not to be deemed nuisances, though all the ordinary consequences of nuisances may flow from them. For example, the swamps and marshes that, from their exhalations, prove injurious to the health of those living near them, are not nuisances provided they exist only as they were by nature, and the hand of man has done nothing to increase them or vary their deleterious effects. No authority in the State to compel their owners to abate them by drainage is recognized, though the State may doubtless assume the duty and provide for it by special levies.⁵ But the moment anything is done by the owner upon or in respect to the lands which increases the deleterious effects, or sensibly renders his lands offensive in a new or different way, he becomes responsible. There is then a nuisance on his own land, which exists by his wrong, and it is his duty to abate it.⁶

4—See *Hoadley v. Seward & Son Co.*, 71 Conn. 640, 42 Atl. 997; *Savannah v. Mulligan*, 95 Ga. 323, 51 Am. St. Rep. 86, 29 L. R. A. 303.

5—See *Reeves v. Treasurer, &c.*, 8 Ohio St. 333, and cases collected in *Cooley on Taxation*, pp. 510-511. When, however, the right of the State to make special levies on the owners for drainage is recognized, it would seem to be going but a step further to compel them to drain by way of abating a nuisance. But the one step is nevertheless a doubtful step.

That cannot be a common law nuisance which the law authorizes as a public improvement. *Transportation Co. v. Chicago*, 99 U. S. 635. But a license to do an act lawfully, as to run a steam engine, is not a license to create a

nuisance. *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655.

6—See *Woodruff v. Fisher*, 17 Barb. 224; *Hartwell v. Armstrong*, 19 Barb. 166. Unwholesome vapor from an artificial pond is a nuisance. *Adams v. Popham*, 76 N. Y. 410. The obstruction of a running stream occasioned by the washing down of its banks does not, in law, constitute a nuisance, unless the obstruction is attributable to the acts or agency of man. *Mohr v. Gault*, 10 Wis. 513, 28 Am. Dec. 687. Where for his own protection one changes the bed of a stream upon his own land and in flood time the opposite bank is thereby injured, he is not liable if a person of ordinary prudence would not have anticipated such injury. *Railroad Co. v. Carr*, 38 Ohio St. 448, 43 Am. Rep. 428.

Classification of Nuisances. Recurring to the definition of a nuisance it will be perceived that it must embrace a very large proportion of those injuries that are commonly redressed [*672] in *special actions on the case. An attempt to classify nuisances is, therefore, almost equivalent to an attempt to classify the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights. It is very seldom, indeed, that even a definition of a nuisance has been attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general it is likely to define nothing. A classification would be equally difficult, because it must either be greatly extended or it must omit many cases. Indeed, new and peculiar cases are arising constantly. In this brief summary of the law of nuisance a few of the most important will be noticed, and the principles applicable to them may be applied generally.

Nuisances Which Injure the Realty. Of these some may cause only a technical injury, but if they interfere with the enjoyment in its entirety of any distinct legal right, such interference is sufficient to make them actionable. Thus, if any part of one's building, though it be only an upper bay window or some similar projection above the ground, extends over the neighbor's line, this is a nuisance, even though no damage is suffered or even anticipated from it, for it constitutes an intrusion on the owner's freehold in its ~~et~~ension upwards.⁷ So it is

But if damage is done to another by an ordinary flood after the embanking and the damage might reasonably have been foreseen, he is liable. *Crawford v. Rambo*, 44 Ohio St. 279. See *Lamb v. Recl. Dist.*, 73 Cal. 125, 14 Pac. 625; *Avery v. Empire Woolen Co.*, 82 N. Y. 582. But compare *Armen daiz v. Stillman*, 67 Tex. 458.

7—*Meyer v. Metzler*, 51 Cal. 142; *Codman v. Evans*, 5 Allen, 308, 81 Am. Dec. 748; *Cherry v. Stein*, 11 Md. 1; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645; *Grove v.*

Fort Wayne, 45 Ind. 429, 15 Am. Rep. 262; *Wilmarth v. Woodcock*, 58 Mich. 482. So a bay window over a street is a public nuisance. *Reimer's App.* 100 Penn. St. 182, 45 Am. Rep. 373. Defendant's wall encroaching in plaintiff's land. *McGann v. Hamilton*, 58 Conn. 69, 19 Atl. 376; *Pile v. Pedrick*, 167 Pa. St. 296, 31 Atl. 646, 46 Am. St. Rep. 677. Defendant had an iron tower near plaintiff's hotel at Niagara Falls. The spray from the falls caused ice formations on the tower, which, in melting, fell upon

a nuisance if the branches of one's trees extend over the premises of another, and the latter may abate it by sawing them off.⁸ The *same rule applies here as in trespass; [*673] the insignificance of the injury goes to the extent of the recovery not to the right of action. More serious cases are mentioned below.⁹

Filthy Percolations. It is said in an early case that where one has filthy deposits on his premises, he whose dirt it is must keep it that it may not trespass.¹⁰ Therefore, if filthy matter from a privy or other place of deposit percolates through the soil of the adjacent premises, or breaks through into the neighbor's cellar, or finds its way into his well, this is a nuisance.¹¹

the plaintiff's hotel, endangering life and damaging the property. The tower was held to be a nuisance. *Davis v. Niagara Falls Tower Co.*, 171 N. Y. 336, 64 N. E. 4, 89 Am. St. Rep. 817, 57 L. R. A. 545.

8—*Lemmar v. Webb*, (1895) A. C. 1; *Earl of Lonsdale v. Nelson*, 2 B. & C. 302, 311; *Grandona v. Lovdal*, 70 Cal. 161. Where maple branches overhung a lot, it was held the remedy was by clipping them, not by abatement as they were not noxious. *Countryman v. Lighthill*, 24 Hun, 405. But where overhanging poisonous yew branches poison a pasturing horse, an action will lie for his value. *Crowhurst v. Amersham, &c., Board*, L. R. 4 Exch. D. 5. There is a dispute concerning the ownership of trees on the line of adjoining estates, or so near them as to draw sustenance from both. The rule, however, seems to be that if the tree is on the line, it is owned in common by the two. *Dubois v. Beaver*, 25 N. Y. 123; *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728. If a tree stands on the line either owner may cut through the trunk and branches up to the line. *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582. If it stands on one side the line, it is owned, with its fruits, by the proprietor on that side. *Masters v. Pollie*, 2 Roll. R. 141; *Holder v. Coates*, 1 Mood. & M. 112; *Waterman v. Soper*, 1 Ld. Raym. 737. But, see, as to this, *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225. Where the occupant piles sand against a division wall until the wall gives way and the wall and sand fall on the adjoining lot, the occupant is liable. *Barnes v. Masterson*, 38 App. Div. 612, 56 N. Y. S. 939.

9—For a case of a cooking range held to be a nuisance to the occupant on the other side the partition wall, see *Grady v. Wolsner*, 46 Ala. 381. A stand to which spectators are admitted erected on one's land so as to overlook a fenced ball park is not a nuisance of which the ball club can complain. *Detroit Base Ball Club v. Deppert*, 61 Mich. 63, 27 N. W. 856.

10—*Tenant v. Goldwin*, 1 Salk. 360; S. C. 6 Mod. 311.

11—*Tenant v. Goldwin*, 1 Salk. 360; *Ball v. Nye*, 99 Mass. 582, 97

Nor where this is the natural result of the deposit is the question of liability one depending on degrees of care to prevent it. Says FOSTER, J.: "To suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well or cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort. Under such *circumstances the reasonable [674] precaution which the law requires, is effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence." Only sudden and unavoidable

Am. Dec. 56; Columbus Gas Co. v. Freeland, 12 Ohio St. 392; St. Helens Chemical Co. v. St. Helens, L. R. 1 Exch. Div. 196; Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Tate v. Parrish, 7 T. B. Mon. 325; Greene v. Nunne-macher, 36 Wis. 50; Haugh's App. 102 Pa. St. 42, 48 Am. Rep. 193; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 So. 593; Livezey v. Schmidt, 96 Ky. 441, 29 S. W. 25; Kinnard v. Standard Oil Co., 11 Ky. L. R. 692, 12 S. W. 937; Brady v. Detroit Steel, etc., Co., 102 Mich. 277, 60 N. W. 687, 26 L. R. A. 175; Beatrice Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711; Anheuser-Busch Brewing Ass. v. Peter-sen, 41 Neb. 897, 60 N. W. 373; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. 453; Pfeiffer v. Brown, 165 Pa. St. 267, 30 Atl. 844, 44 Am. St. Rep. 660; Garigan v. Atlantic Ref. Co., 186 Pa. St. 604, 40 Atl. 834; Price v. Oakfield, etc., Creamery Co., 87 Wis. 536, 58 N. W. 1039, 24 L. R. A. 333. See Lowe v. Prospect Hill Cem. Ass., 58 Neb. 94, 78 N.

W. 488. Plaintiff and defendant were adjoining occupiers. Plaintiff's premises and stock in trade were injured by water and sewage coming into his cellar from defendant's premises. An old drain commenced on defendant's premises and received his sewage; ran under and received the sewage of several other houses; turned back through defendant's premises; ran under plaintiff's cellar, and then to a main sewer. Defendant did not know that this drain turned back and ran through his premises under those of the plaintiff nor that it was out of repair. It was in fact out of repair and its defective state under defendant's premises caused the mischief to plaintiff. The defective state of the drain was not attributable to the negligence of the defendant, but he was held liable. While the plaintiff was bound to receive sewage through the old drain, the defendant was bound to keep the sewage which he was bound to receive from passing from his own premises to the plaintiff's otherwise than through the old drain. Humphries v. Cousins, L. R. 2 C. P. D. 239.

accident, which could not have been foreseen by due care could be an excuse in such a case.¹²

Injury to Realty by Percolating Waters. The soil of a man's estate may be rendered cold and unproductive, or the walls of his buildings weakened, or made damp and unhealthy, and in various other ways his property injured for use or occupation by the percolation of waters beneath the surface caused by some wrongful act of another. The wrongful act may, perhaps, be throwing waters from one's roof so near the boundary line that they must escape upon the adjacent premises;¹³ or gathering water in reservoirs not sufficiently protected against such consequence;¹⁴ or damming up the stream below and thus compel*ling the water to assume a higher level. In the [*675] first two of these cases, the question may be one of negligence; in the third the only question is one of fact. If the

12—Ball *v.* Nye, 99 Mass. 582, 97 Am. Dec. 56; Hodgkinson *v.* Ennor, 4 Best & S. 229. See Ballard *v.* Tomlinson, L. R. 29 Ch. D. 115, stated fully p. *697, *post*. The possible pollution from a graveyard to be established of a well some distance off, is not within this rule, distinguishing the above cases where the exclusion was practicable. “If withdrawing the water from one's well by an excavation in adjoining lands will give no right of action, it is difficult to understand how corrupting its waters by a proper use of adjoining premises can be actionable where there is no intent to injure and no negligence.” Upjohn *v.* Richland, 46 Mich. 542.

13—Bellows *v.* Sackett, 15 Barb. 96; Underwood *v.* Waldron, 33 Mich. 232; Beach *v.* Gaylord, 43 Minn. 476, 45 N. W. 1095.

14—Southard *v.* Brooklyn, 1 App. Div. 175, 37 N. Y. S. 136; Delaware & H. Canal Co. *v.* Goldstein, 125 Pa. St. 246, 17 Atl. 442; Mon-

son, &c., Co. *v.* Fuller, 15 Pick. 554; Wilson *v.* New Bedford, 108 Mass. 261, 11 Am. Rep. 352. So where by a mound or defective piping, one causes water to run into his cellar, whence it percolates through defendant's wall. Hurdman *v.* Northeastern Ry. Co., L. R. 3 C. P. D. 168; Snow *v.* Whitehead, L. R. 27 Ch. D. 588. Distinguishing cases where water flows by gravitation from an upper worked out mine into a lower, such as Wilson *v.* Waddell, L. R. 2 App. Cas. 95; Lord *v.* Carbon Iron Co., 42 N. J. Eq. 157; Nat. Copper Co. *v.* Minn. Min. Co., 57 Mich. 88; Williams *v.* Pomeroy Coal Co., 37 Ohio St. 583. If water flows into another's cellar from defendant's he is liable, although part of the water in his cellar got there without his fault. Slater *v.* Mersereau, 64 N. Y. 138. So if one excavates his land and lets in the sea which percolates into his neighbor's well. Mears *v.* Dole, 135 Mass. 508. Where one dug a

water is so raised that by percolation the land of another is injured, the party raising it is responsible, not because he has unreasonably, negligently, intentionally or unexpectedly flowed the land of another for his own benefit, but because he has done it in fact.¹⁵ If water escapes from an irrigating ditch by percolation or seepage by reason of the negligence of the owner and injures the plaintiff, the owner is liable.¹⁶ Where the defendant stored ice in his building, the walls of which were within two inches of the walls of the plaintiff's house and the dampness from the melting ice penetrated through both walls, and rendered the plaintiff's house damp and uncomfortable, the defendant's use of his property was held to be a nuisance.¹⁷ The right of one to be secure against the undermining of his buildings by water, or the destruction of his crops, or the poisoning of the air by the stealthy attacks of an unseen element, is as complete as his right to be protected against open personal assaults or the more

hole in his lot and water gathering in it damaged an adjoining lot, it was held that it was for the jury to say whether the allowing the water to collect and remain was a nuisance. *Quinn v. Chicago, &c., Co.*, 63 Ia. 510. But where spouts from a house threw water on defendant's land and it soaked through the soil into plaintiff's cellar on a lower lot adjoining it was held that no action would lie, as the natural flow of surface water is no wrong. *Sowers v. Lowe*, 9 Atl. Rep. 44 (Penn.).

15—*PECKHAM*, J., in *Pixley v. Clark*, 35 N. Y. 520, 531, 91 Am. Dec. 72. See *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Shipley v. Fifty Associates*, 106 Mass. 194; *Brown v. Bowen*, 30 N. Y. 519; *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 46. The defendant had a pond on his land with no outlet. He proposed to drain it by a tile

drain 1,400 feet long onto low land adjoining the plaintiff. The effect would be to saturate the defendant's land and to cause percolation on to plaintiff's land. The construction of the drain was enjoined. *Schuster v. Albrecht*, 98 Wis. 241, 73 N. W. 990, 67 Am. St. Rep. 804.

16—*Greeley Irr. Co. v. House*, 14 Colo. 549, 24 Pac. 329; *Catlin L. & T. Co. v. Best*, 2 Colo. App. 481, 31 Pac. 391; *Consolidated Home Supply Ditch Co. v. Hamlin*, 6 Colo. App. 341, 40 Pac. 582; *McCarthy v. Boise City Canal Co.*, 2 Idaho, 245, 10 Pac. 623; *Shields v. Orr Extension Ditch Co.*, 22 Nev. 349, 47 Pac. 194; *Lisonbee v. Monroe Irr. Co.*, 18 Utah, 343, 54 Pac. 1009, 72 Am. St. Rep. 784.

17—*Barrick v. Schifferdecker*, 123 N. Y. 52, 25 N. E. 365; *Barrick v. Schifferdecker*, 48 Hun, 355, 1 N. Y. S. 21.

demonstrative, but not more destructive, trespasses of animals.¹⁸

Deposits Upon Land. For one without license to step upon another's estate has been seen to be a trespass; for one to do any act off the estate which shall cause anything to be carried or thrown upon it, is a nuisance. It is, therefore, a nuisance if the highway authorities shall open drains by the side of the roads which must and do carry earth and other materials and deposit them upon adjacent lands.¹⁹ Their liability here rests upon the same ground as that of any other persons committing a like nuisance; indeed, it is because in what they do they exceed their authority as officers and lose the official protection, that they become liable at all. So it is a nuisance if a riparian proprietor shall cast into the stream earth, sand, the refuse of his business, *or other things, which by the flowing water [*676] are carried and deposited upon the land of a proprietor below.²⁰ The tort here consists in the act of committing the rubbish to the stream; the deposit upon the land below is only the consequence from which a cause of action in favor of a particular individual arises.²¹ Such an occupation of the land is

18—See *Broder v. Saillard*, 2 Ch. Div. 692; S. C. 17 Moak, 693; *Cooper v. Barber*, 3 Taunt. 99; *Smith v. Kenrick*, 7 C. B. 515.

19—*Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 30, 11 Am. Rep. 1; *Alton v. Hope*, 68 Ill. 167; *Jacksonville v. Lambert*, 62 Ill. 519; *Pettigrew v. Evansville*, 25 Wis. 283, 3 Am. Rep. 50; *Moran v. McClearns*, 63 Barb. 185. See *Mosier v. Vincent*, 34 Iowa, 478, 494; *Marvin v. Pardee*, 64 Barb. 353; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Adams v. Richardson*, 43 N. H. 212; *Waldron v. Berry*, 51 N. H. 136; Proprietors, &c., v. *Lowell*, 7 Gray, 223; *Woodward v.*

Worcester, 121 Mass. 245; *Ashley v. Port Huron*, 35 Mich. 296, 20 Am. Rep. 628 n.; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533.

20—*Lind v. San Luis Obispo*, 109 Cal. 340, 42 Pac. 437; *Dierks v. Commissioners of Highways*, 142 Ill. 197, 31 N. E. 496; *Gallagher v. Kemmerer*, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673; *Robb v. Carnegie Bros.*, 145 Pa. St. 324, 22 Atl. 649, 27 Am. St. Rep. 694, 14 L. R. A. 329; *Lentz v. Carnegie Bros.*, 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717.

21—*Little Schuylkill, &c., Co. v. Richards*, 57 Penn. St. 142, 146. See *Red River, &c., Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194.

a taking of property as much as would be an actual *pedis possession*, and an exclusion of the owner altogether.²² And it is immaterial where on the plaintiff's land the déposit is made, whether under water, or, in times of flood, upon land usually dry; it is enough that the plaintiff's land is to some extent occupied by that which, by the wrongful act of another is placed there.²³ If one places a large pile of earth on his land he must take measures to prevent its falling or being washed upon the land of his neighbor, and for a neglect of that duty he will be liable.²⁴ A pile of sand which is blown upon adjoining land and into houses is a nuisance.²⁵

Leakage from Water Pipes, etc. Where one is lawfully making use of water pipes upon his own premises, or in pursuance of a license or easement on the lands of another, if injuries are caused by the bursting of the pipes, or by leakage from other cause, the question of liability is dependent upon the observance or neglect of care. If the proprietor of the pipes is guilty of negligence, which causes the leakage, or fails to observe

The depositing of waste must be no more than a reasonable use of the stream if it is to be defended. *Lockwood, &c., Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828. A deposit of mining waste cannot be upheld on the ground of custom. *Woodruff v. North Bloomfield, &c., Co.*, 18 Fed. Rep. 753; *People v. Gold Run, &c., Co.*, 66 Cal. 138, 56 Am. Rep. 80. But if material lawfully put in a stream to protect a bridge is washed down by an extraordinary flood and causes an overflow of the lower land, there is no liability. *Ill. Centr., &c., Co. v. Bethel*, 11 Ill. App. 17.

22—*MILLER*, J., in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177; *Eaton v. Boston, &c., R. R. Co.*, 51 N. H. 504.

23—*Little Schuylkill, &c., Co. v. Richards*, 57 Pa. St. 142, 146; *Robinson v. Black, &c., Co.*, 59 Cal. 460. Where a city carried a street across a ravine by an embankment and allowed the culvert to become filled up whereby a pond of water twenty feet deep accumulated and swept out the embankment and a large amount of debris was deposited on the plaintiff's land below, the city was held liable. *Stoehr v. St. Paul*, 54 Minn. 549, 56 N. W. 250. And see *Hummell v. Seventh St. Terrace Co.*, 20 Ore. 401, 26 Pac. 277.

24—*Abrey v. Detroit*, 127 Mich. 374, 86 N. W. 785; *American S. & T. Co. v. Lyon*, 21 App. D. C. 122.

25—*Dunsbach v. Hollister*, 49 Hun, 352, 2 N. Y. S. 94; *Wilmot v. Bell*, 76 App. Div. 252, 78 N. Y. S. 591.

due care in protecting against it, he is responsible, otherwise not.²⁶

Injuries by the Bursting of Reservoirs. It is lawful to gather water on one's premises for useful and ornamental purposes, subject to the obligation to construct reservoirs with sufficient strength to retain the water under all contingencies which can reasonably *be anticipated, and after- [*677] wards to preserve and guard it with due care. For any negligence, either in construction or in subsequent attention, from which injury results, parties maintaining such reservoirs must be responsible.²⁷ We say nothing now of injuries arising from the flooding of lands by reservoirs, which, by raising the water, must and do have that effect, but confining our attention to the case of reservoirs which cause injuries to the lower proprietors only as they break away, the American decisions seem to plant the liability on the ground of negligence, and the party constructing or maintaining the reservoir is held liable, not at all events, but as he might be if he had negligently constructed a house which fell down, or invited another into a dangerous place without warning. How far the English doctrine is different may be learned from certain recent cases. In the leading case of *Rylands v. Fletcher* it was held that the party maintaining a reservoir of water, which injures another by breaking away, in consequence of original defects, of which he was ignorant, is responsible for the injury, though chargeable with no negligence. Says Mr. Justice BLACKBURN, with the approval of the House of Lords, "We think that the true rule of law is, that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie*

26—Carstairs *v.* Taylor, L. R. applies to irrigating ditches. Green 6 Exch. 217; Blyth *v.* Proprietors, ley Irr. Co. *v.* House, 14 Colo. 549, &c., 11 Exch. 781; Ortmayer *v.* 24 Pac. 329; *ante*, p. 1180, n. 16. Johnson, 45 Ill. 469; Killion *v.* 27—New York *v.* Bailey, 2 Denio, Power, 51 Pa. St. 429, 91 Am. Dec. 433; Pixley *v.* Clark, 35 N. Y. 520, 127; Moore *v.* Goedel, 7 Bosw. 91 Am. Dec. 72; Monson Manuf. 591, 34 N. Y. 527; Schwab *v.* Cleve- Co. *v.* Fuller, 15 Pick. 554; Wen- land, 28 Hun, 458. The same rule dell *v.* Pratt, 12 Allen, 464; Fuller

answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth from his neighbor's privy, or whose

habitation is made unhealthy by the fumes and noisome [*678] *vapors of his neighbor's alkali works, is damnedified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others, so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.²⁸

Precisely what is meant by "*vis major*, or the act of God," in this opinion we may, perhaps, learn by subsequent decisions. The recent case of *Nichols v. Marsland* to some extent appears to explain it. In that case a reservoir, in the construction and maintenance of which there was no negligence, was broken away by a rainfall greater and more violent than any during the memory of witnesses. An action being brought for injury thereby

v. Chicopee Manuf. Co., 16 Gray, 371; Everett *v. Hydraulic Co.*, 26 46; Wilson *v. New Bedford*, 108 Cal. 225; Widekind *v. Water Co.*, Mass. 261, 11 Am. Rep. 352; Ipswich *v. County Commissioners*, 108 83 Cal. 198, 23 Pac. 311; Cox *v. Odell*, 1 Cal. App. 682. Mass. 363; China *v. Southwick*, 12 28—Fletcher *v. Rylands*, L. R. 1 Me. 238; Lapham *v. Curtis*, 5 Vt. Exch. 265, affirmed in the House of

done, Lord Ch. J. COCKBURN held the defendant liable, but in the Exchequer Chamber the judgment was reversed. Says Baron BRAMWELL, "What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong. She has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did, indeed, store it, and store it in such quantities that if it was let loose it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then, if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbor, the occupier of the house would be liable. That cannot be. Then why is the defendant liable, if some agent, over which she has no control, lets the water out? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for her own purposes; in the case of chimneys some one has put a ton of bricks fifty *feet high for his own purposes; both equally harmless if they stay where [*679] placed, and equally mischievous if they do not. The water is no more a wild or savage animal than the bricks, while at rest, nor more so when in motion. Both have the same common property of obeying the law of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbor's land, and cause it to do damage; or a field of ripe wheat, which might be fired by lightning, and do mischief. I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if, through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control.

"This case differs wholly from *Fletcher v. Rylands*. There
Lords, L. R. 3 H. L. Cas. 330, 339. 64. Compare *Smith v. Kenrick*, 7
See, also, *Smith v. Fletcher*, L. R. C. B. 515.
7 Exch. 305; S. C. L. R. 9 Exch.

the defendant poured the water into the plaintiff's mine. He did not know he was doing so, but he did as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case and the case I put of the chimneys are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district, and so adapting it for habitation.²⁹

[*680] *A comparison of these cases seems to show the English rule to be as follows: Whoever gathers water into a reservoir, where its escape would be injurious to others, must, at his peril, make sure that the reservoir is sufficient to retain the water which is gathered into it. But if thus sufficient in construction, the liability for the subsequent escape of the water becomes a question of negligence. The proprietor is not liable if the water escapes because of the wrongful act of a third party, or from *vis major*, or from any other cause consistent with the observance of due and reasonable care by him. Due care must of course be a degree of care proportioned to the danger of injury from the escape;³⁰ but it is not very clear that the English

29—Nichols *v.* Marsland, L. R. and damaged a tenant's goods in 10 Exch. 255; S. C. 14 Moak, 538, the basement, the landlord was 542. See, also, Madras R. Co. *v.* The Zemindar, L. R. 1 Ind. App. 364; S. C. 9 Moak, 289; Crompton *v.* Lea, L. R. 19 Eq. Cas. 115; S. C. 11 Moak. 719. And see Mr. Bigelow's comments on Rylands *v.* Fletcher, Lead. Cas. on Torts, 492 et seq. Where a pipe supplying the first floor with water from a tank at the top of a building burst

the basement, the landlord was held not liable because the water was brought on the premises partly for the tenant's benefit. Anderson *v.* Oppenheimer, L. R. 5 Q. B. D. 602.

30—It has been held in this country that if a dam is constructed on a stream subject to extraordinary freshets, these must be anticipated in building it, though

rule, as thus explained, differs from that of this country.³¹

***Falling Waters and Snows.** Every man has a clear [*681] legal right to protect his premises against the fall of

they occur only once in many years. *Gray v. Harris*, 107 Mass. 492; *New York v. Bailey*, 2 Denio, 433; *Gulf, &c., R. R. Co. v. Pomeroy*, 67 Tex. 498. See *Rich v. Keshena, &c., Co.*, 56 Wis. 287. A mine owner dammed water coming into his mine from abandoned mines above. The adjacent lower owner had dug through the dividing line. When the dam broke the lower mine was flooded. If ordinary care was used in building the dam, there was no liability to the owner of the lower mine. *Jones v. Robertson*, 116 Ill. 543, 56 Am. Rep. 786. See, also, *Myers v. Fritz*, 10 Atl. Rep. 30 (Penn.), where an extraordinary storm broke the barrier.

31—In *Shipley v. Fifty Associates*, 106 Mass. 194, in which parties were held liable for an injury occasioned by the sliding of ice and snow from the roof, the court, in approval of *Rylands v. Fletcher*, say that “one must, at his peril, keep the ice or snow that collects upon his own roof within his own limits;” but they add—and this is the pith of the decision—that he “is responsible for all damages if the shape of his roof is such as to throw them upon his neighbor’s land, in the same manner as he would be if he threw them there himself.” This is perfectly just, but the case seems far removed from *Fletcher v. Rylands*, for here the injury results as a natural and necessary consequence of the defendant’s act, and must have

been or should have been anticipated by him. Just as in *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, the defendant must or should have anticipated that the fragments of stone that were being blasted would fall within the plaintiff’s enclosure. *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184, is decided on the authority and reasoning of *Fletcher v. Rylands*. It was a case where defendant had undertaken to cut a channel for water through rock, and before its completion the water had burst through the sides of the tunnel, and rushed through and washed out land on which the plaintiff had a right of way and a mill. *Held*, that defendant was responsible irrespective of any question of negligence. *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, was cited with approval in what it says that the right of every man to make use of his own as he pleases is not an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. On the other hand, the owner of a steam engine, purchased of makers of good reputation and handled with care, is not bound to anticipate that it will explode—*Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Marshall v. Welwood*, 38 N. J. 339, 20 Am. Rep. 394—any more than he is

rain or snow, even though incidental injury may result to his neighbor in consequence. In the case of urban property, he may, in erecting buildings and making improvements, find it needful to do this, even to the extent of preventing altogether the fall of rain or snow upon his grounds, and the limitation upon his right to do so is to be found only in the duty which every proprietor of land owes to those about him to so use his own as not unreasonably to restrict the enjoyment by others of corresponding rights. Still this duty only obliges him to use all due care and prudence to protect his neighbor, and does not require that he shall, at all events and under all circumstances, protect him; and any injury that may result, notwithstanding the observance of proper precaution, must be deemed incident to the ownership of town property, and can give no right of action. If one constructs his buildings so as to cast water therefrom upon the land of his neighbor, he commits an actionable wrong;³² but if he puts

that a domestic animal which has all his life been gentle and harmless will suddenly become vicious and inflict upon the first person who comes near him great bodily injury. And see *Grand Rapids, &c., R. R. Co. v. Huntley*, 38 Mich. 537. Where the defendant stored large quantities of crude petroleum, which escaped into plaintiff's property, the defendant was held liable irrespective of negligence. *Berger v. Minneapolis Gas Light Co.*, 60 Minn. 296, 62 N. W. 336.

32—*Baker's Case*, 9 Co. 53 b; *Jackson v. Pesked*, 1 M. & S. 234; *Tucker v. Newman*, 11 Ad. & El. 40; *Fay v. Prentice*, 1 M. G. & S. 828; *Ashley v. Ashley*, 6 *Cush.* 70; *Aiken v. Benedict*, 39 *Barb.* 400; *Shipley v. Fifty Associates*, 106 Mass. 194; *Hazelton v. Edgmand*, 35 Kan. 202; *Chandler v. Lazarus*, 55 Ark. 312, 18 S. W. 181; *Armstrong v. Luco*, 102 Cal. 272, 36 Pac. 674; *Schlitz Brewing Co. v.*

Crompton, 142 Ill. 511, 32 N. E. 693, 34 Am. St. Rep. 92, 18 L. R. A. 390; *Conner v. Woodfill*, 126 Ind. 85, 25 N. E. 876, 22 Am. St. Rep. 568; *Fitzpatrick v. Welch*, 174 Mass. 486, 55 N. E. 178, 48 L. R. A. 278; *Beach v. Gaylord*, 43 Minn. 476, 45 N. W. 1095; *Peters v. Lewis*, 28 Wash. 366, 68 Pac. 869; *Huber v. Stark*, 124 Wis. 359, 102 N. W. 12; *Gould v. McKenna*, 86 Pa. St. 297, 27 Am. Rep. 705, where it is held no defense that the neighbor's wall struck by the drip is not well built. So it is no defense that plaintiff's damage is caused in part by leaks from his own roof. *Chandler v. Lazarus*, 55 Ark. 312, 18 S. W. 181. See, also, *Hooten v. Barnard*, 137 Mass. 36. But it is not an actionable wrong if water falling from a roof flows on a lot three feet below the grade of the surrounding property. *Phillips v. Waterhouse*, 69 Ia. 199, 58 Am. Rep. 220.

proper eave troughs or gutters upon his building for leading off the water upon his own ground, and keeps them in proper order, and is guilty of no negligence in this regard, an adjoining proprietor can have no legal complaint against him for injuries resulting from extraordinary or accidental circumstances, for which no one is in fault; and such injuries must be [*682] left to be borne by those on whom they fall.³³

Interfering With Surface Water. The drawing off of surface water may affect adjoining estates either as it deprives them of the benefits of the ordinary flow in natural water courses, or as it increases the ordinary flow in such water courses, or as it casts water through ditches upon adjoining lands, or so near to them that the water, percolating through the soil, causes the adjoining land to be wet, and unsuited to cultivation, or unproductive. In the first case, that is, where the lower proprietor is deprived of the benefit of the natural flow of mere surface water, or of some portion thereof, we suppose he can have no remedy. As has been forcibly said, one party cannot insist upon another maintaining his field as a mere water table for the other's benefit.³⁴ On the other hand, it is equally well settled that one may

33—Underwood *v.* Waldron, 33 Mich. 232; Barry *v.* Peterson, 48 Mich. 263.

34—Rawstron *v.* Taylor, 11 Exch. 369, 383. To the same effect is Broadbent *v.* Ramsbotham, 11 Exch. 602, in which it is said (p. 615) that “the water belongs absolutely to the defendant, on whose land it falls.” See, also, Curtiss *v.* Ayrault, 47 N. Y. 73; Livingston *v.* McDonald, 21 Iowa, 160, 89 Am. Dec. 563; Wheatley *v.* Baugh, 25 Pa. St. 528, 44 Am. Dec. 721; Boynton *v.* Gilman, 53 Vt. 17; Gibbs *v.* Williams, 25 Kan. 214, 37 Am. Rep. 241. The owner may get rid of surface water as he sees fit. Bunderson *v.* Burlington, etc., R. R. Co., 43 Neb. 545, 61 N. W. 721. If the unused overflow from a

spring on one's land sinks into the soil, he may divert and use it before it reaches a watercourse on a lower level. Bloodgood *v.* Ayers, 37 Hun, 356. But where water from springs forms a pond and watercourse on one's land, he may not stop the flow to lower land. Howe *v.* Norman, 13 R. I. 488. See Colrick *v.* Swinburne, 105 N. Y. 503.

The rule prevailing elsewhere is not accepted in New Hampshire, where the doctrine seems to be, as respects water percolating through the soil, and also mere surface water not gathered into a stream, “that the land owner's right to obstruct or divert it is limited to what is necessary in the reasonable use of his own land.” Bassett

lawfully drain his lands into a natural water course, even though a lower proprietor is injured by the increased flow. "For the sake of agriculture, *agri colendi causa*, a man may drain his ground which is too moist, and, discharging the water according to its natural channel, may cover up and conceal the drains through his lands; may use running streams to irrigate his fields, though he thereby diminishes, not unreasonably, the supply of his neighbors below; and may clear out impediments in the natural channel of his streams, though the flow of water

[*683] upon his neighbor be thereby increased. * * It is not more agreeable to the laws of nature that water should descend, than it is that lands should be farmed and mined; but in many cases they cannot be, if an increased volume of water may not be discharged through natural channels and outlets. The principle, therefore, should be maintained, but it should be prudently applied;³⁵ and it will not preclude the lower proprietor erecting any such protections as may be needful to guard his lands against the additional flow, provided they do not intercept the passage of water which would naturally pass on to his land. In Massachusetts it has been decided that one may erect barriers to prevent surface water which has accumulated elsewhere from coming upon his land, even though it is thereby made to flow upon the land of another, to his loss. "The right of an owner of land to occupy and improve it in such manner and for such purpose as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation, in any portion of it, will cause water which may accumulate thereon by rains and snows falling upon its surface, or flowing on to it over

- v. Salisbury Manuf. Co.*, 43 N. H. 569; *Sweet v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Ridge v. Sargent*, 64 N. H. 294, 9 Atl. 723; *Franklin v. Durger*, 71 N. H. 186, 51 Atl. 911. *v. Griesemer*, 26 Pa. St. 407, 414, 67 Am. Dec. 437; *Meixall v. Morgan*, 149 Pa. St. 415, 24 Atl. 216, 34 Am. St. Rep. 614; *Sheehan v. Flynn*, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632.

35—WOODWARD, J., in Kauffman

the surface of adjacent lands, to pass into and over the same in greater quantities or in other directions than they were accustomed to flow.³⁶ The point of these decisions is, that where there is no water course, by grant or prescription, and no stipulation exists between conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot over that of his neighbor. *Cujus est solum, ejus est usque ad coelum* is a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land, above, upon, or beneath the surface, cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. *Nor is it at all material, in the application of this principle of the [*684] law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil.³⁷

The doctrine of this case is fully approved in several States.³⁸

36—Citing *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859; *Johnson v. Chicago*, etc., R. R. Co., 80 Wis. 640, 50 N. W. 771, 27 Am. St. Rep. 76, 14 L. R. A. 495.

37—*BIGELOW*, Ch. J., in *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625.

38—*Morrison v. Bucksport*, 67 Me. 353; *Murphy v. Kelly*, 68 Me. 521; *Grant v. Allen*, 41 Conn. 156; *Chadeayne v. Robinson*, 55 Conn. 345, 11 Atl. 592; *Bowlby v. Speer*, 31 N. J. 351, 86 Am. Dec. 216; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276, but see *Ridge v. Sergeant*, 64 N. H. 294, 9 Atl. 723; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *White v. Sheldon*, 35 Hun, 193; *Hill v. Cincinnati*.

In others, the rule of the civil law has been adopted and followed, that the lower estate is charged with a servitude for the benefit of the upper estate to permit the surface water to flow off over it as it had been accustomed to do.³⁹ No doubt all the

nati, &c., Co., 109 Ind. 511; Cairo, &c., R. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Atchison, &c., R. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Abbott v. Kansas City, &c., Co., 83 Mo. 271, overruling Shane v. Kansas City, &c., Co., 71 Mo. 237, 36 Am. Rep. 480; O'Connor v. Fond Du Lac, &c., Ry. Co., 52 Wis. 526; Hanlin v. Chicago, &c., Co., 61 Wis. 515; Clay v. Pittsburgh, etc., Ry. Co., 164 Ind. 439; Rarey v. Lee, 16 Ind. App. 121, 44 N. E. 318; Missouri Pac. Ry. Co. v. Renfro, 52 Kan. 237, 34 Pac. 802, 39 Am. St. Rep. 344; Chicago, etc., Ry. Co. v. Steck, 51 Kan. 737, 33 Pac. 601; Burke v. Missouri Pac. Ry. Co., 29 Mo. App. 370; Bunder-son v. Burlington, etc., R. R. Co., 43 Neb. 545, 61 N. W. 721; Edwards v. Charlotte, etc., R. R. Co., 39 S. C. 472, 18 S. E. 58, 39 Am. St. Rep. 746, 22 L. R. A. 246; Balt-zeger v. Carolina Mid. Ry. Co., 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789; Gross v. Lampasas, 74 Tex. 195, 11 S. W. 1086; Barnett v. Matagorda, etc., Co., 98 Tex. 355; Norfolk, etc., R. R. Co. v. Carter, 91 Va. 587, 22 S. E. 517; Cass v. Dicks, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859; Neal v. Ohio Riv. R. R. Co., 47 W. Va. 316, 34 S. E. 914; Johnson v. Chicago, etc., R. R. Co., 80 Wis. 640, 50 N. W. 771, 27 Am. St. Rep. 76, 14 L. R. A. 495. So if the water is turned, not back, but off, on another pro-prietor at one side. Lessard v. Stram, 62 Wis. 112, 51 Am. Rep. 715. See Bangor v. Lansil, 51 Me. 521. The overflow from a swollen stream is to be regarded as sur-face water. Abbott v. Kansas City, &c., Ry. Co., 83 Mo. 271; Cairo, &c., R. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139. *Contra*, Crawford v. Rambo, 44 Ohio St. 279; Byrne v. Minn., &c., Ry. Co., 38 Minn. 212, 36 N. W. 339. Not if overflow is caused by too small a culvert over a water course. Sullens v. Chicago, &c., Ry. Co., 74 Ia. 659, 38 N. W. 546; Cheehan v. Flynn, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632, modifies the common law doctrine as held in Minnesota.

39—Martin v. Riddle, 26 Pa. St. 415; Kauffman v. Greisemer, 26 Pa. St. 407; Delahoussaye v. Judice, 13 La. Ann. 587; Butler v. Peck, 16 Ohio St. 334, 88 Am. Dec. 452; Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Beard v. Murphy, 37 Vt. 99; Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Gillham v. Madison Co. R. R. Co., 49 Ill. 484; Gormley v. Sanford, 52 Ill. 158; Nininger v. Norwood, 72 Ala. 277; Farris v. Dudley, 78 Ala. 124; Boyd v. Conklin, 54 Mich. 583, 52 Am. Rep. 831; Louisville, &c., R. R. Co. v. Hays, 11 Lea, 382, 47 Am. Rep. 291; Jacksonville, &c., R. R. Co. v. Cox, 91 Ill. 500; Eufaula v. Simmons, 86 Ala. 515, 6 So. 47; Savannah, etc., Ry. Co. v. Buford, 106 Ala. 303, 17 So. 395; Central of Georgia Ry. Co. v. Windham, 126 Ala. 552, 28 So. 392; Larned v.

States would recognize an exception in favor of the owner of a town lot, who must be at liberty to cut off drainage across it, or his lot would be worthless for many purposes.⁴⁰ In respect to *agricultural lands, strong reasons may be given [*685] for either view, and it is probable that each will continue to find supporters hereafter as heretofore. In New Hampshire neither the common law nor the civil law as to surface is in force to the full extent. Where a complaint is made for damages by interfering with the natural flow of surface water, the question is whether the act causing the injury was a reasonable use by the defendant of his own land in view of the liability of injury to the plaintiff's land. "A use is reasonable," says the Supreme Court, "which does not unreasonably prejudice the rights of others. In determining the question of reasonableness, the effect of the use upon the interests of both parties, the benefits derived from it by one, the injury caused by it to the other, and all the

Castle, 78 Cal. 454, 18 Pac. 872, 21 Smith, 80 Mich. 100, 45 N. W. 69; Pac. 11; Gray *v.* McWilliams, 98 Finkbinder *v.* Ernst, 135 Mich. 226, Cal. 157, 32 Pac. 976, 35 Am. St. 97 N. W. 684; Kelly *v.* Dunning, Rep. 163, 21 L. R. A. 593; Stanford *v.* San Francisco, 111 Cal. 39 N. J. Eq. 482; Field *v.* West Orange, 46 N. J. Eq. 183; Staton 198, 43 Pac. 605; Wood *v.* Moulton, v. Norfolk, etc., R. R. Co., 109 N. 146 Cal. 317, 80 Pac. 92; Connally C. 337, 13 S. E. 933; Staton *v.* Norfolk, etc., R. R. Co., 111 N. C. 278, *v.* Hall, 84 Ga. 198, 10 S. E. 738; Totel *v.* Bonnefoy, 123 Ill. 653, 14 16 S. E. 181; Mizell *v.* McGowan, N. E. 687, 5 Am. St. Rep. 570; Barnard *v.* Commissioners, 172 Ill. 120; Ribardy *v.* Murray, 391, 50 N. E. 120; Ribardy *v.* Murray, 177 Ill. 134, 52 N. E. 325; Pinkstaff *v.* Steffy, 216 Ill. 406, 75 Pinkstaff *v.* Steffy, 216 Ill. 406, 75 N. E. 163; Vannest *v.* Fleming, 79 N. E. 163; Vannest *v.* Fleming, 79 Ia. 638, 44 N. W. 906, 18 Am. St. Ia. 638, 44 N. W. 906, 18 Am. St. Rep. 387, 8 L. R. A. 277; Willetts Rep. 387, 8 L. R. A. 277; Willetts *v.* Chicago, etc., Ry. Co., 88 Ia. 281, 55 N. W. 313, 21 L. R. A. 601; Williamson *v.* Oleson, 91 Ia. 290, 59 N. W. 267; Foley *v.* God Chaux, 48 La. Ann. 466, 19 So. 247; Philadelphia, etc., R. R. Co. *v.* Davis, 68 Md. 281, 11 Atl. 822, 6 Am. St. Rep. 440; Gregory *v.* Bush, 64 Mich. 37, 31 N. W. 90; Chapel *v.* 40—See Vanderwiele *v.* Taylor, 65 N. Y. 341. Chadeayne *v.* Robinson, 55 Conn. 345, 11 Atl. 592; Barkley *v.* Wilcox, 86 N. Y. 140, 40 Am. Rep. 519, and Bowlsby *v.* Speer, 31 N. J. 351, 86 Am. Dec. 216, *supra*, were cases of town lots. So Hall *v.* Rising, 141 Ala. 431. Where a city grades up a street and thereby causes surface water

circumstances affecting either of them, are to be considered."⁴¹

The question of liability, where one improves his lands by artificial drains, which cast water upon a lower proprietor, is equally difficult with that just mentioned. No doubt he may improve them by filling up low and wet places, without incurring liability to a lower proprietor, upon whom the flow would be increased,⁴² just as the public may lawfully improve streets and public grounds, though the improvement may have the effect to cast the falling or surface water upon adjoining grounds.⁴³ A natural water course must not be stopped up, and the water turned back upon the lands of another proprietor.⁴⁴ But "the true water course is well defined. There must be a stream *usually* flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be some-

to accumulate on the plaintiff's lot, it is not liable for the damages; if no channel was obstructed. Lampe *v.* San Francisco, 124 Cal. 546, 57 Pac. 461, 1001.

41—Ridge *v.* Sargent, 64 N. H. 294, 9 Atl. 723. See also Franklin *v.* Durger, 71 N. H. 186, 51 Atl. 911. Compare Sheehan *v.* Flynn, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632.

42—Goodale *v.* Tuttle, 29 N. Y. 459, 467; Flagg *v.* Worcester, 13 Gray, 601; Hoyt *v.* Hudson, 27 Wis. 656; Bangor *v.* Lansil, 51 Me. 521.

43—Martin *v.* Riddle, 26 Pa. St. 415; Luther *v.* Winnisimmet Co., 9 Cush. 171; Greeley *v.* Maine Centr. R. R. Co., 53 Me. 200; Lampe *v.* San Francisco, 124 Cal. 546, 57 Pac. 461, 1001. One may drain such place into a natural surface water channel. Peck *v.* Herrington, 109 Ill. 611, 50 Am. Rep. 627. But when the right to surface flow upon a lower heritage

is prescriptive, it is held that by draining wet places one may not increase the flow. Gregory *v.* Bush, 64 Mich. 37, 31 N. W. 90.

44—Parks *v.* Newburyport, 10 Gray, 28; Flagg *v.* Worcester, 13 Gray, 601; Dickinson *v.* Worcester, 7 Allen, 19; Turner *v.* Dartmouth, 13 Allen, 291; Emery *v.* Lowell, 104 Mass. 13; Imler *v.* Springfield, 55 Mo. 119; Bunderson *v.* Burlington, etc., R. R. Co., 43 Neb. 545, 61 N. W. 721. It is held, in Franklin *v.* Fisk, 13 Allen 211, that if a proprietor of lands protects them against surface water by an embankment, which throws the water back into the road, the public have no cause of complaint. On the other hand an action will not lie against a town for failing to keep open a drain across a highway, unless it can be shown that an obligation to construct the drain was imposed, either by the common law or by the statute. Estes *v.* China, 56 Me. 407.

thing more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing into the hollows or ravines in land, which is the mere surface *water from rain or melting snow, and is discharged [*686] through them from a higher to a lower level, but which, at other times, are destitute of water. Such hollows or ravines are not, in legal contemplation, water courses."⁴⁵

45—DIXON, Ch. J., in *Hoyt v. Hudson*, 27 Wis. 656, 661. In this case an intimation in *Bowlby v. Speer*, 31 N. J. 351, 86 Am. Dec. 216, that there may possibly be an exception to this proposition in the case of gorges and narrow passages in hills or mountainous regions is repeated. As bearing on the question, see *Eulrich v. Richter*, 37 Wis. 226, and 41 Wis. 318. And compare *Gillham v. Madison, &c.*, R. R. Co., 49 Ill. 484; *Barnes v. Sabron*, 10 Nev. 217; *Wagner v. Long Island R. R. Co.*, 2 Hun, 633; *Neal v. Ohio Riv. R. R. Co.*, 47 W. Va. 316, 34 S. E. 914. A gorge in which excessive rains have immemorially found outlet is a water course. *Palmer v. Waddell*, 22 Kan. 352, but a mere depression is not. *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Kansas City, &c., R. R. Co. v. Riley*, 33 Kan. 374. Says BIGELOW, Ch. J., in *Ashley v. Wolcott*, 11 Cush. 192, 195. "To maintain the right to a water course or a brook, it must be made to appear that the water usually flows in a certain direction, and by a regular channel, with banks or sides. It need not be shown to flow continually; it may be dry at times, but it must have a well defined and substantial existence. Angell on Water Courses, § 4; *Shields v. Arndt*, 3 Green Ch. R. 234, 246; *Luther v. Winnisimmet Co.*, 9 Cush. 171." To substantially the same effect are *Stanchfield v. Newton*, 142 Mass. 110; *Ferris v. Wellborn*, 64 Miss. 29. In *Earl v. DeHart*, 12 N. J. 280, 283, 72 Am. Dec. 395, the chancellor gives a definition of a water course. "A water course is defined to be 'a channel or a canal for the conveyance of water, particularly in draining lands.' It may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in case of a ditch, or other artificial means used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow, in consequence of the natural formation of the surface of the surrounding land. It is an ancient water course, if the channel through which it naturally runs has existed from time immemorial. Whether it is entitled to be called an ancient water course, and, as such, legal rights can be acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams of water, which, if dammed up, would inundate a large region of

[*687] *In Iowa, in a carefully considered case, it was held that if a ditch made by the defendant for the purpose of draining his lands, and which terminated within sixty feet of the line of the plaintiff's, had the effect to increase the quantity of water on the plaintiff's land to his injury, or, without increasing it, threw the water upon the land in a different manner from what the same would naturally have flowed upon it, to his injury, the defendant would be liable for the injury, even though the ditch was constructed by the defendant in the course of the ordinary use and improvement of his farm.⁴⁶ So in Wisconsin

country, are dry for a great portion of the year. If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and melting of large bodies of snow, as to require an outlet of some common reservoir, and if such water is regularly discharged through a well defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient water course."

A lake was fed by living streams. A current set out of it through a gravel bed into which it percolated. The passage through the lake to the bed was held a water course. *Hebron Gravel Rd. Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199. A pond, covering four acres of ground owned by different persons, made by surface flow but itself permanent and retained in a natural basin, is not surface water. It is governed by the rules as to water courses and one land owner cannot by ditching drain the pond. *Schaefer v. Marthaler*, 34 Minn. 487.

See, further, on this subject,

Martin v. Riddle, in note to *Kauffman v. Griesemer*, 26 Pa. St. 407, 415, 67 Am. Dec. 437.

46—*Livingston v. McDonald*, 21 Ia. 160, 89 Am. Dec. 563. To same effect, *Williamson v. Oleson*, 91 Ia. 290, 59 N. W. 267; *Stinson v. Fishel*, 93 Ia. 656, 61 N. W. 1063. See *Vannest v. Fleming*, 79 Ia. 638, 44 N. W. 906, 18 Am. St. Rep. 387, 8 L. R. A. 277; *Willitts v. Chicago, etc., Ry. Co.*, 88 Ia. 281, 55 N. W. 313, 21 L. R. A. 601; *Reynolds v. Clark*, Ld. Raym. 1399; *Laney v. Jasper*, 39 Ill. 46. To substantially the same effect are *McCormick v. Kansas City, &c., R. R. Co.*, 70 Mo. 359, 35 Am. Rep. 431; *Hicks v. Silliman*, 93 Ill. 255; *West Orange v. Field*, 37 N. J. Eq. 600; *Templeton v. Voshlo*, 72 Ind. 134, 37 Am. Rep. 150; *Hogenson v. St. Paul, &c., Ry. Co.*, 31 Minn. 224; *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Knight v. Brown*, 25 W. Va. 808; *Mitchell v. New York, &c., R. R. Co.*, 36 Hun, 177; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424. The case of *Adams v. Walker*, 34 Conn. 466, 91 Am. Dec. 742, the facts of which are somewhat imperfectly stated

it has been decided that the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it through an artificial channel upon the land of another, or so near it that it *will flow over upon such land to its [*688] injury.⁴⁷ And so in other States.⁴⁸ A case in Ohio somewhat similar was decided in the same way. In that case a part of the water which the defendant discharged upon the land of the plaintiff would naturally have found its way there had the drain not been cut.⁴⁹ These cases seem to confine the obligation of the owner of the lower estate to receive the water flowing from the upper estate, to "waters which flow naturally without the art of man; those which come from springs, or from

in the report, lays down the same doctrine, perhaps going somewhat further. In New Hampshire, apparently, the question would be one of reasonable use. *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Rindge v. Sargent*, 64 N. H. 294, 9 Atl. 723; *Franklin v. Durger*, 71 N. H. 186, 51 Atl. 911. Says *DENIO*, Ch. J., in *Goodale v. Tuttle*, 29 N. Y. 459, 467: "In respect to the running off of surface water, caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well settled rule that the owner of land has full dominion over the whole space above and below the surface." If, by ditching, water from a pond with no natural outlet is cast on land there is a wrong. *Davis v. Londgreen*, 8 Neb. 43. If the water is diverted from its natural course but is cast in the same quantity and place and at the same rate there is no wrong. *Dorr v. Simerson*, 73 Ia. 89, 34 N. W. 752. Where a railroad commits a wrong in pouring surface water from its ditch upon another's land it is not liable for damage caused by water turned into such ditch by others without its sanction. *Chicago, &c., Ry. Co. v. Glenney*, 118 Ill. 487.

47—*Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50. And see *Proctor v. Jennings*, 6 Nev. 83; *Vernum v. Wheeler*, 35 Hun, 53; *Davis v. Fry*, 14 Okl. 340, 78 Pac. 180.

48—*Brandenberg v. Zeigler*, 62 S. C. 18, 39 S. E. 790, 89 Am. St. Rep. 887, 55 L. R. A. 414; *Noyes v. Cosselman*, 29 Wash. 635, 70 Pac. 61, 92 Am. St. Rep. 937; *Sullivan v. Johnson*, 30 Wash. 72, 70 Pac. 246; 1 Lewis Em. Dom. § 91.

49—*Butler v. Peck*, 16 Ohio St. 334, 88 Am. Div. 452. Compare *Curtiss v. Ayrault*, 47 N. Y. 73. And, see *Wheeler v. Worcester*, 10 Allen, 591. In *Whalley v. Lancashire, &c., Co.*, L. R. 13 Q. B. D. 131, an embankment was cut to let off accumulations of an unprecedented rainfall, and though it was reasonably necessary to

rain falling directly on the heritage, or even by the natural depressions of the place.⁵⁰ The conclusion seems to be that where the surface waters are collected and cast in a body upon the proprietor below, unless into a natural watercourse, the lower proprietor sustains a legal injury, and may have his action therefor.⁵¹ This is the rule that has been applied against municipal corporations: While they are not bound to construct sewers or drains to protect adjoining owners against the flow of surface water from the public ways, yet if they actually construct such as must carry water upon the adjacent lands, they are liable as much as they would be if they had invaded such lands by sending in their servants or otherwise.⁵²

save the embankment and though the water would have percolated through it in time, it was held a wrong.

50—*Kauffman v. Griesemer*, 26 Pa. St. 407, 413, 67 Am. Dec. 437. See *Martin v. Jett*, 12 La. 504, 32 Am. Dec. 120. And compare *Bowlsby v. Speer*, 31 N. J. 351, 86 Am. Dec. 216.

51—*Eufaula v. Simmons*, 86 Ala. 515; *Springfield*, etc., R. R. Co. v. *Henry*, 44 Ark. 360; *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92; *Atkinson v. Atlanta*, 81 Ga. 625, 7 S. E. 692; *Albany v. Sikes*, 94 Ga. 30, 20 S. E. 257; *Elgin v. Kimball*, 90 Ill. 569, 25 N. E. 689; *Graham v. Keene*, 143 Ill. 425, 32 N. E. 180; *Weddell v. Hapner*, 124 Ind. 315, 24 N. E. 368; *Patoka Tp. v. Hopkins*, 131 Ind. 142, 30 N. E. 896; *Williamson v. Oleson*, 91 Ia. 290, 59 N. W. 267; *Stinson v. Fishel*, 93 Ia. 656, 61 N. W. 1063; *Schofield v. Cooper*, 126 Ia. 334, 102 N. W. 1110; *Litchins v. Frostburg*, 68 Md. 100, 11 Atl. 826; *Gregory v. Bush*, 64 Mich. 37, 31 N. W. 90; *Olson v. St. Paul*, etc., R. R. Co., 38 Minn. 419, 37 N. W. 953; *Illinois Central R. R. Co. v. Miller*, 68

Miss. 760, 10 So. 61; *Paddock v. Somes*, 102 Mo. 226, 14 S. W. 746; *Fremont*, etc., R. R. Co. v. *Marley*, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; *Lincoln St. Ry. Co. v. Adams*, 41 Neb. 737, 60 N. W. 83; *Jacobson v. Van Boening*, 48 Neb. 80, 66 N. W. 993, 58 Am. St. Rep. 684, 32 L. R. A. 229; *Field v. West Orange*, 46 N. J. Eq. 183; *Staton v. Norfolk*, etc., R. R. Co., 111 N. C. 278, 16 S. E. 181; *Weir v. Plymouth*, 148 Pa. St. 566, 24 Atl. 94; *Bohan v. Avoca*, 154 Pa. St. 404, 26 Atl. 604; *Tyrus v. Kansas City*, etc., R. R. Co., 114 Tenn. 579; *Austin*, etc., R. R. Co. v. *Anderson*, 79 Tex. 427, 15 S. W. 484; *Norfolk*, etc., R. R. Co. v. *Carter*, 91 Va. 587, 22 S. E. 517; *Northwood v. Raleigh*, 3 Ontario, 347; *Stalker v. Dunwick*, 15 Ontario, 342; *Miner v. Buffalo*, etc., R. R. Co., 9 U. C. C. P. 280; *Rowe v. Rochester*, 22 U. C. C. P. 319. But see *Brown v. Winona*, etc., Ry. Co., 53 Minn. 259, 55 N. W. 123, 39 Am. St. Rep. 603.

52—*Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 30, 11 Am. Rep. 1;

***Subterranean Waters.** If one by an excavation on [*689] his own land draws off the subterraneous waters from the land of his neighbor to the prejudice of the latter, no action will lie for the consequent damage. This is fully settled in England by the leading case of *Acton v. Blundell*,⁵³ and in a later case it is decided that prescriptive rights cannot be gained in subterraneous waters, which will preclude such excavations on adjoining grounds as may draw them off.⁵⁴ These decisions have been generally followed in this country, and it may be consid-

Alton v. Hope, 68 Ill. 167; *Pettigrew v. Evansville*, 25 Wis. 223; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552, and cases cited. *Gould v. Booth*, 66 N. Y. 62; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22; *Gilluly v. Madison*, 63 Wis. 518; *West Orange v. Field*, 37 N. J. Eq. 600; *Vale Mills v. Nashua*, 63 N. H. 136. And, see *Pumpelly v. Green Bay Co.*, 13 Wall. 166; 1 Lewis Em. Dom. § 103; *Cain v. South Bound R. R. Co.*, 62 S. C. 25, 39 S. E. 792.

So as to highway officers. *Blakely v. Devine*, 36 Minn. 53. As to flowage caused incidentally by changing grade of streets. *Morris v. Council Bluffs*, 67 Ia. 343, 56 Am. Rep. 343; *Bronson v. Wallingford*, 54 Conn. 513. Upon the right of an upper proprietor to have natural passages for the surface water kept open for his drainage, though they are not water courses, see *Franklin v. Fisk*, 13 Allen, 211; *Goodale v. Tuttle*, 29 N. Y. 459; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Ex parte Martin*, 13 Ark. 198.

One may turn his surface water into a natural water course provided the natural capacity thereof is sufficient to carry off such additional water, although the flow is accelerated. *McCormick v. Horan*,

81 N. Y. 86, 37 Am. Rep. 479; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540. And water drawn from wells on the land may be thus disposed of. *Jackman v. Arlington Mills*, 137 Mass. 277. So whether the channel is that of a water course or of surface flowage. *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627. But if such flowage increases a small pond tenfold, it is unjustifiable. *Galveston, &c., Ry. Co. v. Tait*, 63 Tex. 223. If one covers a brook so as to make a drain, he is liable if he diminishes its capacity to carry the natural flow from a heavy rain, but not if an increase of flow is due to the city's discharging water into it above his land. *Selleck v. Hall*, 47 Conn. 260.

53—*Acton v. Blundell*, 12 M. & W. 324.

54—*Chasemore v. Richards*, 7 H. L. Cas. 349; S. C. in Ex. Ch. 2 H. & N. 168. See, also, *New River Co. v. Johnson*, 2 El. & El. 435; *Hammond v. Hall*, 10 Sim. 551; *Smith v. Kenrick*, 7 C. B. 515; *The Queen v. Metropolitan Board of Works*, 3 B. & S. 710; *Popplewell v. Hodkinson*, L. R. 4 Exch. 248.

ered settled law that if the well dug by one man ruins the well or spring of his neighbor by drawing off its water, it is *damnum absque injuria*.⁵⁵ Where a city obtained a part of its water supply from wells upon its own land, to which a powerful suction was applied by means of pumps and machinery, and the effect

55—*Greenleaf v. Francis*, 18 Pick. 117; *Wheatley v. Baugh*, 25 Pa. St. 528; *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511; *Frazier v. Brown*, 12 Ohio St. 294; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Bliss v. Greeley*, 45 N. Y. 671, 6 Am. Rep. 152; *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. 433; *New Albany, &c., R. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60; *Chatfield v. Wilson*, 28 Vt. 49; *Clark v. Conroe*, 38 Vt. 469; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 412; *Morrison v. Bucksport, &c., R. R. Co.*, 67 Me. 353; *Commonwealth v. Richter*, 1 Pa. St. 467; *Ocean Grove Ass. v. Comrs. of Asbury Park*, 40 N. J. Eq. 447; *Springfield W. W. Co. v. Jenkins*, 62 Mo. App. 74; *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. 433, 2 Am. St. Rep. 443; *Herrman Irr. Co. v. Butterfield, M. & M. Co.*, 19 Utah, 453, 57 Pac. 537, 51 L. R. A. 930; *Wheelock v. Jacobs*, 70 Vt. 162, 40 Atl. 41, 67 Am. St. Rep. 659, 43 L. R. A. 105; *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747, 40 S. E. 27, 86 Am. St. Rep. 924; *Huber v. Merkel*, 117 Wis. 355, 94 N. W. 354, 98 Am. St. Rep. 933, 62 L. R. A. 589; *McNab v. Robertson*, (1897) A. C. 129. Compare *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Parker v. Boston, &c., R. R. Co.*, 3 Cush. 107, 50 Am. Dec. 709; *Buffum v. Harris*, 5 R. I. 243. The same rule has been applied to polluting waters underground. *Upjohn v. Richland*, 46 Mich. 542. Draining such waters incidentally by the proper use of land so that they do not reach a spring is not a breach of contract of sale of the spring and its waters. *Brain v. Marfell*, 29 Am. L. Reg. 93 (Court App. of England). It is said in some cases that if this is done not for his own benefit but to injure his neighbor, the neighbor may recover damages. *Thurston v. Hancock*, 12 Mass. 221, 7 Am. Dec. 57; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Greenleaf v. Francis*, 18 Pick. 117; see *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569. The decision in *Chatfield v. Wilson*, 28 Vt. 49, is directly to the contrary, but some of the other cases here cited avoid the point. See also cases, Ch. XXII. A railroad company dug a well, and used the water for its engines to the extent of 25,000 gallons a day, whereby the plaintiff's well was dried up. It was held that there was no liability. *Houston, etc., R. R. Co. v. East*, 98 Tex. 146.

The principles applicable to percolating water have been applied to natural gas. One cannot enjoin his neighbor from "shooting" his well with explosives because the effect will be to decrease the flow of the plaintiff's well. *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59, 31 Am. St. Rep. 433, 16 L. R. A. 443; *Tyner v. People's Gas Co.*, 131 Ind. 408, 31 N. E. 61.

was to destroy a stream and spring on the plaintiff's land half a mile away, the city was held liable.⁵⁶ So where the plaintiff's land was made valueless for agricultural purposes by withdrawal of the underground water in the same manner.⁵⁷ In the case last referred to the court says: "In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. * * * But to fit it (the land) up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired."⁵⁸

In Indiana it is held that one may not appropriate subterranean waters maliciously and for the sole purpose of injuring his neighbor, and such an appropriation was enjoined.^{58a} But

56—*Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664. Co. v. Farmer, 89 Minn. 58, 93 N. W. 907, 99 Am. St. Rep. 541, 60 L. R. A. 875; *Miller v. Black Rock*, etc., Co., 99 Va. 747, 40 S. E. 27. So in Springfield W. W. Co. v. Jenkins, 62 Mo. App. 74. In the Indiana case the court says: "The

strong trend of the later decisions is towards a qualification of the earlier doctrine that the land owner could exercise unlimited and irresponsible control over subterranean waters on his own land, without regard to the injuries which might thereby result to the lands of other proprietors in the neighborhood. Local conditions, the purpose for which the land owner excavates or drills holes or wells on his land, and other like circumstances have come to be regarded as more or less influential in this class of cases, and have justly led to an extension of the maxim,

58—Ibid. p. 526. The court further says: "We more readily conclude to affirm, because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes; it does wrong under the letter of the law in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in the previous cases in the light of the cases themselves." p. 527.

58a—*Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687, 72 N. E. 849, citing *Stillwater Water*

the contrary is held in New York and Vermont.^{58b}

In Pennsylvania it is held that the reason of the rule of non-liability for drawing off or interfering with subterranean waters, is that the damage could not be foreseen or avoided.⁵⁹ The case referred to arose out of the following facts: A natural gas company in boring a well encountered salt water in one of the lower strata, which rose in the well, found its way through the upper rock formation and destroyed the neighboring wells. The existence of the salt water in the lower stratum, the geological formation in the vicinity and the probable consequences were all well known and the damage could have been prevented by a small outlay. The company was held liable. The court says: "It is therefore clear, from the principles and the reasoning of all the cases, that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location and course. * * * If the boundaries of knowledge have been so enlarged as to make an end of the reason, then, *cessante ratione, cessat ipsa lex*. Geology is a progressive, and now, in many respects, a practical science; and, as truly remarked by the learned judge below, in his opinion on the motion for a new trial, 'since the decisions in *Acton v. Blundell*,⁶⁰ and *Wheatley v. Baugh*,⁶¹ probably more deep wells have been drilled in Western Pennsylvania than had previously been dug in the entire earth in all time. And that which was held to be necessarily unknown, and merely speculative, as to the flow of water underground, has been, by experience in such cases as this, reduced almost to a certainty.' If this is the state of knowledge at the present day; if the existence of a stratum of clear water, and its flow into wells and springs in the

'Sic utere tuo ut alienum non laedas,' to the rights of land owners over subterranean waters, and to some abridgment of their supposed power to injure their neighbors without benefitting themselves." pp. 697-8.

58b—*Phelps v. Nowlen*, 72 N. Y.

39; *Chatfield v. Wilson*, 28 Vt. 49. See *Chesley v. King*, 74 Me. 164. 59—*Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143, 18 Atl. 1012, 17 Am. St. Rep. 791, 6 L. R. A. 280.

60—12 M. & W. 324.

61—25 Pa. St. 528.

vicinity, and the existence of a separate and deeper stratum of salt water, which is likely to rise and mingle with the fresh, when penetrated in boring for oil and gas, are known, and the means of preventing the mixing are available at reasonable expense, then, clearly, it would be a violation of the living spirit of the law not to recognize the change, and apply the settled and immutable principle of right, to the altered conditions of fact."⁶²

Probably if the subterraneous water were a stream flowing in a well-known course it would be *different, [*690] and one through whose land it flowed would be protected against its being drawn away from him.⁶³ But one claiming rights in such a stream would be under the necessity of proving its existence and tracing it; not an easy task in any case.⁶⁴ In a recent case the Supreme Court of Florida says that "if subterranean water has assumed the proportions of a stream flowing in a well defined channel, the owner of the land through which it flows will not be authorized to divert it, pollute it, or improperly use it, any more than if the stream ran upon the surface in a well defined course."⁶⁵ And the same rule has been held in Iowa and Maryland.⁶⁶

62—*Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143, 159, 160, 18 Atl. 1012, 17 Am. St. Rep. 791, 6 L. R. A. 280.

63—See *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282, 300; *Dudden v. Guardians, &c.*, 1 H. & N. 627; *Chasemore v. Richards*, 7 H. L. Cas. 349, 373; *Smith v. Adams*, 6 Paige, 435; *Wheatley v. Baugh*, 25 Pa. St. 528; *Whetstone v. Bowser*, 29 Pa. St. 59; *Cole Silver Mining Co. v. Virginia, &c.*, *Water Co.*, 1 Sawyer, 470; *Burroughs v. Saterlee*, 67 Ia. 396, 56 Am. Rep. 350; *Hale v. McLea*, 53 Cal. 578; *Lybe's Appeal*, 106 Pa. St. 626; *Roath v. Driscoll*, 20 Conn. 532; *Brown v. Illius*, 25 Conn. 583; *Haldeman v. Bruckhart*, 45 Pa. St. 512; *Angell on Watercourses*, 150-159; *Washburn on Easements*, 441-448; *Gould on Waters*, § 281. But in Pennsylvania it is denied that this rule applies where the course of the stream cannot be discovered from the surface. *Lybe's App.*, 106 Pa. St. 626. One may not dig a well near a pond which supplies power and let the well fill by percolation to the injury of the owner of the power. *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265. See *Bailey v. Woburn*, 126 Mass. 416; *Aetna Mills v. Waltham*, 126 Mass. 422; *Same v. Brookline*, 127 Mass. 69.

64—See *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Mosier v. Caldwell*, 7 Nev. 363.

65—*Tampa W. W. Co. v. Cline*, 37 Fla. 586, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376.

66—*Willis v. Perry*, 92 Ia. 297,

Nuisances in the Use of Water Courses. Certain principles control the utilization of water in the running streams of the country, the violation of which may constitute a nuisance. These principles apply equally to navigable and non-navigable waters, and in general they are not affected by the fact that one riparian proprietor has first appropriated the waters to his own use. It is well settled that at the common law no superior rights can be acquired by one over the other by such prior appropriation.⁶⁷ The rule is modified in the mining States where the use of water upon the public domain is allowed to be appropriated to private use, independent of any ownership in [*691] the soil; and there the right of the first *appropriator is recognized as the superior right.⁶⁸ It is also modified by those statutes which in some States allow a riparian proprietor

60 N. W. 727, 26 L. R. A. 124; Washington County Water Co. v. Garver, 91 Md. 398, 46 Atl. 979. And see Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. 849.

67—Wright v. Howard, 1 Sim. & Stu. 190; Mason v. Hill, 3 B. & Ad. 304; Martin v. Bigelow, 2 Aik. 184, 16 Am. Dec. 696; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Platt v. Johnson, 15 Johns. 213, 8 Am. Dec. 233; Tyler v. Wilkinson, 4 Mason, 397; Gilman v. Tilton, 5 N. H. 231; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; Hoy v. Sterrett, 2 Watts, 327, 27 Am. Dec. 313; Hartzall v. Sill, 12 Pa. St. 24; Keeney & Wood Manuf. Co. v. Union Manuf. Co., 39 Conn. 576; Parker v. Hotchkiss, 25 Conn. 321; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723; Bliss v. Kennedy, 43 Ill. 67; Wood v. Edes, 2 Allen, 578; Thurber v. Martin, 2 Gray, 394, 41 Am. Dec. 468; Gould v. Boston Duck Co., 13 Gray, 442.

68—Atchison v. Peterson, 20 Wall. 507; Kelly v. Natoma Water Co., 6 Cal. 105; Butte Canal, &c., Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769; Nevada Water Co. v. Powell, 34 Cal. 109; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537; Ophir S. M. Co. v. Carpenter, 4 Nev. 534; Barnes v. Sabron, 10 Nev. 217; Strait v. Brown, 16 Nev. 317; Jerrett v. Mahan, 20 Nev. 89, 17 Pac. 12. See an elaborate discussion of appropriation in Lux v. Haggin, 69 Cal. 255. The prior appropriator may remove an obstruction upon an upper proprietor's land to the usual flow. Ware v. Walker, 70 Cal. 591; but he does not own the water before it reaches him and may not sue for its diversion as for goods sold. Parks, &c., Co. v. Hoyt, 57 Cal. 44. The appropriator has no right to a surplus in flood time not used by him. Edgar v. Stevenson, 70 Cal. 286; nor to more than necessary for his purposes at any time. Clough v. Wing, 2 Ariz. 371, 17 Pac. 453. The right of the first

to flow the lands of those above him, for manufacturing purposes, on making compensation. "The priority of first possession necessarily arises from the nature of the appropriation; where two or more have an equal right to appropriate, and where the actual appropriation by one necessarily excludes all others, the first in time is the first in right."⁶⁹

Questions may arise as between the adjacent proprietors on the opposite sides of the water course, or between the upper and lower proprietors. No one of them has a right to the water itself, but each of them has a right to the use of the water as it passes by his estate. And where the water course divides two estates, each proprietor has the right to the use, not of one-half merely, but of the whole bulk of the stream; that is, he is entitled to such advantage as it can be to him to have the whole stream flow past his estate; and neither can carry off or divert any part of it without the consent of the other.⁷⁰ The advantage might be very great where the stream is used for moving machinery, though it is obvious that, in order to obtain power by means of dams, the consent of the two proprietors would also be essential, since neither could go upon the land of the other for the purpose without permission.

*The general principle is that every proprietor of land [*692] on a water course is entitled to the enjoyment and use of the stream substantially according to its natural flow, subject only to such interruption as is necessary and unavoidable in its reasonable and proper use by other proprietors.⁷¹ The pro-

appropriator is limited to so much as he can economically and reasonably use. *Roeder v. Stein*, 23 Nev. 92, 42 Pac. 867.

69—*Gould v. Boston Duck Co.*, 13 Gray, 442, 451; *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 43; *Lincoln v. Chadbourne*, 56 Me. 197.

70—*Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Vandenburgh v. Van Bergen*, 13 Johns. 212; *Pratt v. Lamson*, 2 Allen, 275; *Canal Trustees v. Haven*, 11 Ill. 554; *Harding v. Water Co.*, 41

Conn. 87. See *Carpenter v. Gold*, 88 Va. 551, 14 S. E. 329. Where there is a public landing at the mouth the owner on one side of a brook may not sell one half the water as merchandise. *Moulton v. Newburyport Water Co.*, 137 Mass. 163.

71—*Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572; *Tampa W. W. Co. v. Cline*, 37 Fla. 586, 20 So. 780; *Ferguson v. Formenich Mfg. Co.*, 77 Ia. 576, 42 N. W. 448;

proprietors above have no right to divert, or unreasonably to retard the natural flow of the water to the proprietors below, and the proprietors below have no right to retard it or turn it back upon the proprietors above to their prejudice.⁷² The use may be for mills, for irrigation or other agricultural purposes; in short for any purpose whatsoever, within the limits of what is reasonable.

Diversion. The upper proprietor is at liberty to divert the water from its natural channel on his own estate at will, provided he returns it again before it leaves his land, and allows it to pass as it naturally would to those entitled to its use below him.⁷³ But he has no right to divert it without thus returning it; and to turn any portion of it into a new channel would be an actionable injury.⁷⁴ He may not divert the water even for

Shamleffer v. Peerless Mill Co., 18 Kan. 24; *Anderson v. Cincinnati So. R. R. Co.*, 86 Ky. 44, 5 S. W. 49; *Heath v. Williams*, 25 Me. 209; *Clark v. Cambridge, etc., Co.*, 45 Neb. 799, 64 N. W. 239; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841; *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 432, 22 Atl. 989; *Silver Spring, etc., Co. v. Wanskuck Co.*, 13 R. I. 611; *Carpenter v. Gold*, 88 Va. 551, 14 S. E. 329; *United States v. Rio Grande, D. & I. Co.*, 174 U. S. 690.

72—*Wright v. Howard*, 1 Sim. & Stu. 190; *Webb v. Portland Manuf. Co.*, 3 Sum. 189; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Thurber v. Martin*, 2 Gray, 394, 41 Am. Dec. 468; *Chandler v. Howland*, 7 Gray, 348, 66 Am. Dec. 487; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Miller v. Miller*, 9 Pa. St. 74; *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Arnold v. Foot*, 12 Wend. 330; *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438, 22 Atl. 989, 27 Am. St. Rep. 710.

73—*Tolle v. Correth*, 31 Tex. 362, 98 Am. Dec. 540; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Van Hoesen v. Coventry*, 10 Barb. 518; *Sackrider v. Beers*, 10 Johns. 241; *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404; *Oregon Iron Co. v. Trullinger*, 3 Ore. 1; *Porter v. Durham*, 74 N. C. 767; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504. So as to one not a riparian owner, but the licensee of such an owner, who takes and returns the water by pipes. *Kensit v. Grt. East. Ry. Co.*, L. R. 27 Ch. D. 122.

74—*Webb v. Portland Manuf. Co.*, 3 Sum. 189; *Parker v. Griswold*, 17 Conn. 287, 42 Am. Dec. 739; *Harding v. Stamford Water Co.*, 41 Conn. 87; *Newhall v. Iresson*, 8 Cush. 595, 54 Am. Dec. 790; *Pratt v. Lamson*, 2 Allen, 275; *Anthony v. Lapham*, 5 Pick. 175; *Blanchard v. Baker*, 8 Me. 253; *Vandenburgh v. Van Bergen*, 13 Johns. 212; *Shively v. Hume*, 10 Ore. 76; *Weiss v. Oreg., &c., Co.*, 13 Ore. 496; *Ulbricht v. Eufaula*

the purposes of repair of machinery; though a mere detention of *the water for that purpose would be lawful, [*693] if not under the circumstances unreasonable.⁷⁵

A town or city cannot by purchase of an upper proprietor, or even by legislation, acquire the right to appropriate a water course for municipal purposes, without the consent of the proprietors below, or without first appropriating their interests under the eminent domain.⁷⁶

Reasonable Use. The reasonableness of the use depends upon the nature and size of the stream, the business or purposes to which it is made subservient, and on the ever-varying circumstances of each particular case. Each case must therefore stand upon its own facts, and can be a guide in other cases

Water Co., 86 Ala. 587, 6 So. 78, 122, 19 Atl. 1007, 20 Am. St. Rep. 864, 8 L. R. A. 202.

East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. 631; Hogg v. Connellsville Water Co., 168 Pa. St. 456, 31 Atl. 1010; Carpenter v. Gold, 88 Va. 551, 14 S. E. 329; Hinckle v. Avery, 88 Ia. 47, 55 N. W. 77; Standard Plate Glass Co. v.

Butler Water Co., 5 Pa. Supr. Ct., 563; Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425. So if for more than twenty years an upper proprietor has caused water to run in an artificial channel, upon which a lower owner has erected a mill, he may not divert it from the channel. Shepardson v. Perkins, 58 N. H. 354. The owner of land upon which a spring is situated that is the source of a stream flowing through the lands of others, is only a riparian proprietor and may not appropriate the spring for his own exclusive use and it makes no difference that the owner is a water company. Lord v. Meadville Water Co., 135 Pa. St. 75—Davis v. Getchell, 50 Me. 602; Van Hoesen v. Coventry, 10 Barb. 518. See Angell on Water Courses, § 99 *a*. Peter v. Caswell, 38 Ohio St. 518, where water long diverted was turned into original channel causing harm.

76—Wilts, &c., Canal Co. v. Swindon Water Works Co., L. R. 9 Ch. App. 451; S. C. L. R. 7 H. L. 697; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; 1 Lewis Em. Dom. § 62; Osborn v. Norwalk, 77 Conn. 663. The state may not authorize the drawing of water from a lake which feeds a mill stream whereby the power is decreased, unless compensation is made to the riparian owners. Smith v. Rochester, 92 N. Y. 463, 44 Am. Dec. 391. But a corporation for the improvement of navigation may divert navigable water from a riparian owner. Black River, &c., Co. v. LaCrosse, &c., Co., 54 Wis. 659.

only as it may illustrate the application of general principles.⁷⁷ It has been well said that in determining upon the reasonableness of the use, it is necessary to take into account not only the general customs of the country, but also any local customs along the stream; and that such general rule should be laid down as appears best calculated to secure the entire water of the stream to useful purposes.⁷⁸ In a recent New York case, the court of appeals, speaking on this subject, says: "A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has a right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of others to have the stream substantially preserved in its natural rise, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others, and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law is still in force; *aqua currit et debet currere, ut currere solebat*. Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation where not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in

77—*Hetrich v. Deachler*, 6 Pa. St. 32; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573; *Tyler v. Wilkinson*, 4 Mason, 397; *Davis v. Getchell*, 50 Me. 602; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Holden v. Lake Co.*, 53 N. H. 552; *Parker v. Hotchkiss*, 25 Conn. 321; *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Honsee v. Ham-*

Murray, 6 Ind. 324, 63 Am. Dec. 385; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Timm v. Bear*, 29 Wis. 254; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Dumont v. Kelllogg*, 29 Mich. 420, 18 Am. Rep. 102; *Embrey v. Owen*, 6 Exch. 352; *Chasemore v. Richards*, 2 H. & N. 168.

78—*Keeney, &c., Manuf. Co. v. Union Manuf. Co.*, 39 Conn. 576.

order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the rise and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which, under certain circumstances, is held reasonable, under different circumstances would be held unreasonable.⁷⁹ In the same case it is held that the question of reasonable use is generally a question of fact, but whether the undisputed facts and the necessary inferences therefrom establish an unreasonable use is a question of law.

Detention of the Water. The general rule is that each riparian proprietor is entitled to the steady flow of the stream, *according to its natural course. But to apply [*694] this rule strictly would be to preclude the best use of flowing waters in most cases; and where power is desired, the rule must yield to the necessity of gathering the water into reservoirs. It is lawful to do this where it is done in good faith,⁸⁰

79—*Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 320, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687. The following are leading cases on the subject of reasonable use: *Drake v. Lady Ensley Coal, etc., Co.*, 102 Ala. 501, 14 So. 749; *Heilbron v. Land & Water Co.*, 80 Cal. 189, 22 Pac. 62; *White v. East Lake Land Co.*, 96 Ga. 415, 23 S. E. 393; *Dwight v. Hays*, 150 Ill. 273, 37 N. E. 218; *Barnard v. Shirley*, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117; *Willis v. Perry*, 92 Ia. 297, 60 N. W. 727, 26 L. R. A. 124; *Helfrich v. Catonsville Water Co.*, 74 Md. 269, 22 Atl. 72; *Smith v. Agawam Canal Co.*, 2 Allen, 355; *Doorman v. Ames*, 12 Minn. 451; *Creek v. Bozeman W. W. Co.*, 15 Mont. 121, 38 Pac. 459; *Jones v. Adams*, 19 Nev. 78, 6 Pac. 442; *Garwood v. New York Central, etc., R. R. Co.*, 83 N. Y. 400; *Mumpower v. Bristol*, 90 Va. 151, 17 S. E. 853; *Green Bay, etc., Canal Co. v. Kaukauna Water Power Co.*, 90 Wis. 370, 61 N. W. 1121. Where a riparian owner sold the right to use the waters of a stream to non-riparian owners, but such use made no sensible diminution in the quantity flowing to the lower proprietors, the court refused to disturb a finding that the use was reasonable. *Gillis v. Chase*, 67 N. H. 161, 31 Atl. 18, 68 Am. St. Rep. 645.

80—*Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313,

for a useful purpose, and with as little interference with the rights of other proprietors as is reasonably practicable under the circumstances.⁸¹ It is an unreasonable detention of the water to gather it into reservoirs for future use in a dry season, or for the purpose of obtaining a greater supply than the stream affords by its natural flow in ordinary stages,⁸² or in order that, by letting it off occasionally a flood may be obtained for the purpose of floating logs;⁸³ but it is not unreasonable, and therefore not unlawful to detain the surplus water not used in a wet season and discharge it in proper quantities for use in a dry season.⁸⁴ It has been held not to be an unreasonable use of a

81—*Pitts v. Lancaster Mills*, 13 Met. 156; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Wood v. Edes*, 2 Allen, 578; *City of Springfield v. Harris*, 4 Allen, 494; *Hetrich v. Deachler*, 6 Pa. St. 32; *Hartzall v. Sill*, 12 Pa. St. 248; *Hoy v. Sterrett*, 2 Watts, 327; *Platt v. Johnson*, 15 Johns. 213; *Van Hoesen v. Coventry*, 10 Barb. 518; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Mabie v. Mattieson*, 17 Wis. 1; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636; *Parker v. Hotchkiss*, 25 Conn. 321; *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Oregon Iron Co. v. Trullinger*, 3 Ore. 1. Proprietors from making use of it as it flows past them. *Pollitt v. Long*, 58 Barb. 20; *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404; *Thunder Bay Co. v. Speechly*, 31 Mich. 336; *Thurber v. Martin*, 2 Gray, 394, 41 Am. Dec. 468; *Oregon Iron Co. v. Trullinger*, 3 Ore. 1. See also *Mason v. Hoyle*, 56 Conn. 265, 14 Atl. 786, as to unreasonable use of reservoir.

In *Drake v. Hamilton Woolen Co.*, 99 Mass. 574, it was held that the owner of a reservoir and mill may discharge from his reservoir in a dry season what is reasonably necessary for the use of his mill if it does not increase the volume beyond its usual limits, though it exceeds the amount which would naturally flow during such season and renders the intermediate land wet and less valuable for cultivation.

82—*Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Brace v. Yale*, 10 Allen, 441; *Timm v. Bear*, 29 Wis. 254.

83—*Thunder Bay, &c., Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046. To same effect, *McKee v. Delaware, etc., Co.*, 125 N. Y. 353, 26 N. E. 305, 21 Am. St. Rep. 740.

84—*Oregon Iron Co. v. Trullinger*, 3 Ore. 1, 7. The discharge, however, must not be made in such unusual and unnatural quantities as to preclude the lower prop-

erty owners from making use of it as it flows past them. *Pollitt v. Long*, 58 Barb. 20; *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404; *Thunder Bay Co. v. Speechly*, 31 Mich. 336; *Thurber v. Martin*, 2 Gray, 394, 41 Am. Dec. 468; *Oregon Iron Co. v. Trullinger*, 3 Ore. 1. See also *Mason v. Hoyle*, 56 Conn. 265, 14 Atl. 786, as to unreasonable use of reservoir.

Whatever injury is incidental to a reasonable use of the water of a running stream is of course *damnum absque injuria*. *Tyler v. Wilkinson*, 4 Mason, 397, 401; *Chandler v. Howland*, 7 Gray, 348, 66 Am. Dec. 487; *Pitts v. Lancaster Mills*, 13 Met. 156; *Hetrich v. Deachler*, 6 Pa. St. 32; *Hartzall v.*

stream for the defendant to detain the flow for two days and a night for the purpose of filling a reservoir for a supply of ice.⁸⁵

***Diminution of the Water.** The right of the lower [*695] proprietor to have the stream flow to him in undiminished volume is qualified to this extent, that the upper proprietor may lawfully withdraw from it whatever may be necessary to supply the wants of his family and of his domestic animals, and also for irrigation, manufacturing and other useful purposes, provided what he withdraws does not essentially diminish the volume to the prejudice of those below him.⁸⁶

Flooding Lands by Water. At the common law, the owner of land has no right, by dams or otherwise, to cause the water of a stream passing through his lands to set back upon the lands of a proprietor above. He must allow the water to enter upon his

Sill, 12 Pa. St. 248; *Bliss v. Kennedy*, 43 Ill. 68.

85—*Gehler v. Knorr*, 101 Ia. 700, 70 N. W. 757, 63 Am. St. Rep. 416, 36 L. R. A. 697. See *Pierson v. Speyer*, 178 N. Y. 270, 70 N. E. 799, 102 Am. St. Rep. 499. Riparian owners upon a lake or pond are entitled to have the water stand at its natural level and it is an actionable injury to raise, or lower or divert the water. *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 192; *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233; *Troe v. Larson*, 84 Ia. 649, 51 N. W. 179; *Clark v. Rockland Water Co.*, 52 Me. 68; *Fernold v. Knox Woolen Co.*, 82 Me. 48, 19 Atl. 93; *Hyatt v. Albro*, 121 Mich. 638, 80 N. W. 641; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718; *Peay v. Salt Lake City*, 11 Utah, 341, 40 Pac. 206; *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.*, 79 Wis. 297, 48 N. W. 371.

86—*Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Bliss v. Kennedy*, 43 Ill. 68; *Fleming v. Davis*, 37 Tex. 173; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Lapham v. Anthony*, 5 Pick. 175; *Lakin v. Ames*, 10 Cush. 198; *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160; *Arnold v. Foot*, 12 Wend. 330; *Randall v. Silverthorn*, 4 Pa. St. 173; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Gillett v. Johnson*, 30 Conn. 180; *Embrey v. Owen*, 6 Exch. 353; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Wood v. Waud*, 3 Exch. 748, 780; *Chasemore v. Richards*, 2 H. & N. 168; *Messinger's Appeal*, 109 Pa. St. 285; *Baker v. Brown*, 55 Tex. 377; *Shook v. Colohan*, 12 Ore. 239. Water for locomotives may not be taken if flow is sensibly diminished. *Garwood v. New York, &c., R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452; *Penn. R. R. Co. v. Miller*, 112 Pa. St. 34; *Anderson*

premises in the accustomed way, and the upper proprietor, if necessary, may cross his line to keep the channel open.⁸⁷ Any act of his which raises the water in the stream above his estate is presumptively damaging and therefore actionable.⁸⁸ It is actionable, also, because, if persisted in, with^{*}out objection, it might, in the lapse of time, establish permanent

v. Cinn., &c., Co., 86 Ky. 44, 5 S. W. 49. The right to the flow extends to the non-riparian grantee of the riparian right. *Williams v. Wadsworth*, 51 Conn. 277. Compare *Weston v. Alden*, 8 Mass. 136; *Perkins v. Dow*, 1 Root, 535; *Haywood v. Mason*, 1 Root, 537. See 1 Lewis Em. Dom. § 62.

87—*Prescott v. Wilhams*, 5 Met. 429.

88—*Bell v. McClintonck*, 9 Watts. 119, 34 Am. Dec. 107; *Martin v. Riddle*, 26 Pa. St. 415; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Brown v. Cayuga, &c.*, R. R. Co., 12 N. Y. 486; *Bellinger v. N. Y. Cent. R. R. Co.*, 23 N. Y. 42; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45; *Staple v. Spring*, 10 Mass. 72; *Smith v. Agawam Canal*, 2 Allen, 355; *Monson v. Fuller*, 15 Pick. 554; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Monroe v. Gates*, 48 Me. 463; *Strout v. Milbridge Co.*, 45 Me. 76; *Merritt v. Parker*, 1 N. J. 460; *Phinzy v. Augusta*, 47 Ga. 260; *Whitcomb v. Vt. Cent. R. R. Co.*, 25 Vt. 49; *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334; *Hutchinson v. Granger*, 13 Vt. 386; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Woodman v. Tufts*, 9 N. H. 88; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Miss. Cent. R. R. Co. v. Caruth*, 51 Miss. 77; *Arimond v. Green Bay, &c., Co.*,

31 Wis. 316; *Lull v. Davis*, 1 Mich. 77; *Eaton v. Railroad Co.*, 51 N. H. 504; *Sullens v. Chicago, &c., Ry. Co.*, 74 Ia. 659, 38 N. W. 545; *Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 4 S. E. 885; *Southern Ry. Co. v. Cook*, 117 Ga. 286, 43 S. E. 697; *Kankakee, etc., R. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Ohio, etc., Ry. Co. v. Ramey*, 139 Ill. 9, 28 N. E. 1087, 32 Am. St. Rep. 176; *Centralia v. Wright*, 156 Ill. 561, 41 N. E. 217; *Illinois Central R. R. Co. v. Ferrell*, 108 Ill. App. 659; *Mississippi, etc., R. R. Co. v. Archibald*, 67 Miss. 38, 7 So. 212; *Beech v. Kuder*, 15 Pa. Supr. Ct. 89; *Ennis v. Gilder*, 32 Tex. Civ. App. 351, 74 S. W. 585; *Goodrich v. Dorset Marble Co.*, 60 Vt. 280, 13 Atl. 636; 1 Lewis Em. Dom. § 67. See *Pensacola, etc., R. R. Co. v. Hyer*, 32 Fla. 539, 14 So. 381, 22 L. R. A. 368. But the upper proprietor may not recover for setting back of water by a barrier put across by a lower proprietor to prevent refuse from the upper mill from coming down and doing damage. *Davis v. Munroe*, 66 Mich. 485, 33 N. W. 408. If a right to flow to a certain extent with a dam built loosely and with flash boards has become prescriptive, the extent cannot be increased by making the dam tighter and solid though it is not built higher than before. *Turner v. Hart*, 71 Mich. 128, 38 N. W. 890, departing

rights by prescription.⁸⁹ Any showing of actual damage is therefore unnecessary to the maintenance of the action.⁹⁰ It has been already stated, that in aid of manufactures, this common law has been so far changed by statute in some States as to allow parties to flow the lands of others for the purpose of obtaining power on making compensation.⁹¹

All the foregoing principles are as much applicable to municipal corporations in their dealings with water courses as to individuals. Thus, if a town shall so erect a bridge as that the natural and probable consequences shall be to raise the water on the lands above, by the partial obstruction interposed to its flow, the town will be liable, as an individual would for a like obstruction.⁹²

Fouling the Water of Streams, etc. It has been said, in one case, that whether the use of a stream to *carry off the waste from a manufactory is reasonable or not, is a [*697] question of fact for the jury, depending upon the circumstances of the particular case; such as the size and character of the stream, and for what purpose it is used, the extent of the pollution, the benefit to the manufacturer, and the injury to the

from the opposite Massachusetts utes are collected in Cooley Const. Lim. 666-669. And see 1 Lewis Em. Dom. §§ 178-182.

89—See *ante*, p. 89; Mississippi Cent. R. R. Co. v. Mason, 51 Miss. 234.

90—*Ante*, p. 89, and cases cited. The rule applies not only to the raising of water, but to any diversion or detention that cannot be justified on the ground of reasonable use. *Cook v. Hull*, 3 Pick. 269; *Butman v. Hussey*, 12 Me. 407; *Monroe v. Stickney*, 48 Me. 462; *Parker v. Griswold*, 17 Conn. 287, 42 Am. Dec. 739; *Woodman v. Tufts*, 9 N. H. 88; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53; *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790; *Wilts, &c., Canal Co. v. Swindon Water Works Co.*, L. R. 9 Ch. App. 451; *S. C. L. R. 7 H. L. 697.*

91—The cases under these stat-

utes are collected in Cooley Const. Lim. 666-669. And see 1 Lewis Em. Dom. §§ 178-182.

92—*Haynes v. Burlington*, 38 Vt. 350; *Lawrence v. Fairhaven*, 5 Gray, 110; *Parker v. Lowell*, 11 Gray, 353; *Sprague v. Worcester*, 13 Gray, 193; *Helena v. Thompson*, 29 Ark. 559; 1 Lewis Em. Dom. § 67. But if a town changes the course of a watercourse under legislative authority, it is not liable for a flood caused by the change in an extraordinary freshet when the ground is frozen. *Diamond Match Co. v. New Haven*, 55 Conn. 510, 13 Atl. 409. So if a bridge built under proper authority and with due care causes an overflow, it is held there is no liability. *Abbott v. Kansas City, &c., Co.*, 83 Mo. 271.

other riparian owners.⁹³ The general right of every riparian owner is to have the stream come to him in its natural state and purity;⁹⁴ and when the privilege is claimed to do that which will foul the water to his prejudice, the reasonableness of so doing must be justified by the circumstances, and usage short of the period of prescription cannot determine this.⁹⁵

93—*Hayes v. Waldron*, 44 N. H. 580, 84 Am. Rep. 105. See *Murga-troyd v. Robinson*, 7 El. & Bl. 391; *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592.

94—*Merrifield v. Lombard*, 13 Allen, 16; *Gladfelter v. Walker*, 40 Md. 1; *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 So. 192; *Drake v. Lady Ensley Coal, etc., Co.*, 102 Ala. 501, 14 So. 749; *Kewanee v. Otley*, 204 Ill. 402, 68 N. E. 388; *Ferguson v. Formenich Mfg. Co.*, 77 Ia. 576, 42 N. W. 448; *Jessup & M. Paper Co. v. Ford*, 6 Del. Ch. 52; *Richmond Mfg. Co. v. Atlantic DeLaine Co.*, 10 R. I. 106; *Silver Spring, etc., Co. v. Wanskuck Co.*, 13 R. I. 611; *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Randolph v. Penn. S. V. R. R. Co.*, 186 Pa. St. 541; *Van Egmond v. Seaforth*, 6 Ontario, 599; *Attorney General v. Lunatic Asylum*, 4 L. R. Ch. App. 146. See cases, p. 1181, n. 21, *supta*. The non-riparian grantee of a riparian owner may not return water which he has taken so changed in quality as to be sensibly less valuable. *Ormerod v. Todmorden Mills Co.*, L. R. 11, Q. B. D. 155. In a late case in the English Court of Appeals the question arose as to an underground current. Plaintiff had a deep well on his land. On higher land near by defendant had likewise a deep well which he used as a receptacle for filth. The filth affected the water which plaintiff pumped from his well. Defendant was held liable for polluting plaintiff's source of supply although the latter had no property in the water until he appropriated it. "No one," says BRETT, M. R., "of those who have a right to appropriate it has a right to contaminate the source so as to prevent his neighbor from having the full benefit of his right of appropriation." Nor does it alter the case that plaintiff gets his water by artificial means, that is, by pumping. *Ballard v. Tomlinson*, L. R. 29 Ch. D. 115. Compare with this *Upjohn v. Richland*, 46 Mich. 542.

95—*Stockport Waterworks v. Potter*, 7 H. & N. 160; *Clowes v. Staffordshire Potteries, &c., Co.*, L. R. 8 Ch. App. 125; *Norton v. Scholefield*, 9 M. & W. 665; *Gold-smid v. Commissioners*, L. R. 1 Ch. App. 349; *Wright v. Williams*, 1 M. & W. 77; *Baxendale v. McMurray*, L. R. 2 Ch. App. 790; *St. Helen's Chemical Co. v. St. Helens*, 1 Exch. Div. 196 *Richmond, &c., Co. v. Atlantic, &c., Co.*, 10 R. I. 106; *Blydenburgh v. Miles*, 39 Conn. 484; *Merrifield v. Lombard*, 13 Allen, 16; *Hayes v. Waldron*, 44 N. H. 580; *Merrifield v. Worcester*, 110 Mass. 216; *Howell v. McCoy*, 3 Rawle, 256.

In the leading case of *Wood v. Waud*, the ground of complaint was that the defendant fouled the water of a stream, to the prejudice of lower riparian proprietors, by pouring into it soapsuds, wool comber's suds, etc. In defense, it was urged that the act *of defendant did no actual damage [*698] to the plaintiffs, because the stream was already so polluted by similar acts of mill owners above the defendant's mills, etc., that the wrongful act complained of made no practical difference. It was held, notwithstanding, that the plaintiffs had received damage in point of law: "they had a right to the natural stream flowing through the land in its natural state, as an incident to the right to the land on which the water course flowed."⁹⁶ And again, it is said, in *Holsman v. Boiling Spring Bleaching Co.*, "Every owner of land through which a stream of water flows, is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion, or pollution. The right extends to the *quality*, as well as to the quantity of the water. If, therefore, an adjoining proprietor corrupts the water, an action upon the case lies for the injury."⁹⁷ Language equally pointed is used in other cases.⁹⁸ Nevertheless, we think these must

96—*Wood v. Waud*, 3 Exch. 748, 772. See *Stonehewer v. Farrar*, 6 Q. B. 730. An injunction will lie against one of several who pollute a stream, though his act causes but an inconsiderable part of the damage. *Woodyear v. Schaefer*, 57 Md. 1; *Shobel v. Kerr Salt Co.*, 164 N. Y. 303, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687. It is no defense that the plaintiff has himself to some extent polluted the stream. *Jackman v. Arlington Mills*, 137 Mass. 277; *West Arlington Imp. Co. v. Mount Hope Retreat*, 97 Md. 191, 54 Atl. 982.

97—*Holsman v. Boiling Springs Bleaching Co.*, 14 N. J. Eq. 335, 342, citing *Aldred's Case*, 9 Co. 59, and other cases. This lan-

guage is approved and adopted in *Richmond Manuf. Co. v. Atlantic Delaine Co.*, 10 R. I. 106, 111. In both cases the language of Chancellor KENT is quoted with approval: "The right of the riparian proprietor to the use and enjoyment of a stream of water in its natural state is as sacred as the right to the soil itself." *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526. In *Silver Spring, &c., Co. v. Wanskuck Co.*, 13 R. I. 611, it is held that this right is not changed by the fact that the flow has been increased by reservoirs up the stream.

98—See *Gladfelter v. Walker*, 40 Md. 1, where a stream was fouled by throwing into it the refuse of

[*699] be understood merely as *strong and clear declarations of the general principle in cases in which it did not become necessary to consider how far there might be exceptions, or how far one might be at liberty to complain of insignificant injuries which still left the stream to flow on in the main as it did before. Every saw mill upon a stream of water to some extent changes the natural condition of the water, and many saw mills may entirely unfit it for some purposes; but a very large proportion of the value of all the streams in the country would be sunk and lost, if mills might not be erected upon them because some taint to the water was inevitable from their use. But if there may be some change in the natural condition of the water without legal wrong, the question, how much, and what, shall constitute a legal wrong must necessarily, it seems to us, be a question of what, under the circumstances, is a reasonable use. This is strongly and clearly put by Chief Justice REDFIELD, in one case: “The reasonableness of the use,” he says, “must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit which might be of no account in some streams, might seriously affect the usefulness of others. So, too, a kind of deposit which would affect one stream seriously would be of little importance in another. There is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below. This is true of everything

a paper manufactory, where Judge DOBBIN instructed the jury as follows: “Every man must so use his own property as not to injure the property of another, and if the jury shall find that the drainage or refuse from the defendant's paper mill was, prior to the institution of the suit, discharged into a stream of water which flowed through the land of the plain-

tiff, and that the stream was thus soiled or polluted, to the injury of the plaintiff, then he is entitled to recover, even if the jury shall believe that the business carried on by defendant at his mill was a lawful one, conducted in the usual manner, and with the usual precaution.” This instruction was fully approved by the Court of Appeals.

which we use in common with others. The air is somewhat corrupted by the most ordinary use; large manufacturing establishments affect it still more seriously, and some, by reason of their vicinity to a numerous population, become so offensive and destructive of comfort, and health, even, as to be regarded as common nuisances. Within reasonable limits, those who have a common interest in the use of air and running water, must submit to small inconveniences to afford a disproportionate advantage to others.⁹⁹

The question of what is a reasonable use of one's land, though such use results in the pollution of a stream to the damage of those below, has been much considered in Pennsylvania in connection with coal mines and oil wells. It has there been de-

99—*Snow v. Parsons*, 28 Vt. 459, 462, 67 Am. Dec. 723. See *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828; *Lockwood, &c., Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763. The same idea is expressed clearly and fully by *BELLOWS, J.*, in *Hayes v. Waldron*, 44 N. H. 580, 585, 84 Am. Rep. 105, and by *WELLS, J.*, in *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592. In this last case it was held that a city was liable for polluting a stream by the flow from its sewers, provided it was attributable to the improper construction or unreasonable use of the sewers, or to negligence or other fault in the care or management of them; but it is said that "the natural right of the plaintiff to have the water descend to him in its pure state, fit to be used for the various purposes to which he may have occasion to apply it, must yield to the equal right of those who happen to be above him. Their use of the stream for mill purposes, for irrigation, watering cattle, and the manifold purposes for which they may lawfully use it, will tend to render the water more or less impure. Cultivating and fertilizing the lands bordering on the streams, and in which are its sources, their occupation by farm houses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided, and their occupation and use become multifarious, these causes will be rendered more operative and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results only from the reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy."

For other cases where this sort of nuisance has been complained of, see *Carhart v. Gas Light Co.*, 22 Barb. 297; *Davis v. Lamberton*, 56 Barb. 480, case of fouling a spring. *Tate v. Parrish*, 7 T. B. Mon. 325; *Jacobs v. Allard*, 42 Vt. 303, 1 Am. Rep. 331.

terminated that the right to mine coal is "a right incident to the ownership of coal property and when exercised in the ordinary manner, and with due care the owner cannot be held for permitting the natural flow of mine water over his own land, into the water course, by means of which the natural drainage of the country is effected."¹ In regard to the rights of the lower proprietor the court says: "The plaintiff's grievance is for a mere personal inconvenience, and we are of opinion that mere private personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."² In a later case where underground waters were corrupted by salt from the defendant's oil well and the damage could have been prevented by a comparatively small outlay, the defendant was held liable and the principles applicable are discussed at length. It is held that in all such cases, if the damage can be prevented by reasonable care and expenditure the owner of the works is bound to exercise the care or incur the expense and that otherwise he will be liable.³

1—*Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. 453; S. C. 86 Pa. St. 401, 94 Pa. St. 302, 102 Pa. St. 370.

2—*Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 149, 6 Atl. 453.

3—*Pfeiffer v. Brown*, 165 Pa. St. 267, 30 Atl. 844, 44 Am. St. Rep. 660. "In regard to what is reasonable expense in this connection," says the court, "neither in the Chartiers nor in any of the other cases has it been necessary to define it strictly, but it is clear from all of them that the word reasonable is not to be taken in a narrow sense. It is not to be lost sight of that the defendant's right

to injure another's land at all, to any extent, is an exception, and the burden is always upon him to bring himself within it. And this exception is founded on necessity and because otherwise he would himself be deprived of the beneficial use and enjoyment of his own land. Unless that would be the substantial result of forbidding his action, he is not within the immunity of any of the cases. And the expense that will absolve him from the duty of preventing the injury must come substantially up to the same standard. If the expense of preventing the damage from his act is such as to counterbalance the ex-

In a New York case the plaintiffs were mill owners on a stream and the defendant had large salt works above, and used large quantities of water from the stream in the manufacture of salt. The water was let down to the salt beds and then forced up and evaporated. The consequence was that the volume of the stream was materially diminished and that considerable salt escaped into the stream so that it was unfit for stock or domestic use, and fish were destroyed, vegetation killed and machinery rusted. The court held that the use was unreasonable as a matter of law. There were fourteen other salt works upon the same stream, operated in a similar manner, and having a large capital invested. In answer to the plea that the law should be modified in favor of so important an industry the court said: "While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long established business, for the purpose of enabling a great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule every man must so use his own property as not to injure that of his neighbor, and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land, does not change the rule, nor permit to prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or

pected profit or benefit then it is clearly unreasonable, and beyond what he could justly be called upon to assume. If on the other hand, however large in actual amount, it is small in proportion to the gain to himself, it is reasonable in regard to his neighbor's rights, and he should pay it to prevent the damage, or should make compensation for the injury done. Between these two extremes lies a debatable region where the

cases must stand upon their own facts, under the only general rule that can be laid down in advance, that the expense required would so detract from the purpose and benefit of the contemplated act, as to be a substantial deprivation of the right to use one's own property. If damage could have been prevented short of this it is *injuria* that will sustain an action." p. 274.

to so pollute the rest of the stream as to render it unfit for ordinary use.''⁴

In an Indiana case the defendant used the water of an artesian well on his premises for baths for persons afflicted with syphilis and other contagious diseases and discharged the water after such use into a small stream which was the natural outlet for the drainage of the basin in which the well was situated. The stream flowed through the lands of the plaintiff and she sued to enjoin such pollution of the stream by the defendant. The court held that the defendant's use was a reasonable one and that the plaintiff had no remedy. "Mines and mineral springs, natural gas and oil wells cannot be removed; they must be operated where they are or totally abandoned. Where, therefore, a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected; and any injury that may result, notwithstanding such care in the management of the work, must be borne without compensation. It is then a case in which the interests and convenience of the individual must give way to the general good."^{4a}

An action lies against a city for polluting a stream with sew-

4—*Shobel v. Kerr Salt Co.*, 164 N. Y. 303, 322, 58 N. E. 142, 79 Am. St. Rep. 643, 51 L. R. A. 687. The suit was for an injunction and while holding that the plaintiffs were entitled to relief, the court also held that it did not follow that the defendant must make such terms as they could with the plaintiffs or submit to an injunction, as the court could, as a condition of withholding the injunction, require the defendants to construct reservoirs upon the upper sources of the stream to accumulate water when plentiful for use in times of scarcity and so

make good the loss by use and to take such measures as were necessary to prevent the escape of salt into the stream. See further on the subject of reasonable use as respects pollution: *Barnard v. Shirley*, 135 Ind. 547, 34 N. E. 600; *Helfrich v. Catonsville Water Co.*, 74 Md. 269, 22 Atl. 72; *Indianapolis Water Co. v. Am. Strawboard Co.*, 53 Fed. 970, 57 Fed. 1000.

4a—*Barnard v. Shirley*, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 41 Am. St. Rep. 454, 24 L. R. A. 568; *Barnard v. Shirley*, 151 Ind. 160, 47 N. E. 671, 41 L. R. A. 737.

erage.⁵ So where pollution was caused by refuse from a coal breaker,⁶ or from coke ovens,⁷ or by using the water for washing ore.⁸

***Negligent Fires.** Fire being a dangerous element, [*700] a degree of care is required in making use of it corresponding to the danger. It may be employed lawfully for all the purposes of life for which it is useful, and also for amusement, upon one's own premises, subject only to the condition of due care. But due care is a degree of care corresponding to the danger, and requires circumspection not only as to time and place of starting it, but in protecting against its spread afterwards. The obligation of the party kindling it is well stated in a case in Maine. He must do it at a proper time and in a suitable manner, and use "reasonable care and diligence to prevent its spreading and doing injury to the property of others. The

5—*Birmingham v. Land*, 137 Ala. 538, 34 So. 613; *Lind v. San Luis Obispo*, 109 Cal. 340, 42 Pac. 437; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703; *Dudley v. New Britain*, 77 Conn. 322; *Jacksonville v. Doan*, 145 Ill. 23, 33 N. E. 878; *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; *Kewanee v. Otley*, 204 Ill. 402, 68 N. E. 388; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; *Chapman v. Rochester*, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296; *Lefrois v. Monroe Co.*, 24 App. Div. 421, 48 N. Y. S. 519; *Butler v. White Plains*, 59 App. Div. 30, 69 N. Y. S. 193; *Mansfield v. Balliett*, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628; *Good v. Altoona*, 162 Pa. St. 493, 29 Atl. 741, 42 Am. St. Rep. 840; *Trevitt v. Prison Assn.*, 98 Va. 332, 36 S. E. 373, 81 Am. St. Rep. 727, 50 L. R. A. 564. But not for pollution caused by the surface drainage

from the streets. *Bainard v. Newton*, 154 Mass. 255, 27 N. E. 995.

6—*Gallagher v. Kemmerer*, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673.

7—*Robb v. Carnegie Bros.*, 145 Pa. St. 324, 22 Atl. 649, 27 Am. St. Rep. 694, 14 L. R. A. 329; *Lentz v. Carnegie Bros.*, 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717.

8—*Drake v. Lady Ensley, etc.*, Co., 102 Ala. 501, 14 So. 749, 48 Am. St. Rep. 77, 24 L. R. A. 64. See also on liability for pollution: *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149; *Satterfield v. Rowan*, 83 Ga. 187, 9 S. E. 677; *West Arlington Imp. Co. v. Mount Hope Retreat*, 97 Md. 191, 54 Atl. 982; *Beach v. Sterling Iron Co.*, 54 N. J. Eq. 65, 32 Atl. 286; *Townsend v. Bell*, 70 Hun, 557, 24 N. Y. S. 193; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21; *Bowman v. Humphrey*, 124 Ia. 744, 100 N. W. 854; *Watson v. Colusa Parrot M. & S. Co.*, 31 Mont. 513.

time may be suitable and the manner prudent, and yet if he be guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these [*701] particulars, and an in*jury is done in consequence thereof, the liability attaches, and it is immaterial whether the proof establishes gross negligence or only a want of ordinary care on the part of defendant.⁹ But there must be some evidence which will warrant imputing the injury to the negligence or misconduct of the defendant or his servants, and the burden is upon the plaintiff to make this showing.¹⁰ The plaintiff makes out this part of his case by showing that the fire was kin-

9—*Hewey v. Nourse*, 54 Me. 256, citing *Barnard v. Poor*, 21 Pick. 378; *Bachelder v. Heagan*, 18 Me. 30; *Tourtellot v. Rosebrook*, 11 Met. 462; *Dean v. McCarty*, 2 Up. Can. Q. B. 448. And see *Clark v. San Francisco, etc., Ry. Co.*, 142 Cal. 614, 76 Pac. 507; *Regan v. New York, etc., R. R. Co.*, 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306; *Brummit v. Furness*, 1 Ind. App. 401, 27 N. E. 656, 50 Am. St. Rep. 215; *Polzen v. Morse*, 91 Mich. 208, 51 N. W. 940; *Needham v. King*, 95 Mich. 303, 54 N. W. 891; *Bolton v. Calkins*, 102 Mich. 69, 60 N. W. 297; *Kelley v. Anderson*, 15 S. D. 107, 87 N. W. 579. In *Scott v. Hale*, 16 Me. 326, the care required was "that degree of carefulness which a discreet, prudent and careful man would do in the possession of his own premises." See *Fahn v. Reichart*, 8 Wis. 255, 76 Am. Dec. 237; *Mich. Cent. R. R. Co. v. Anderson*, 20 Mich. 244. Ordinary care must be used in setting and in restraining it. *Sweeney v. Merrill*, 38 Kan. 216, 16 Pac. 454. In a suit against a contractor for building a railroad for fire

communicated from brush burned on the right of way, it was held error to admit evidence of a customer to do such work in that manner. *Pulsifer v. Berry*, 87 Me. 405, 32 Atl. 986.

10—*Clark v. Foot*, 8 Johns. 421; *Hanlon v. Ingram*, 3 Iowa, 81; *Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322; *Clealand v. Thornton*, 43 Cal. 437; *Stuart v. Hawley*, 22 Barb. 619; *Teall v. Barton*, 40 Barb. 137; *Calkins v. Barger*, 44 Barb. 424; *Miller v. Martin*, 16 Mo. 508, 57 Am. Dec. 242; *Averitt v. Murrell*, 4 Jones, (N. C.) 322; *Fahn v. Reichart*, 8 Wis. 255, 76 Am. Dec. 237. See *Sturgis v. Robbins*, 62 Me. 289, (under statute); *Gillson v. North Grey, &c.*, 33 Up. Can. Q. B. 128; S. C. 35 Up. Can. Q. B. 475; *Catron v. Nichols*, 81 Mo. 80, 51 Am. Rep. 222; *Vansyoc v. Freewater Cem. Ass.*, 63 Neb. 143, 88 N. W. 162. If there was no negligence there is no liability; *Garnier v. Porter*, 90 Cal. 105, 27 Pac. 55; *Sweeney v. Merrill*, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734; *Atchison, etc., R. R. Co. v. Dennis*, 38 Kan. 424, 17 Pac.

dled when and where it would be likely to spread as it did, or pass beyond control, or that it was left without proper care afterwards.¹¹ If the fire was kindled by a servant while engaged about his master's business, and acting within the general scope of the employment, it is no excuse for the master that the servant departed from his instructions in doing so.¹² A case of spontaneous combustion may be one of negligent fire, if ignition was reasonably to be looked for.¹³ It is immaterial whether the fire spreads by running along *the ground [*702] or by sparks or brands being carried through the air by the wind.¹⁴

153; Hitchcock *v.* Riley, 44 Misc. 260, 89 N. Y. S. 890; Warden *v.* Millar, 112 Wis. 67, 87 N. W. 828.

11—Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63; Cleland *v.* Thornton, 43 Cal. 437; Garrett *v.* Freeman, 5 Jones, (N. C.) 78; Hewey *v.* Nourse, 54 Me. 257; Fahn *v.* Reichtart, 8 Wis. 255, 76 Am. Dec. 237; Barnard *v.* Poor, 21 Pick. 378; Jacobs *v.* Andrews, 4 Iowa, 506; St. Louis S. W. Ry. Co. *v.* Ford, 65 Ark. 96, 45 S. W. 55; Louisville, etc., Ry. Co. *v.* Nitsche, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750; Needham *v.* King, 95 Mich. 303, 54 N. W. 891; Jesperson *v.* Phillips, 46 Minn. 147, 48 N. W. 770. Where the defendant went to sleep in his own barn with a lighted pipe in his mouth, whereby his barn was set on fire, and the fire was communicated to and destroyed the plaintiff's buildings, he was held liable. Lillibridge *v.* McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381. Leaving an oil can on a hot stove is evidence of negligence. Read *v.* Penn. R. R. Co., 44 N. J. L. 280.

See, also, a carefully considered case where after a fire had burnt

four or five days and some effort had been made to extinguish it, it escaped and the landowner was held liable. Furlong *v.* Carroll, 7 Ont. App. 145. Where the defendant in a very dry time set fire to brush heaps on his own land, three hundred feet from plaintiff's boundary and the soil was set on fire and the fire gradually spread and after the lapse of six weeks reached the plaintiff's land and did the damage sued for, it was held there was no liability, as so long a drought was not to be anticipated. McGibbon *v.* Baxter, 51 Hun, 587, 4 N. Y. S. 382.

12—Johnson *v.* Barber, 10 Ill. 425; Armstrong *v.* Cooley, 10 Ill. 509. Compare Wilson *v.* Peverly, 2 N. H. 548; Garrett *v.* Freeman, 5 Jones, (N. C.) 78; Wickham *v.* Wolcott, 1 Neb. (Unof.) 160, 95 N. W. 366; Andrews *v.* Green, 62 N. H. 436; *ante*, p. 1028. But for negligence of an independent contractor in clearing land the owner is not liable. Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544.

13—Vaughan *v.* Menlove, 3 Bing. (N. C.) 468.

14—Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63; Ayer *v.* Star-

The setting of fires, under certain circumstances, is sometimes prohibited by statute because of the great danger of injurious consequences. This is the case in some States where large prairies exist. Whoever unlawfully sets a fire thus prohibited must take all the consequences.¹⁵ The same must be true in any case where the kindling of the fire was a trespass or otherwise unlawful.¹⁶

Fires Communicated by Machinery. Steam machinery is so exceedingly liable to cause unintentional fires that special precautions are required to prevent them. But where the use is lawful, the principles already mentioned apply. If fires are kindled by sparks or otherwise in the use of it, no action lies unless negligence appears.¹⁷ But it is negligence if those employing such machinery fail to make use of approved appliances for arresting sparks, or if the machinery, by reason of being unsuitable or out of order, is likely to scatter fire.¹⁸ And in the

key, 30 Conn. 304; Chicago, etc., R. R. Co. v. Williams, 131 Ind. 30, 30 N. E. 696; Cincinnati, etc., R. R. Co. v. Baker, 94 Ky. 71, 21 S. W. 347; Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381; *ante*, pp. 113-119.

15—*Thoburn v. Campbell*, 80 Ia. 338, 45 N. W. 769; *Ellsworth v. Ellingson*, 96 Ia. 154, 64 N. W. 774; *Burton v. McClellan*, 3 Ill. 434. See *Finley v. Langston*, 12 Mo. 120.

16—This rule was applied in *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733, to an incorporated company using a steam engine which it was held under its charter it had no right to employ. But the fact that a fire started from hot ashes kept contrary to the ordinance in a wooden barrel is not conclusive of negligence. *Cook v. Johnston*, 58 Mich. 437.

17—*Burroughs v. Housatonic*, &c., R. R. Co., 15 Conn. 124, 38

Am. Dec. 64; *Hoyt v. Jeffers*, 30 Mich. 181; *Jefferis v. Philadelphia*, &c., R. R. Co., 3 Houst. 447. See *Huyett v. Philadelphia*, &c., R. R. Co., 23 Pa. St. 373; *McCready v. Sou. Car. R. R. Co.*, 2 Strob. 356; *Hull v. Sac. Val. R. R. Co.*, 14 Cal. 387, 73 Am. Dec. 656; *Sheldon v. Hud. Riv. R. R. Co.*, 29 Barb. 226; *Hinds v. Barton*, 25 N. Y. 544; *Teall v. Barton*, 40 Barb. 137; *Flinn v. New York Cent. R. R. Co.*, 142 N. Y. 11, 36 N. E. 1046; *Lienallen v. Mosgrove*, 37 Ore. 446, 61 Pac. 1022. It is evidence of negligence if a burning stick is thrown upon a right of way covered by grass. *Mobile, &c., R. R. Co. v. Gray*, 62 Miss. 383. Where an unlicensed engine is a nuisance, a recovery for damage from a fire caused by it cannot be maintained on the mere ground that no license had been taken out. *Burbank v. Bethel, &c., Co.*, 75 Me. 373, 46 Am. Rep. 400.

18—*Ill. Cent. R. R. Co. v. Mc-*

case of railroad engines it has been repeatedly decided that the fact that fire had been communicated by *them to the premises of individuals is sufficient to raise a presumption that the railroad company was not employing the best known contrivances to retain the fire and to make out a *prima facie* case of negligence.¹⁹ Still, as the business itself is

Clelland, 42 Ill. 355; Frankford, &c., Co. *v.* Philadelphia, &c., R. R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Hoyt *v.* Jeffers, 30 Mich. 181; Anderson *v.* Cape Fear Steamboat Co., 64 N. C. 399; Chicago, &c., R. R. Co. *v.* McCahill, 56 Ill. 28; Toledo, &c., R. R. Co. *v.* Corn, 71 Ill. 493; Southern Ry. Co. *v.* Wilson, 138 Ala. 510, 35 So. 561; John Monat Lumber Co. *v.* Wilmore, 15 Colo. 136, 25 Pac. 556; Hubbard *v.* New York, etc., R. R. Co., 70 Conn. 563, 40 Atl. 533; Lake Erie, etc., R. R. Co. *v.* Middlecoff, 150 Ill. 27, 37 N. E. 660; American Strawboard Co. *v.* Chicago, etc., R. R. Co., 177 Ill. 513, 53 N. E. 97; Chicago, etc., R. R. Co. *v.* Williams, 131 Ind. 30, 30 N. E. 696; Richardson *v.* Douglass, 100 Ia. 239, 69 N. W. 530; Cincinnati, etc., R. R. Co. *v.* Baker, 94 Ky. 71, 21 S. W. 347; York *v.* Cleaves, 97 Me. 413, 54 Atl. 915; Webster *v.* Symes, 109 Mich. 1, 66 N. W. 580; Mobile, etc., R. R. Co. *v.* Stinson, 74 Miss. 453, 21 So. 14, 522; Watt *v.* Nevada Cent. R. R. Co., 22 Nev. 154, 46 Pac. 52, 726; Blue *v.* Aberdeen, etc., R. R. Co., 117 N. C. 644, 23 S. E. 275; Railroad Co. *v.* Short, 110 Tenn. 713, 77 S. W. 936; Collins *v.* George, 102 Va. 509, 46 S. E. 684. If a spark arrester is of an approved pattern and in good order there is no liability. Hoff *v.* West Jersey R. R. Co., 45 N. J. L. 201. But the fact that a fire has occurred from sparks may be evidence that the arrester is imperfect. Alpern *v.* Churchill, 53 Mich. 607. It must, of course, be made to appear that the burning was the natural and proximate consequence of the defendant's carelessness, and ought to have been foreseen. Milwaukee, &c., R. R. Co. *v.* Kellogg, 94 U. S. 469; Penn. R. R. Co. *v.* Hope, 80 Pa. St. 373, 21 Am. Rep. 100; Lehigh, &c., R. R. Co. *v.* McKeen, 90 Pa. St. 122, 35 Am. Rep. 644. See cases on page 113, *et seq.*, *ante*. The use of wood for fuel upon an engine may be negligence. Chicago, etc., R. R. Co. *v.* Ostrander, 116 Ind. 259, 15 N. E. 227.

19—Pigott *v.* East. Counties R., 3 C. B. 229; Ill. Cent. R. R. Co. *v.* Mills, 42 Ill. 407; Ellis *v.* Portsmouth, &c., R. R. Co., 2 Ired. 138; Galpin *v.* Chicago, &c., R. R. Co., 19 Wis. 638; Spalding *v.* Chicago, &c., R. R. Co., 30 Wis. 110; Brusberg *v.* Milw., &c., Ry. Co., 55 Wis. 106; Miller *v.* St. Louis, &c., Ry. Co., 90 Mo. 389; St. Louis, etc., Ry. Co. *v.* Ayres, 67 Ark. 371, 55 S. W. 159; Seska *v.* Chicago, etc., Ry. Co., 77 Ia. 137, 41 N. W. 596; Greenfield *v.* Chicago, etc., Ry. Co., 83 Ia. 270, 49 N. W. 95; Fort Scott, etc., Ry. Co. *v.* Tubbs, 47 Kan. 630, 28 Pac. 612; Raleigh Hosiery Co. *v.* Raleigh, etc., R. R. Co., 131 N. C. 238, 42 S. E. 602; Johnson *v.* Northern Pac. R. R. Co., 1 N. D. 354, 48 N. W. 227; Koontz *v.* Oregon Ry. & Nav. Co.,

lawful, all that can be required is that it be managed with a care proportioned to its risks; the law cannot require that which is unusual.²⁰

In some States statutes exist which either render railroad companies responsible for all injuries by fire originating with their engines, or which expressly impose upon them the burden of showing that the fire originated without negligence on their part.²¹

It is held to be negligent in a railroad company to [*704] leave grass *and other combustibles lying along the track, where they are peculiarly liable to take fire by falling sparks or coals.²² The rules of contributory negligence

20 Ore. 3, 23 Pac. 820; Louisville, etc., R. R. Co. v. Reese, 85 Ala. 497, 5 So. 283, 7 Am. St. Rep. 66; Louisville, etc., R. R. Co. v. Malone, 109 Ala. 509, 20 So. 33; Louisville, etc., R. R. Co. v. Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; Railway Co. v. Jones, 59 Ark. 105, 26 S. W. 595; Kelsey v. Chicago, etc., Ry. Co., 1 S. D. 80, 45 N. W. 204; Missouri Pac. R. R. Co. v. Bartlett, 69 Tex. 79, 6 S. W. 549; Gulf, etc., R. R. Co. v. Benson, 69 Tex. 407, 5 S. W. 822; Gulf, etc., Ry. Co. v. Johnson, 92 Tex. 591, 50 S. W. 563; Kimball v. Borden, 95 Va. 203, 28 S. E. 207. See Chicago, etc., R. R. Co. v. Ostrander, 116 Ind. 259, 15 N. E. 227; Erd v. Chicago, &c., R. R. Co., 41 Wis. 65. But the case is only *prima facie*. Tilley v. St. Louis, &c., Ry. Co., 49 Ark. 535, 6 S. W. 8. And see Ruffner v. Railroad Co., 34 Ohio St. 96, contrary to the cases above.

20—Mich. Cent. R. R. Co. v. Coleman, 28 Mich. 440; Frankford, &c., Co. v. Philadelphia, &c., R. R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Jefferis v. Philadelphia, &c., R. R. Co., 3 Houst. 447; Aldridge v.

Great West. R. R. Co., 3 M. & Gr. 515; Toledo, &c., R. R. Co. v. Corn, 71 Ill. 493.

21—See Lyman v. Boston, &c., R. R. Co., 4 Cush. 288; Hart v. Western R. R. Co., 13 Met. 99, 46 Am. Dec. 719; Ingersoll v. Stockbridge, &c., R. R. Co., 8 Allen, 438; Perley v. Eastern R. R. Co., 98 Mass. 414, 96 Am. Dec. 645; Chapman v. Atlantic, &c., R. R. Co., 37 Me. 92; Pratt v. Same, 42 Me. 579; Stearns v. Same, 46 Me. 95; Chicago, &c., R. R. Co. v. McCahill, 56 Ill. 28; Baltimore, &c., R. R. Co. v. Shipley, 39 Md. 251; Hooksett v. Concord, &c., R. R. Co., 38 N. H. 242; Rowell v. Railroad, 57 N. H. 132, 24 Am. Rep. 59. For a case arising under the Vermont statute, see Grand Trunk R. Co. v. Richardson, 91 U. S. 454. If the property burned is not covered by the statute, negligence must be shown. Lowney v. New Brunswick Ry. Co., 78 Me. 479. If a fire started on A's land is allowed to burn at his request, and thence reaches B's land, the railroad is liable to B. Simmonds v. New York, &c., R. R. Co., 52 Conn. 264.

22—Flynn v. San Francisco, &c.,

apply here, as in other cases, but the fact that the neighboring land owner leaves grass and other combustibles on his premises, near the road, does not render him chargeable with contributory negligence; the obligation of care to prevent fires resting not upon him, but upon the company.²³ Nor is it contributory neg-

R. R. Co., 40 Cal. 14, 6 Am. Rep. 595; *Webb v. Rome, &c.*, R. R. Co., 49 N. Y. 420, 10 Am. Rep. 389; *Kellogg v. Chicago, &c.*, R. R. Co., 26 Wis. 223, 7 Am. Rep. 69; *Bass v. Chicago, &c.*, R. R. Co., 28 Ill. 9; *Ill. Cent. R. R. Co. v. Mills*, 42 Ill. 407; *Ill. Cent. R. R. Co. v. Frazier*, 47 Ill. 505; *Delaware, &c., R. R. Co. v. Salmon*, 39 N. J. 299, 23 Am. Rep. 214; *Ohio, &c., R. R. Co. v. Clutter*, 82 Ill. 123; *Troxler v. Richmond, &c.*, R. R. Co., 74 N. C. 377; *Fort Worth, &c., R. R. Co. v. Hogsett*, 67 Tex. 685; *Jones v. Mich. Cent. R. R. Co.*, 59 Mich. 437; *St. Johns, etc., R. R. Co. v. Ransom*, 33 Fla. 406, 14 So. 892; *Louisville, etc., Ry. Co. v. Hart*, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; *Chicago, etc., R. R. Co. v. Williams*, 131 Ind. 30, 30 N. E. 696; *Livermon v. Roanoke, etc.*, R. R. Co., 131 N. C. 527, 42 S. E. 942; *Richmond v. McNeill*, 31 Ore. 342, 49 Pac. 879; *New York, etc., R. R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264. See *Waters-Pierce Oil Co. v. King*, 6 Tex. Civ. App. 93, 24 S. W. 700; *Gibbons v. Wisconsin, &c., Ry. Co.*, 66 Wis. 161. Compare *Henry v. Sou. Pac. R. R. Co.*, 50 Cal. 176; *Smith v. Hannibal, &c., R. R. Co.*, 37 Mo. 287; *Pittsburgh, &c., R. R. Co. v. Nelson*, 51 Ind. 150. In the absence of statute negligence is not to be presumed from the fact that fire has started near the track. *Pittsburgh, &c., Ry. Co. v. Hixon*, 110 Ind. 225. But if it starts in com- bustible matter on the track, a railroad company is negligent if it allows it to spread on adjoining lands. *Ind., &c., Ry. Co. v. Overman*, 110 Ind. 538. See *Louisville, &c., Ry. Co. v. Ehlert*, 87 Ind. 339. Under the S. C. statute, if a fire starts on the right of way, the company is liable without regard to negligence. *Thompson v. Richmond, &c., Co.*, 24 S. C. 366. In Kansas, for a purely accidental escape of fire from men burning over the right of way there is no liability. *Atchison, &c., Ry. Co. v. Dennis*, 17 Pac. Rep. 153. See same *v. Riggs*, 31 Kan. 622.

23—*Flynn v. San Francisco, &c., R. R. Co.*, 40 Cal. 14, 6 Am. Rep. 595. See *Philadelphia, &c., R. R. Co. v. Hendrickson*, 80 Penn. St. 183, 21 Am. Rep. 97; *Delaware, &c., Co. v. Salmon*, 39 N. J. 299, 23 Am. Rep. 214; *Fero v. Buffalo, &c., R. R. Co.*, 22 N. Y. 209, 78 Am. Dec. 178; *Vaughan v. Taff Vale R. Co.*, 3 H. & N. 743; *Louisville, etc., R. R. Co. v. Malone*, 116 Ala. 600, 22 So. 897; *Lake Erie, etc., R. R. Co. v. Middlecoff* 150 Ill. 27, 37 N. E. 660; *Cleveland, etc., Ry. Co. v. Stephens*, 173 Ill. 430, 51 N. E. 69; *Louisville, etc., Ry. Co. v. Hart*, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; *Fort Scott, etc., Ry. Co. v. Tubbs*, 47 Kan. 630, 28 Pac. 612; *Mobile, etc., R. R. Co. v. Stinson*, 74 Miss. 453, 21 So. 14, 522; *Tacoma L. & M. Co. v. Tacoma*, 1 Wash. 12, 23 Pac. 929, 24 Pac. 29. But see *Ill. Cent. R. R.*

ligence to put up a building,²⁴ stack straw,²⁵ or leave cotton²⁶ near the track. But where a fair association cut the weeds and grass between its grounds and the railroad right of way and allowed it to dry up on the ground and a fire was started from an engine either on the right of way or in this dry grass and spread to the fence and buildings of the association, it was held that there was evidence to go to the jury on the question of contributory negligence and a judgment for the railroad company was affirmed.²⁷ If the plaintiff could have put out the fire and

Co. v. Nunn, 51 Ill. 78. See *West v. Chicago, &c., Ry. Co.*, 77 Ia. 654, 35 N. W. Rep. 479, 42 N. W. 512; *Engle v. Chicago, &c., Ry. Co.*, 77 Ia. 661, 37 N. W. Rep. 61, 42 N. W. 512; *Kendrick v. Towle*, 60 Mich. 363; *Gibbons v. Wisconsin, &c., Ry. Co.*, 66 Wis. 161. Failure to try to put out a fire after hearing of it will not prevent recovery for damage done before. *Stebbins v. Centr. Vt. R. R. Co.*, 54 Vt. 464, 41 Am. Rep. 855. See, also, on contributory negligence, *Moomey v. Peak*, 57 Mich. 259; *Alpern v. Churchill*, 53 Mich. 607; *King v. Am. Tr. Co.*, 1 Flipp. 1; *Miss. Pac. Ry. Co. v. Cornell*, 30 Kan. 35.

24—*Cleveland, etc., Ry. Co. v. Scantland*, 151 Ind. 488, 51 N. E. 1068; *Confer v. New York, etc., R. R. Co.*, 146 Pa. St. 31, 23 Atl. 202.

25—*American Strawboard Co. v. Chicago, etc., R. R. Co.*, 177 Ill. 513, 53 N. E. 97.

26—*Southern Ry. Co. v. Wilson*, 138 Ala. 510, 35 So. 561; *Railway Co. v. Fire Ass.*, 55 Ark. 163, 18 S. W. 43; *Alabama, etc., Ry. Co. v. Fried*, 81 Miss. 314, 33 So. 74; *Railroad Co. v. Short*, 110 Tenn. 713, 77 S. W. 936.

27—*Omaha Fair Ass. v. Missouri Pac. R. R. Co.*, 42 Neb. 105, 60 N. W. 330. The court says: “The construction of a railroad near

one's premises does not require one to forbear the ordinary use of his land, nor does it require him to take unusual precautions to guard against the consequences of probable negligence on the part of the railroad; but a railroad company is liable for losses caused by fires set out only when the fires are set out by its negligence. In spite of the utmost precaution fires may arise, and while the owner of adjacent land need not fortify himself against negligence merely to be anticipated and not yet committed, still, especially as fires are not necessarily the result of negligence, he should be required to take such precautions as a person of reasonable prudence would under similar circumstances to prevent the destruction of his property. This rule does not deprive him of the beneficial enjoyment of his property any more than in any other case of negligence. It would probably be under very exceptional circumstances that he would be required to do any affirmative act for his protection; but to hold that with knowledge of the danger he may place combustible materials in such manner as to invite the spread of any fire which may be set out and, notwithstanding such act, recover, would be to es-

makes no effort to do so, he cannot recover.²⁸ If the plaintiff sets a back fire to protect his property from an approaching fire due to the defendant's negligence and the two unite and burn his property, the liability of the defendant depends upon whether the plaintiff's property would have been burned if the back fire had not been started.²⁹ And where, in such a case, the united fires burned the property of a third party, the proximate cause of the loss was held to be the original fire and not the back fire.³⁰

Boiler Explosions. The explosion of a steam boiler whereby one is injured is held in Illinois *prima facie* evidence of negligence in those having the management of it,³¹ but this does not seem to be the rule elsewhere.³² Where damage is done by the explosion of a boiler, there is no liability unless the explosion was due to negligence.³³ In Pennsylvania it is held that if the owner employs competent mechanics to make repairs when needed and competent persons to inspect the condition of his boilers, he has discharged his whole duty in the premises, and is

tablish a rule wholly foreign to the spirit of our law and as unjust as it would be unique. Here the evidence tended to show that the fair association actually went off of its own property and performed acts which resulted in the accumulation of combustible matter near the tracks of the defendant and between those tracks and the fair grounds. This was certainly sufficient evidence to submit to the jury under the well settled rule in this state, and the court did not err in so doing." pp. 115, 116.

28—*Tatley v. Courter*, 93 Mich. 473, 53 N. W. 621; *Illinois Central R. R. Co. v. McKay*, 69 Miss. 139, 12 So. 447; *Eaton v. Oregon Ry. & Nav. Co.*, 19 Ore. 391, 24 Pac. 415.

29—*Thoburn v. Campbell*, 80 Ia. 338, 45 N. W. 769.

30—*Owen v. Cook*, 9 N. D. 134,

81 N. W. 285, 47 L. R. A. 646. See *McKenna v. Boessler*, 86 Ia. 197, 53 N. W. 103; *Jesperson v. Phillips*, 46 Minn. 147, 48 N. W. 770. One may recover for personal injuries in attempting to put out a fire negligently set by the defendant. *Burnett v. Atlantic Coast Line R. R. Co.*, 132 N. C. 261, 43 S. E. 797.

31—Ill. Cent. R. R. Co. v. Phillips, 99 Ill. 234, and 55 Ill. 194.

32—*Spencer v. Campbell*, 9 W. & S. 32; *Losee v. Buchanan*, 51 N. Y. 476; *S. B. New World v. King*, 16 How. 469; *Marshal v. Welwood*, 38 N. J. L. 339; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613; *Young v. Bransford*, 12 Lea, 232.

33—Ibid; *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

not bound to see that the repairs are properly made or that the inspection is sufficient.³⁴ In reversing a judgment for the plaintiff in one of the cases cited, the Supreme Court says "that on a retrial the court below should instruct the jury, that if they find there was no evidence of want of care upon the part of defendant in selecting competent mechanics to make the repairs, and that if the evidence shows an inspection by competent persons afterwards, and before the explosion, then even if they should find, that the mechanics and inspectors did not perform their duty, the defendant is not answerable for their neglect."³⁵ The same cases hold that the owner cannot shield himself behind the report of an official inspector or of an insurance inspector, without showing that such inspectors were competent to perform the duty.

Where an insurance company stipulated for the right to inspect the boiler insured and did actually make such inspection and was negligent about it and the boiler exploded by reason of defects which proper inspection would have disclosed, and injured the property of a third party, it was held that the insurance company was liable for the damage.³⁶

34—*Anderson v. Hays Mfg. Co.*, 207 Pa. St. 106, 56 Atl. 345, 63 L. R. A. 540; *McNeil v. Crucible Steel Co.*, 207 Pa. St. 493, 56 Atl. 1067.

35—*Anderson v. Hays Mfg. Co.*, 207 Pa. St. 106, 117, 56 Atl. 345, 63 L. R. A. 540.

36—*Van Winkle v. Am. Steam Boiler Ins. Co.*, 52 N. J. L. 240, 19 Atl. 472. The boiler belonged to the Ivanhoe Paper Company and the grounds of the decision are thus stated in the opinion of the court: "What the defendant did was this: It co-operated with the owner of this dangerous instrument in its management, in a particular indispensable to its safe use, and it thereby, in that degree, constituted itself the agent, or the substitute, of such owner. It per-

formed a series of acts that could not be performed by the owner without the responsibility just mentioned; and as such responsibility belonged not to the ownership of the machine, but to the function of operating it, it does not seem that anyone could perform such function without incurring the responsibility. Very plainly the defendant stood within the spirit of the rule that laid upon the proprietor of the boiler the duty of exercising care and skill in its use. That rule is but the creature of social justice. That a man cannot do an act for his own benefit or pleasure, the natural consequence of which will be detrimental to the equal rights of another, is an equitable principle

***Injuries by Fire-Arms and Explosives.** When one [*705] makes use of loaded weapons, he is responsible only as he might be for any negligent handling of dangerous machinery, that is to say, for a care proportioned to the danger of injury

of importance to the common welfare; and the rule that one man cannot with impunity assist another in doing such wrongful act, appears to be a necessary corollary to the proposition, unless such proposition is to be regarded as purely formal and arbitrary. In the present instance, this boiler burst and injured the adjacent property of the plaintiff solely, as the facts now appear, by reason of the omission of a proper test and inspection; the defendant, by its inspector, was in the actual performance of that function, and it was its agent that was morally and primarily at fault; it would seem, therefore, quite unreasonable to say that the defendant, whose servant the inspector was, is not liable; but that the Ivanhoe Paper Mill Company, whose servant the inspector was not, is liable. The plaintiff was the owner of the adjacent property, near to the place of this boiler; the machine, unless carefully operated, was dangerous to everything in its immediate neighborhood; no one could open his eyes and not see this situation, for, in this respect, *res ipsa loquitur*; plainly, therefore, the owner of the machine, even according to the limited rule, adopted by the courts of this country, was answerable to the plaintiff for the results of the careless management of the machine; and so, for a like reason, as we think, must every person be similarly responsible who participates in a substantial de-

gree in such management, whether he be a contractor with the owner, or his servant, or even if he be a mere volunteer. The situation itself creates the duty to exercise care and skill in a high degree in everyone who meddles in a matter fraught with such peril to the property of another. The defendant, the insurance company, as soon as it took part, practically, in the management of this machine, became subject to a duty in that particular by virtue of its contract with the Ivanhoe Paper Mill Company to conduct itself with care and skill, and by virtue of the law, to a similar duty towards the plaintiff; and it is the violation of this latter duty which, we think, forms a legal foundation for this action.

"And it would seem that there is a broader ground than the one above defined on which the present case can be based. It is this, that in all cases in which a person undertakes the performance of an act, which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, *ipso facto*, imposes as a public duty the obligation to exercise such care and skill. The law hedges around the lives and persons of men with much more care than it employs when guarding their property, so that, in this particular, it makes in a way, every one his brother's keeper, and, therefore, it may well

from it.³⁷ A high degree of care is necessary in the use or manipulation of loaded weapons in the presence or vicinity of other persons and where injury results from a failure to exercise such care the defendant is liable.³⁸ An agricultural society operating a fair ground was held liable for the death of a person who, while standing on one of the approaches to the fair, was hit and killed by a bullet shot by one practicing in a shooting gallery licensed by the society within its grounds. It was held to be the duty of the society to use reasonable care that there should be no firing of dangerous weapons upon its grounds, so as to jeopardize the life or limb of any of those whom it had invited to the fair, whether they were at the time within the grounds or on the approaches thereto, and that it could not relieve itself from this duty by leasing the privilege to another.³⁹ The firing of guns for sport or exercise is not unlawful if a suitable place is chosen for the purpose; but in the streets of a city, or in any place where many persons are congregated, it might be negligence in itself.⁴⁰ In New York a military officer

be doubted, whether in any susceptible case redress should be withheld from an innocent person who has sustained immediate damage by the neglect of another in doing an act which, if carelessly done, threatens, in a high degree, one or more persons with death or great bodily harm." pp. 245-247.

37—Underwood *v.* Hewson, Stra. 596; Weaver *v.* Ward, Hob. 134; Chataigne *v.* Bergeron, 10 La. Ann. 699. See Sutton *v.* Bonnett, 114 Ind. 243, 16 N. E. 180.

38—Glueck *v.* Scheid, 125 Cal. 288, 57 Pac. 1003; Hankins *v.* Watkins, 77 Hun, 360, 28 N. Y. S. 867; Winans *v.* Randolph, 169 Pa. St. 606, 32 Atl. 622. In Cleghorn *v.* Thompson, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 442, defendant C worked for the other defendants at a slaughter house from which

the ground rose to a highway seventy-five rods away. C fired a rifle at some dogs about seventy-five yards away and the ball after being widely deflected hit and killed a person on the highway. The person killed was far without the range of the rifle and the ball would naturally have buried itself in the rise of ground. It was held as matter of law that there was no negligence and no liability.

39—Thornton *v.* Maine State Agricultural Soc., 97 Me. 108, 53 Atl. 979, 94 Am. St. Rep. 488. The owners of fair grounds permitting target shooting thereon are liable to one whose horse is hit thereby. Conradt *v.* Clauve, 93 Ind. 476.

40—See Conklin *v.* Thompson, 29 Barb. 218, case of injury by fright from exploding fire crackers. Compare Cole *v.* Fisher, 11 Mass. 137;

has been held liable for negligence in ordering the firing of blank cartridges by the men under his command, at an assembled crowd of people, whereby one of them was injured.⁴¹ But the owner of a vessel is not responsible for an injury caused by the firing of a gun therefrom, where the firing was by one of the crew, not in the line of his employment and against the owner's orders.⁴² An injury by a young child with a loaded gun placed in its hands negligently by another, is the wrong of the person putting it in his hands.⁴³ It has been held not to be negligent for a father to give his boy of nine or eleven a toy air gun,⁴⁴ but when he knows that the boy is careless and reckless in its use, it is negligence to permit him to keep it.⁴⁵ A father gave his seventeen year old son a 22-rifle and cautioned him never to let his younger brother of seven have possession of it when loaded. The older son violated this injunction and the plaintiff's intestate was killed by the carelessness of the younger boy in carrying the loaded rifle. It was held that the father had not been guilty of any want of care and was not liable.⁴⁶

Bissell v. Booker, 16 Ark. 308. The president of a club, in the name of which a meeting is held, is liable to one injured in the street by the explosion of fireworks at the meeting, when he has paid for the fireworks. *Jenne v. Sutton*, 43 N. J. L. 257. "Shooting at a mark is lawful, but not necessary, and may be dangerous, and the law requires extraordinary care to prevent injury to others; and if the act is done where there are objects from which the balls may glance and endanger others, the act is wanton, reckless, without due care, and grossly negligent." *BUTLER*, J., in *Welch v. Durand*, 36 Conn. 182, 185, 4 Am. Rep. 55, citing *Bullock v. Babcock*, 3 Wend. 391, approving Y. B. 21 H. vii. 28 a.

41—*Castle v. Duryee*, 2 Keyes, 169.

42—*Haack v. Fearing*, 5 Rob. 528.

43—*Dixon v. Bell*, 5 M. & S. 198; S. C. 1 Stark. 287; *Meers v. McDowell*, 110 Ky. 926, 62 S. W. 1013, 53 L. R. A. 789.

44—*Chaddock v. Plummer*, 88 Mich. 225, 50 N. W. 135, 26 Am. St. Rep. 223; *Harris v. Cameron*, 81 Wis. 239, 51 N. W. 437, 29 Am. St. Rep. 891. In both these cases the gun was loaned to another boy who did the mischief.

45—*Johnson v. Glidden*, 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep. 795.

46—*Taylor v. Seil*, 120 Wis. 32, 97 N. W. 498. See *Palm v. Iverson*, 117 Ill. App. 535. Where one is injured by the setting off of

The same rule applies to explosives as to fire arms, and those who use such agencies in their business must exercise due care in their custody and use. Thus where railroad employes carelessly left a signal torpedo on the track at a crossing or place frequented by the public and a boy who picked it up and exploded it was injured, the company was held liable.⁴⁷ So where such torpedoes were exploded in fun by employees having them in charge and persons lawfully in the vicinity were injured.⁴⁸ But where a boy, walking along a track at a distance from any station or crossing, picked up a torpedo and was injured by exploding it, the company was held not liable, as the company was not bound to keep its track safe for trespassers.⁴⁹ A contractor for street work left dynamite sticks half buried in a vacant lot where children were accustomed to play, whereby one of them was injured. He was held liable.⁵⁰ But in all such

fire works, liability is a question of negligence. Crowley *v.* Rochester Fire Works Co., 95 App. Div. 13, 88 N. Y. S. 483. Where the plaintiff ordered a particular cartridge of the defendant for use in a particular rifle and the defendant assumed to give him what he asked for but really gave him a different kind closely resembling what he called for, which was dangerous to use in the rifle, and the plaintiff was injured by a premature explosion, the defendant was held liable. Smith *v.* Clarke Hardware Co., 100 Ga. 163, 28 S. E. 73, 39 L. R. A. 607.

47—Harriman *v.* Railway Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Pittsburgh, etc., Ry. Co. *v.* Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464; Cleveland, etc., R. R. Co. *v.* Marsh, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142. But where a boy of eight found such a torpedo on the track at a crossing and was injured by exploding

it; the company was held not liable, though there was evidence to show that a brakeman threw the torpedo at a flagman who tossed it back to the brakeman and, the latter failing to catch it, it fell to the ground and was left there. The act of the brakeman was held not to be within the scope of his employment and the fact of the torpedo being found on the crossing was held not to be evidence of negligence. Obertoni *v.* Boston, etc., R. R. Co., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422.

48—Euting *v.* Chicago, etc., Ry. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. Rep. 936, 60 L. R. A. 158; Euting *v.* Chicago, etc., Ry. Co., 120 Wis. 651, 98 N. W. 944. *Contra*, Sullivan *v.* Louisville, etc., R. R. Co., 115 Ky. 447, 74 S. W. 171.

49—Hughes *v.* Boston, etc., R. R. Co., 71 N. H. 279, 51 Atl. 1070, 93 Am. St. Rep. 518.

50—Nelson *v.* McLellan, 31 Wash. 208, 71 Pac. 747, 96 Am. St. Rep. 902, 60 L. R. A. 793.

cases some negligence on the part of the defendant in the custody or use of the article must be shown, or no recovery can be had.⁵¹

If one deliver to a carrier explosive articles for transportation, without disclosing what they are, he will be responsible to parties injured if an explosion takes place.⁵² If the carrier is informed and the article properly marked the consignor is not liable.⁵³ It would probably be negligence for a carrier to knowingly permit fire works or other similar explosives to be carried in a passenger car or smoker, but to hold the carrier for an accident arising therefrom, knowledge or its equivalent would have to be shown.⁵⁴

Where a person puts articles *in the trade for a certain use, in which they would be dangerous,⁵⁵ or sells poisonous drugs wrongfully labeled, or labeled as being innocent,⁵⁶

51—*Afflick v. Bates*, 21 R. I. 281, 43 Atl. 539, 79 Am. St. Rep. 801. A child too young to understand the effects of exploding powder, and who injures himself therewith may have his action against the person who sold it to him. *Carter v. Towne*, 98 Mass. 567. It is a nuisance to explode fireworks in streets. *Conklin v. Thompson*, 29 Barb. 218.

52—*Williams v. East India Co.*, 3 East, 192; *Farrant v. Barnes*, 11 C. B. (N. S.) 553; *Carter v. Towne*, 98 Mass. 567; *Boston, &c., R. R. Co. v. Carney*, 107 Mass. 568; *Standard Oil Co. v. Tierney*, 92 Ky. 367, 17 S. W. 1025, 36 Am. St. Rep. 595, 14 L. R. A. 677; *Standard Oil Co. v. Tierney*, 96 Ky. 89, 27 S. W. 983. See *Kilbride v. Carbon Dioxide, etc., Co.*, 210 Pa. St. 552, 51 Atl. 347, 88 Am. St. Rep. 829.

53—*Standard Oil Co. v. Tierney*, 92 Ky. 367, 17 S. W. 1025, 36 Am. St. Rep. 595, 14 L. R. A. 677. In this case the defendant shipped naphtha as "carbon oil" and the package was marked "Unsafe for

illuminating purposes." It was held to be a question for the jury whether this was sufficient to give notice of the danger.

54—See *East Indian Ry. Co. v. Mukerjee*, (1901) A. C. 396.

55—*Wellington v. Downer, &c., Co.*, 104 Mass. 64; *Faro v. Remington Arms Co.*, 67 App. Div. 414, 73 N. Y. S. 788.

56—*Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *George v. Skivington*, L. R. 5 Ex. 1; *Loop v. Litchfield*, 42 N. Y. 351; *Hansford v. Payne*, 11 Bush. 380; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Burgess v. Sims Drug Co.*, 114 Ia. 275, 86 N. W. 307, 89 Am. St. Rep. 359, 54 L. R. A. 364; *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698; *Fisher v. Galladay*, 38 Mo. App. 531; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428. See *Rouker v. St. John*, 21 Ohio C. C. 39.

he will be liable to one injured in consequence. But a druggist who sells a regular proprietary or patent medicine is not responsible for its effects. "If he delivers to the consumer the article called for with the label of the proprietor or patentee upon it, he cannot justly be charged with negligence in so doing."⁵⁷

Removing Lateral Support. Incident to the ownership of land is the right to lateral support by the land which adjoins it. This exists independent of contract, and to remove it, or to do anything which endangers it is to commit a nuisance.⁵⁸ Whoever in the course of improvements on his own lands may have occasion to make excavations which endanger the land of his neighbor, must supply walls or other sufficient substitutes for the support which he removes. But his obligation is limited to the support of the land in its natural condition; and if the neighbor's land shall be weighted with buildings or other burdens, the owner of the servient tenement, in removing collateral support, can be held responsible only for such consequences as would have followed if the land had not been thus weighted.⁵⁹

57—*West v. Emanuel*, 198 Pa. S. W. 526; *Gildersleeve v. Hammond*, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; *Nichols v. Duluth*, 40 Minn. 389, 42 N. W. 84, 12 Am. St. Rep. 743; *Schultz v. Bowen*, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630; *Novotney v. Danforth*, 9 S. D. 301, 68 N. W. 749.

The lower proprietor on a hill side may not by quarrying cause an upper proprietor's land to slide down. *Wier's App.* *81 Penn. St. 203. A city in grading may not remove lateral support. *Dyer v. St. Paul*, 27 Minn. 457.

58—*Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Farrand v. Marshall*, 19 Barb. 380; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *McGuire v. Grant*, 25 N. J. 356; *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771; *Charless v. Rankin*, 22 Mo. 566; *Boothby v. Androscoggin R. R. Co.*, 51 Me. 318; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Baltimore, &c., R. R. Co. v. Reaney*, 42 Md. 117; *Beard v. Murphy*, 37 Vt. 99; *Stimmler v. Brown*, 7 Houst. 219, 30 Atl. 996; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793; *Moellering v. Evans*, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; *Louisville, etc., R. R. Co. v. Bonhayo*, 94 Ky. 67, 21

S. W. 526; *Gildersleeve v. Hammond*, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; *Nichols v. Duluth*, 40 Minn. 389, 42 N. W. 84, 12 Am. St. Rep. 743; *Schultz v. Bowen*, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630; *Novotney v. Danforth*, 9 S. D. 301, 68 N. W. 749. The lower proprietor on a hill side may not by quarrying cause an upper proprietor's land to slide down. *Wier's App.* *81 Penn. St. 203. A city in grading may not remove lateral support. *Dyer v. St. Paul*, 27 Minn. 457.

59—*Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220; *Backhouse v. Bonomi*, 9 H. L. Cas. 502; *Humphries v. Brogden*, 12 Q. B. 739; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec.

The case, however, is eminently one in which the obligation of care for the protection of the neighbor's interest is imposed; and before proceeding to remove collateral support, he should give reasonable notice of his intention, that the *owner [*707] of the dominant tenement may have the opportunity to provide against any threatened danger.⁶⁰ He must also observe due care in making the excavations, and will be responsible for all the consequences of negligence.⁶¹

- 771; *Richardson v. Vermont Cent. R. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; *Obert v. Dunn*, 140 Mo. 476, 41 S. W. 901; *Ketcham v. Newman*, 141 N. Y. 205, 36 N. E. 197, 24 L. R. A. 102; *McGettigan v. Potts*, 149 Pa. St. 155, 24 Atl. 198; *Bailey v. Gray*, 53 S. C. 503, 31 S. E. 354. See *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *McMillan v. Watt*, 27 Ohio St. 306; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Backus v. Smith*, 5 Ont. App. 341. Under Cal. statute there is an easement for support after five years. *Aston v. Nolan*, 63 Cal. 269.
- 60—*Wyley Canal Co. v. Bradley*, 7 East, 368; *Massey v. Goyer*, 4 C. & P. 161; *Shriever v. Stokes*, 8 B. Mon. 453; *Richart v. Scott*, 7 Watts, 460; *Brown v. Werner*, 40 Md. 15; *Bonaparte v. Wiseman*, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482; *Serio v. Murphy*, 99 Md. 545, 58 Atl. 435, 105 Am. St. Rep. 316; *Gerst v. St. Louis*, 185 Mo. 191, 84 S. W. 34, 105 Am. St. Rep. 580; *Schultz v. Byers*, 53 N. J. L. 442, 22 Atl. 514, 13 L. R. A. 569; *Davis v. Summerfield*, 131 N. C. 352, 42 S. E. 818, 92 Am. St. Rep. 781. No notice is necessary if the adjoining owner has knowledge. *Schultz v. Byers*, 53 N. J. L. 442, 22 Atl. 514, 13 L. R. A. 569; *Novotney v. Danforth*, 9 S. D. 301, 68 N. W. 749.
- 61—*Jeffries v. Williams*, 5 Exch. 792; *Elliot v. N. E. R. Co.*, 10 H. L. Cas. 333; *Humphries v. Brogden*, 12 Q. B. 739; *Baltimore, &c., R. R. Co. v. Reaney*, 42 Md. 117; *Shafer v. Wilson*, 44 Md. 268; *Boothby v. Androscoggin, &c., R. R. Co.*, 51 Me. 318; *Shriever v. Stokes*, 8 B. Mon. 453; *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771; *Charless v. Rankin*, 22 Mo. 566; *Myer v. Hobbs*, 57 Ala. 175; *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. 937; *Bohrer v. Dienhart Harness Co.*, 19 Ind. App. 489, 49 N. E. 296; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; *Serio v. Murphy*, 99 Md. 545, 58 Atl. 435, 105 Am. St. Rep. 316; *Gildersleeve v. Hammond*, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; *Larson v. Met. St. Ry. Co.*, 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330; *Obert v. Dunn*, 140 Mo. 476, 41 S. W. 901; *Davis v. Summerfield*, 131 N. C. 352, 42 Am. St. Rep. 818, 92 Am. St. Rep. 781; *Board of Education v. Volk*, 72 Ohio St. 469; *Spohn v. Davis*, 174 Pa. St. 474, 34 Atl. 192; *Witherow v. Tannehill*, 194 Pa. St. 21, 44 Atl. 1088; *Bailey v. Gray*, 53 S. C. 503, 31 S. E. 354. See *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581. If the drainage

The right to collateral support for land weighted with buildings may be acquired by prescription; it being in the nature of an easement.⁶² But this has been denied in a vigorous opinion by the Supreme Court of Kentucky which says: "It would be a rule at war with reason and justice. It would make the owner an insurer of his neighbor's house in case he desired to take down his own, or was compelled to remove it owing to its condition. It would make him liable for all damage, however carefully he may have acted. It would in great measure prevent all improvement. Whatever may be the English doctrine, such a rule has not been and should not be adopted in a changing growing, country like this one, any more than the doctrine of ancient lights, which has been rejected. * * * A right by prescription results from acquiescence; this is its basis; and it seems to us none is to be implied where the adverse party has no right and can invoke no remedy to prevent it. There is no encroachment upon his rights, no adverse user, and nothing being done to enable him to resort to a legal remedy. The other party cannot properly be said to be enjoying something so as to invest him with a legal right to that enjoyment, where no power exists to prevent it."⁶³

Subjacent Support. A freehold is sometimes divided laterally, that is, one man owns the surface, and another owns the

of land weakens collateral support there is no responsibility for it. Popplewell *v.* Hodkinson, L. R. 4 Exch. 248. An abutter may not cause a highway to fall in by his excavating. Milburn *v.* Fowler, 27 Hun, 568. In Davis *v.* Summerfield, 131 N. C. 352, 42 S. E. 818, 92 Am. St. Rep. 781, it is held that the defendant should do the work in sections, when that would prevent injury to the plaintiff's adjoining property. But the contrary is held in Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901. If a person exercises due care in excavating on his own land, he is not

obliged to expend money in order to support his neighbor's building and he cannot recover for money so expended either in contract or tort. First National Bank *v.* Villegra, 92 Cal. 96, 28 Pac. 97. A recovery was allowed for such expense in Eads *v.* Gains, 58 Mo. App. 586, but the grounds of recovery are not made very clear.

62—Washb. on Easements, 3d ed. 547; Richart *v.* Scott, 7 Watts, 460.

63—Clemens *v.* Speed, 93 Ky. 284, 289, 290, 19 S. W. 660, 19 L. R. A. 240.

sub-surface where minerals exist or are supposed to exist. Where that condition of things is found, it must have had its origin in grants emanating from a common source; as the whole must at some time have been in the same hands. Therefore contracts or covenants fixing the respective rights and obligations of the parties are likely to exist, and these must govern so far as they extend.⁶⁴ In the absence of any such contracts or covenants, the owner of the surface is entitled to support, not only for the land itself, but for the buildings erected upon it.⁶⁵ The liability of the sub-surface owner does not depend upon negligence, but if he removes the natural support he must substitute that which is sufficient to protect the surface. And a custom to work mines without providing such support is unreasonable and void.⁶⁶

***Nuisances Causing Personal Discomfort.** Where [*708] the complaint is that something done or suffered by the defendant causes personal discomfort to the plaintiff, it is seldom that the controversy is confined to the single point of personal annoyance, and it will generally be found to embrace considerations of what is a reasonable use of the property of the parties respectively, and what discomforts and inconveniences one can reasonably be required to submit to and endure for the

64—See for example, *Smith v. mi v. Backhouse, El., Bl. & El.* 622; *Darby, L. R.* 7 Q. B. 715; *S. C.* 3 S. C. in error, 9 H. L. Cas. 503; *Moak,* 281; *Aspden v. Seddon, L. Fisher v. Beard,* 32 Iowa. 346. *R.* 10 Ch. App. 394.

65—*Hext v. Gill, L. R.* 7 Ch. App. 699; *S. C.* 3 *Moak,* 574; *Bonomi v. Backhouse, El., Bl. & El.* 622; *S. C.* in error, 9 H. L. Cas. 503; *Smith v. Thackerah, L. R.* 1 C. P. 564.

66—*Hilton v. Lord Granville,* 5 Q. B. 701; *Humphries v. Brogden,* 12 Q. B. 739; *Blackett v. Bradley,* 1 Best & S. 940; *Jones v. Wagner,* 66 Penn. St. 429, 5 Am. Rep. 385; *Horner v. Watson,* 79 Pa. St. 242, 21 Am. Rep. 55, *Zinc Co. v. Franklinite Co.,* 13 N. J. 342.

The right of action arises when some actual damage is done. *Bono-*

mi v. Backhouse, El., Bl. & El. 622; *S. C. in error, 9 H. L. Cas. 503;* *Fisher v. Beard,* 32 Iowa. 346.

Perhaps it is not entirely certain how far the party mining is bound to provide support for the buildings on the surface. There is no doubt on the authorities that he is liable if the buildings are injured for want of support that would have been sufficient without their weight; in other words, is liable unless the buildings themselves caused the support to give way. So he would be liable if the buildings had been on the land for the period of prescription. See *Bonomi v. Backhouse, El., Bl. & El.* 622.

convenience or benefit of his neighbor. If a discomfort were wantonly caused from malice or wickedness, a slight degree of inconvenience might be sufficient to render it actionable; but if it were to result from pursuing a useful employment in a way which but for the discomfort to others would be reasonable and lawful, it is perceived that the position of both parties must be regarded, and that what would have been found wholly unreasonable before may be found as clearly justified by the circumstances now.

The rule by which the relative rights of the parties are to be regulated is laid down for England by the case of *St. Helen's Smelting Co. v. Tipping*. The Lord Chancellor, in that case, speaking for the court, said, that with regard to the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality which are actually necessary for trade *and commerce, and also for the enjoyment of [*709] property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. In a case of that description the submission that is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors would not apply to cir-

cumstances the immediate result of which is sensible injury to the value of the property.⁶⁷ Every business should be carried on in a suitable and convenient place, and by convenient is meant, not a place which may be convenient to the party himself, looking at his interest merely, but a place suitable and convenient when the interests of others are considered.⁶⁸ "All that can be required of men who engage in lawful business is that they shall regard the fitness of locality. In the residence sections of a city, business of no kind is desirable or welcome. On the other hand, one who becomes a resident of a trading or manufacturing neighborhood, or who remains while in the march of events a residence district gradually becomes a trading or manufacturing neighborhood, should be held bound to submit to the ordinary annoyances, discomforts and injuries which are fairly incidental to the reasonable and general conduct of such business in his chosen neighborhood. The true rule would be that any discomfort or injury beyond this would be actionable; anything up to that point would not be actionable."⁶⁹

In the application of this rule to actual controversies, in this country, there has been some apparent divergency in views; but this probably is to be attributed to local or special circumstances and not to any disagreement concerning the law itself.⁷⁰

67—*St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; S. C. Big. Lead. Cas. 454. And see *Bamford v. Turnley*, 3 Best & S. 66, questioning *Hole v. Barlow*, 4 C. B. (N. s.) 334; *Cavey v. Leadbitter*, 13 C. B. (N. s.) 470; *Walter v. Selfe*, 4 De G. & S. 315; S. C. 4 Eng. L. & Eq. 15; *Gaunt v. Fynney*, L. R. 8 Ch. App. 8; S. C. 4 Moak, 718.

68—WILLIAMS, J., in *Bamford v. Turnley*, 3 Best & S. 65, 75, citing *Jones v. Powell*, Palm. 536; S. C. Hutt. 135.

69—*Eller v. Koehler*, 68 Ohio St. 51, 67 N. W. 89. See *Alexander v. Stewart Bread Co.*, 21 Pa. Supr. Ct. 526.

70—See *English v. Progress Elec. Lt. & M. Co.*, 95 Ala. 259, 10 So. 134; *Hurlbut v. McKone*, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; *Harley v. Merrill Brick Co.*, 83 Ia. 73, 48 N. W. 1000; *Davis v. Whitney*, 68 N. H. 66, 44 Atl. 78; *Ladd v. Granite State Brick Co.*, 68 N. H. 185, 37 Atl. 1041; *Bohan v. Port Jervis Gas Lt. Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; *Pach v. Geoffroy*, 67 Hun, 401, 22 N. Y. S. 275; *Chamberlain v. Douglas*, 24 App. Div. 582, 48 N. Y. S. 710; *Price v. Grantz*, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 601; *Powell v. Bentley, etc., Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; *McCann v. Strong*, 97

[*710] *The question, then, is what is reasonable under all the circumstances. The unlimited and undisturbed enjoyment which one is entitled to have of his own property must

Wis. 551, 72 N. W. 1117; *Dolan v. Chicago, etc., Ry. Co.*, 118 Wis. 362, 95 N. W. 385; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533; *Rogers v. Elliott*, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316; *Bacon v. Boston*, 154 Mass. 100, 28 N. E. 9; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722. *St. Helen's Smelting Co. v. Tipping* was accepted as authority in *Huckenstein's Appeal*, 70 Pa. St. 102, 10 Am. Rep. 669. That was an application to enjoin the burning of brick adjoining complainant's premises. The court denied the injunction on the special circumstances, but dwelt upon the fact that the business of defendant only caused that sort of inconvenience which must be caused by manufactures, and said: "In the present case the kiln of the defendant is situated on an outskirt of the city of Allegheny. The properties of the plaintiff and defendant lie adjoining each other on the hill side overlooking the city, whose every day cloud of smoke from thousands of chimneys and stacks hangs like a pall over it, obscuring it from sight. This single word describes the characteristics of this city, its kind of fuel, its business, the habits of its people, and the industries which give it prosperity and wealth. The people who live in such a city, or within its sphere of influence, do so of choice, and they voluntarily subject themselves to its peculiarities and its discomforts for the greater benefits they think they derive from their residence or their business there. A chancellor cannot disregard all this." In *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659, *St. Helen's Smelting Co. v. Tipping*—or rather the case in the court below where the same rule was laid down—was also cited with approval; but there the business was found to be a nuisance. In *Campbell v. Seaman*, 9 N. Y. Sup. C. 231, S. C. on Appeal, 63 N. Y. 568, and 20 Am. Rep. 567, it is assumed that the cases in 70 Pa. St. and 51 N. Y. are in conflict, which they clearly are not, on the rule of law. But in the latter, which was a case of brick burning, near the little village of Castleton, on the Hudson river, the business was declared to be a nuisance, and the plaintiff recovered damages. The special circumstances to which the Pennsylvania court attached importance were entirely wanting here, and it seems quite probable that on the same state of facts the Pennsylvania court would have reached the same conclusion. Moreover, the Pennsylvania court only refused an injunction without deciding what rights the plaintiff might have had at law.

For further American cases laying down a like rule of law, see *Gilbert v. Showerman*, 23 Mich. 448; *Kirkman v. Handy*, 11

be qualified to this extent: that trifling inconveniences resulting from the useful employment of his neighbor's property must be submitted to when that which is done by the other, in point of locality is not unsuitable, and in point of management not unreasonable.⁷¹ Towns cannot be built up and the business of a dense population cannot be carried on upon any principle less accommodating.

The subject received very careful consideration by the Supreme Court of Maryland in a case where the defendant carried on a factory for the manufacture of fertilizers, adjoining the property of the plaintiff, which consisted of a hotel and dwellings. It was shown that the factory emitted noxious and offensive gases which were a very material annoyance to the occupants of the plaintiff's property and which actually produced physical injury to the property by injuriously affecting the paint, glass, metals, etc. The defendant had a large amount invested in its plant, and had established its plant before the plaintiff's buildings were erected. There were numerous other similar establishments in the same neighborhood. In giving judgment for the plaintiff the court said: "No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the

Humph. 406, 54 Am. Dec. 45; Whitney v. Bartholomew, 21 Conn. 213.

71—Gaunt v. Fynney, L. R. 8 Ch. App. 8; S. C. 4 Moak, 718. An unsightly building near a residence is not a nuisance, *per se*. Trulock v. Merte, 72 Ia. 510, 34 N. W. 307. Nor an undertaker's shop, where a single very sensitive person is annoyed. Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490; Affirmed Wescott v. Middleton, 44 N. J. Eq. 297, 18 Atl. 80. Nor a private burying ground which does not injure the health though it depreciates the value of

one's land and offends the taste. Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315. Where the extension of a cemetery is complained of, that one has voluntarily settled near it is to be considered. Upjohn v. Richland, 46 Mich. 542. A cemetery is not a nuisance, *per se*. Ex parte Wygant, 39 Ore. 429, 64 Pac. 867, 87 Am. St. Rep. 673, 54 L. R. A. 636. But it is a nuisance to stand stallions and jacks for mares near a dwelling. Farrell v. Cook, 16 Neb. 483, 49 Am. Rep. 721; Hayden v. Tucker, 37 Mo. 214.

neighboring owner, for which an action will lie. And this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business.⁷² * * * We cannot agree with the appellant that the court ought to have directed the jury to find whether the place where this factory was located was a convenient and proper place for the carrying on of the appellant's business, and whether such a use of his property was a reasonable use, and if they should so find the verdict must be for the defendant. It may be convenient to the defendant and it may be convenient to the public, but, in the eye of the law, no place can be convenient for carrying on a business which is a nuisance, and which causes substantial injury to the property of another. Nor can any use of one's own land be said to be a reasonable use which deprives an adjoining owner of the lawful use and enjoyment of his property."⁷³ In regard to the claim that the defendant's works were first in order of time the court held that the defendant had no right to erect works which would be a nuisance to the adjoining land owned by the plaintiff, and thus measurably control the uses to which the plaintiff's land might in the future be subject, and that it could not, by the use of its own land, deprive the plaintiff of the lawful use of his property.⁷⁴ Evidence of the large amount in-

72—"As a general proposition, it may be said, that any establishment erected on the premises of the owner, though for the purposes of trade or business lawful in itself, which, from the situation, the inherent qualities of the business, or the manner in which it is conducted, directly causes substantial injury to the property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is a nuisance." English *v. Progress Elec. Lt. & M. Co.*, 95 Ala. 259, 264, 10 So. 134. See also to same effect: *People v. Detroit White Leads Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; *Bohan v. Port Jervis Gas Lt. Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711.

73—See *Eller v. Koehler*, 68 Ohio St. 51, 67 N. E. 89.

74—"A man is not to be precluded from building and living on his own land because the adjoining proprietor first erected a nuisance." *Hurlbut v. McKone*, 55

vested in such factories in the neighborhood was held incompetent. "The law, in cases of this kind," says the court, "will not undertake to balance the conveniences, or estimate the differences between the injury sustained by the plaintiff, and the loss that may result to the defendant from having its trade and business, as now carried on, found to be a nuisance. No one has a right to erect works which are a nuisance to a neighboring owner, and then say he has expended a large sum of money in the erection of his works, while the neighboring property is comparatively of little value. The neighboring owner is entitled to the reasonable and comfortable enjoyment of his property, and if his rights in this respect are invaded, he is entitled to the protection of the law, let the consequences be what they may."⁷⁵ It was held to be no defense that the defendant's business was conducted with care and skill and with the best appliances.⁷⁶

In respect to those things which are a nuisance because of the annoyance and discomfort they produce, they are to be judged by the effect they are calculated to produce upon ordinary people under normal conditions, not by their effect upon the oversensitive, the fastidious, or the sick, nor, on the other hand, by their effect upon those who are abnormally indifferent to such things, or who by long experience have learned to endure them without inconvenience.⁷⁷ The annoyance must be material and substantial, but "it is not necessary to a right of action that the owner should be driven from his dwelling; it is enough that

Conn. 31, 44, 10 Atl. 164, 3 Am. St. Rep. 17. To same effect People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722. The plaintiff is not estopped because he did not object to the erection of the works. Harley *v.* Merrill Brick Co., 83 Ia. 73, 48 N. W. 1000.

75—Susquehanna Fertilizer Co. *v.* Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737. The holdings in this case were confirmed in the following similar case against the same company. Susquehanna Fertilizer Co. *v.* Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533.

76—Ibid.; People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

77—Rogers *v.* Elliott, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316; Powell *v.* Bentley, etc., Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; McCann *v.* Strong, 97 Wis. 551, 72 N. W. 1117.

the enjoyment of life and property be rendered uncomfortable.''⁷⁸

It should be remarked that in those cases in which the questions of nuisance or no nuisance have been raised in a court of equity, the conclusion of the court to grant or deny [*711] *relief in the particular cases is not always a guide to a court of law when it comes to pass upon similar facts. The relief which equity gives by way of injunction is so severe in its consequences that it is never granted except upon a case clearly and conclusively made out. To break up a man's business in a case of doubt, or even of slight inconvenience, would be an abuse of power. The court of equity wisely and justly, in such cases, declines to interfere, and sends the plaintiff to a court of law for damages.⁷⁹ In the latter court the question of law is the same, but the remedy not resting in discretion, as it does in equity, the court and jury must apply the rule of law and award or refuse damages according as they find the plaintiff does or does not suffer an inconvenience which is not merely trifling and proceeds from conduct of defendant that cannot be justified as reasonable under the circumstances.

78—*Bohan v. Port Jervis Gas Lt. Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; *Price v. Grantz*, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 601; *McCann v. Strong*, 97 Wis. 551, 72 N. W. 1117.

79—*Huckenstine's Appeal*, 70 Penn. St. 102, 10 Am. Rep. 669. “If one lives in a city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. As Lord Justice JAMES beautifully said in *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. App. 705. ‘If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town, which would drive the Dryads and their masters from their ancient solitudes.’” EARL, J., in *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; see *Rouse v. Martin*, 75 Ala. 510, 51 Am. Rep. 463; *Daniels v. Keokuk Water Works*, 61 Ia. 549; *Louisville Coffin Co. v. Warren*, 78 Ky. 400. In equity the court may restrain the defendant from conducting its business in such a way as to be a nuisance, when it is capable of being conducted in such a way as not to be a nuisance. *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321; *Chamberlain v. Douglas*, 24 App. Div. 582, 48 N. Y. S. 710.

Offensive Noises. A dog which disturbs the rest of the community at night by loud and continuous barking about or in the neighborhood of their residences may be a nuisance.⁸⁰ So the noises of billiard rooms, or places which are frequented by persons for drinking and carousing, and disorderly houses of all sorts, while they constitute public nuisances, may also, from their noises and other reasons, be nuisances to the neighborhood.⁸¹ *No doubt the blowing of a steam whistle as [*712] a signal of the approach or departure of trains may be prohibited in cities and places densely populated; but it may possibly, under extraordinary circumstances, become a private nuisance also.⁸² And so may the keeping of a noisy livery stable,⁸³ or the manufacture of machinery, or any business in which the noises are great and incessant or frequent.⁸⁴

80—*Brill v. Flagler*, 23 Wend. 354.

81—See *Tanner v. Albion*, 5 Hill, 121; *Bloomhuff v. State*, 8 Blackf. 205; *People v. Sergeant*, 8 Cow. 139; *Gaunt v. Fynney*, L. R. 8 Ch. App. 8; S. C. 4 Moak, 718; *Inchbald v. Robinson*, L. R. 4 Ch. App. 388; *Marsan v. French*, 61 Tex. 173, 48 Am. Rep. 272; see *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421. Gathering in a noisy way in a pigeon shooting match may be a nuisance. *King v. Moore*, 3 B. & Ad. 184. See *Walker v. Brewster*, L. R. 5 Eq. Cas. 25. The noise of a roller skating rink near a dwelling may be a nuisance. *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241. So of a baseball park. *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. 27, 53 Atl. 289.

82—See *Knight v. Goodyear, &c., Co.*, 38 Conn. 438, 9 Am. Rep. 406; *First Baptist Church v. Schenectady, &c., R. R. Co.*, 5 Barb. 79. The ringing of a large bell at an early hour in a village

may be a nuisance. *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519. But the question of nuisance in ringing a church bell depends on its effect on ordinary persons, not on those who are ill. *Rogers v. Elliott*, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316. Blowing of a steam whistle near highway held a nuisance. *Albee v. Chappaqua Shoe Mfg. Co.*, 62 Hun, 223, 16 N. Y. S. 687.

83—*Ball v. Ray*, L. R. 8 Ch. 467; *Broder v. Saillard*, 2 Ch. Div. 692; S. C. 17 Moak, 693; *Dargan v. Waddill*, 9 Ired. 244, 49 Am. Rep. 421.

84—*Soltau v. DeHeld*, 2 Sim. (N. s.) 133; *Elliotson v. Feetham*, 2 Bing. (N. C.) 134; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378; *Bishop v. Banks*, 33 Conn. 118, 87 Am. Dec. 197; *Rhodes v. Dunbar*, 57 Pa. St. 274, 98 Am. Dec. 221; *Robinson v. Baugh*, 31 Mich. 290; *Duncan v.*

Jar of Machinery. Where manufacturing operations are carried on with heavy machinery in the part of a city mainly occupied by residences, the jar of machinery may constitute a serious nuisance, injurious not to comfort merely, but to health. It is usually increased, also, by noise, smoke, soot, etc.⁸⁵ Grist mills are sometimes complained of on this ground.⁸⁶

Nuisance of Dust, Smoke, etc. This may be caused in many kinds of business. It is what is generally complained of

Hayes, 22 N. J. Eq. 25; Davidson 294; *Pach v. Geoffroy*, 67 Hun, v. Isham, 9 N. J. Eq. 186, 190; 401, 22 N. Y. S. 275; *Bly v. Edison Dennis v. Eckhardt*, 3 Grant, 390; Elec. Ill. Co., 54 App. Div. 427, 66 Bradley *v. Gill*, Lutw. 69. This applies to a planing mill near a dwelling. *Hurlbut v. McKone*, 55 Conn. 31, 10 Atl. 164. To a school for training in hammered brass work. Appeal of Ladies' Art, &c., Co., 13 Atl. Rep. 537 (Penn.). But not necessarily to a blacksmith shop. *Faucher v. Grass*, 60 Ia. 505. See *Balt.*, &c., R. R. Co. v. Fifth Bapt. Ch., 108 U. S. 317; *Cogswell v. New York*, &c., Co., 103 N. Y. 10, 57 Am. Rep. 707; *Beseman v. Penn. R. Co.*, 50 N. J. L. 235, 13 Atl. 164.

85—*Robinson v. Baugh*, 31 Mich. 290; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 90 Am. Dec. 181; *Whitney v. Bartholomew*, 21 Conn. 213; *Crump v. Lambert*, L. R. 3 Eq. Cas. 409; *Demarest v. Hardham*, 34 N. J. Eq. 469; *English v. Progress Elec. Lt. & M. Co.*, 95 Ala. 259, 10 So. 134; *Hurlbut v. McKone*, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; *Hoadley v. Seward & Son Co.*, 71 Conn. 640, 42 Atl. 997; *Hyde Park T.-H. Lt. Co. v. Porter*, 167 Ill. 276, 47 N. E. 206; *Froelicher v. Oswald Iron Works*, 111 La. 705, 35 So. 821, 64 L. R. A. 228; *Lursen v. Lloyd*, 76 Md. 360, 25 Atl. 294; *Pach v. Geoffroy*, 67 Hun, 401, 22 N. Y. S. 275; *Bly v. Edison Elec. Ill. Co.*, 54 App. Div. 427, 66 N. Y. S. 737; *Pritchard v. Edison Elec. Ill. Co.*, 92 App. Div. 178, 87 N. Y. S. 225; *Eller v. Koehler*, 68 Ohio St. 51, 67 N. E. 89; *Rodenhausen v. Craven*, 141 Pa. St. 546, 21 Atl. 774, 23 Am. St. Rep. 306. See McCaffrey's App. 105 Pa. St. 253. A license to run an engine will not defeat an action for jar of machinery distinct from the engine and run by its power. *Quinn v. Lowell, &c., Co.*, 140 Mass. 106; railroad coal chutes held a nuisance on account of noise and dust. *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726; *Wylie v. Elwood*, 34 Ill. App. 244; *Spring v. Delaware*, etc., R. R. Co., 88 Hun, 385, 34 N. Y. S. 810. So of roundhouse near dwelling. *Louisville*, etc., *Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188. There can be no recovery for the noise, smoke, dust, etc., arising from the operation of a railroad, unless due to negligence. *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. Rep. 618.

86—*Gilbert v. Showerman*, 23 Mich. 448; *Cooper v. Randall*, 53 Ill. 24.

in *brick making, but sometimes also in the grinding of [*713] grain, the manufacture of machinery, etc.⁸⁷ If the smoke or dust, or both, that rises from one man's premises and passes over and upon those of another causes perceptible injury to the property, or so pollutes the air as sensibly to impair the enjoyment thereof, it is a nuisance.⁸⁸ But the inconvenience must be something more than mere fancy; mere delicacy or fastidiousness; "it must be an inconvenience materially interfering with the ordinary comfort, physically, of human existence; not merely according to elegant and dainty modes and habits of living, but according to plain, sober and simple notions among the English people."⁸⁹

87—See *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Hutchens v. Smith*, 63 Barb. 251; *Wesson v. Iron Co.*, 13 Allen, 95, 90 Am. Dec. 181; *Cooper v. Randall*, 53 Ill. 24; *Norcross v. Thoms*, 51 Me. 503, 81 Am. Dec. 588; *Conklin v. Phoenix Mills*, 62 Barb. 299; *Gilbert v. Showerman*, 23 Mich. 448; *Sampson v. Smith*, 8 Sim. 272; *Crump v. Lambert*, L. R. 3 Eq. Cas. 409; *Hyatt v. Myers*, 71 N. C. 271; *Jeffersonville, &c.*, R. R. Co. v. *Esterle*, 13 Bush, 667; *Daniels v. Keokuk Water Works*, 61 Ia. 549; *Louisville Coffin Co. v. Warren*, 78 Ky. 400; *Ponder v. Quitman Ginnery*, 122 Ga. 29, 49 S. E. 746; *Harley v. Merrill Brick Co.*, 83 Ia. 73, 48 N. W. 1000; *McMorran v. Fitzgerald*, 106 Mich. 649, 64 N. W. 569, 58 Am. St. Rep. 511; *Kirchgraber v. Lloyd*, 59 Mo. App. 59; *Davis v. Whitney*, 68 N. H. 66, 44 Atl. 78; *Ladd v. Granite State Brick Co.*, 68 N. H. 185, 37 Atl. 1041; *Bohan v. Port Jervis Gas Lt. Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; *Rosenheimer v. Standard Gas Lt. Co.*, 39 App. Div. 482, 57 N. Y. S. 330; *Herbert*

v. Rainey, 162 Pa. St. 525, 25 Atl. 725.

88—*Ross v. Butler*, 19 N. J. Eq. 294; *Rhodes v. Dunbar*, 57 Pa. St. 274, 98 Am. Dec. 221; *Beier v. Cooke*, 37 Hun, 38; *Skelton v. Fenton Elec. Lt. & P. Co.*, 100 Mich. 87, 58 N. W. 609; *Dunsbach v. Hollister*, 49 Hun, 352, 2 N. Y. S. 94; *Wilmot v. Bell*, 76 App. Div. 252, 78 N. Y. S. 591; *Madison v. Copper Co.*, 113 Tenn. 331, 83 N. W. 658; *Sterrett v. Northport M. & S. Co.*, 30 Wash. 164, 70 Pac. 266. If a city has no power to declare an act a nuisance it may not punish as such the emitting of dense smoke, which is not necessarily a common law nuisance. *St. Paul v. Gilfillan*, 36 Minn. 298.

89—V. C. KNIGHT-BRUCE, in *Walter v. Selfe*, 4 De G. & S. 315; S. C. 4 Eng. L. & Eq. 15. And, see *Soltau v. De Held*, 2 Sim. (N. S.) 133, 159; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392; *Price v. Grantz*, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. Rep. 601. A railway company authorized to build such works as were necessary and convenient for the main-

Offensive Odors. These may proceed from a business carried on in an inconvenient place, or managed improperly, or from something simply permitted on one's premises from which offensive odors arise. Where they proceed from a lawful and proper business, the question of suitableness and reasonableness in point of place and management is almost necessarily presented.

[*714] Some kinds of business are in their nature offensive, *and tenements near them can be occupied with neither health nor comfort. But if a business be necessary or useful, it is always presumable that there is a proper place and a proper manner for carrying it on; in other words, that it may be carried on without being a nuisance. "It is the injury, annoyance, inconvenience or discomfort that the law regards, and not the particular business, trade or occupation from which these result. A lawful as well as an unlawful business may be carried on so as to prove a nuisance. The law in this respect looks with an impartial eye upon all useful trades, avocations and professions. However ancient, useful or necessary the business may be, if it is so managed as to occasion serious annoyance, injury or inconvenience, the injured party has a remedy."⁹⁰ It has, therefore, been held repeatedly that the burn-

tenance if its road built its round house close to a church. The smoke and noise incident to the use of the round house greatly interfered with the comfortable use of the church as a place of worship. Held a nuisance for which damages could be recovered. *Balt., &c., R. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317. In a like case it is held that statutory sanction cannot justify acts otherwise constituting a nuisance unless the right to do the acts in that way is expressly or by necessary implication conferred. *Cogswell v. New York, &c., R. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 707. (And as to this in case of storing

explosives, see *McAndrews v. Colclerd*, 42 N. J. L. 189.) But incidental damage to land near a railroad track from a proper running of the road is not a ground of recovery. *Beseman v. Penn. R. R. Co.*, 50 N. J. L. 235, 13 Atl. 164. So an owner of land not abutting on the right of way may not recover for annoyance from dust from a coal chute beside the track. *Dunsmore v. Centr. Ia. Ry. Co.*, 72 Ia. 182, 33 N. W. 456.

90—*Norcross v. Thoms*, 51 Me. 403, 504, 81 Am. Dec. 588. To constitute it a nuisance, it is not necessary the offensive smell should be unwholesome. *Davidson v. Isham*, 9 N. J. Eq. 186.

ing of brick was a nuisance;⁹¹ but this can be no general rule: indeed the contrary has been sometimes held. The same methods of making brick are not universal; the same fuel is not always used; and sometimes the business is not offensive even in the immediate neighborhood. So the business of tanning leather is often found to be a nuisance;⁹² in part because of offensive smells proceeding from it, and in part from the fouling of streams on which the business is usually carried on. A livery stable is often a nuisance; and it is said in one case that situated within sixty-five feet of a hotel it is *prima facie* a nuisance.⁹³ But no such general rule can be applied. A livery stable may well be kept from being offensive in almost any locality not *generally devoted to residences. It is peculiarly a [*715] business which may or may not be offensive according as it is carried on.⁹⁴ The same may be said of a brewery, which is also sometimes a nuisance.⁹⁵ A distillery is more likely to be one,⁹⁶ and a soap manufactory still more.⁹⁷ A gas manufactory

91—See in addition to the cases before mentioned, Duke of Grafton *v.* Hilliard, referred to in 18 Ves. 210, and in note to 4 Eng. L. & Eq. 18; Earl of Ripon *v.* Hobart, 3 M. & K. 169; Walter *v.* Selfe, 4 De G. & S. 315; S. C. 4 Eng. L. & Eq. 15; State *v.* Board of Health, 16 Mo. App. 8.

92—See Rex *v.* Pappineau, 1 Stra. 686; Howard *v.* Lee, 3 Sandf. 281; Moore *v.* Webb, 1 C. B. (N. S.) 673; Howell *v.* McCoy, 3 Rawle, 256; Francis *v.* Schoelkopf, 53 N. Y. 152.

93—Coker *v.* Birge, 9 Ga. 425, 54 Am. Dec. 347; S. C. 10 Ga. 336. See Aldrich *v.* Howard, 8 R. I. 246; Dargan *v.* Waddill, 9 Ired. 244. But see Shivery *v.* Streepner, 3 South Rep. 865.

94—Kirkman *v.* Handy, 11 Humph. 406, 54 Am. Dec. 45; Dargan *v.* Waddill, 9 Ired. 244, 49 Am. Dec. 421; Brooder *v.* Sallard, 2 Ch. Div. 692; S. C. 17 Moak, 693;

Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230; Kaspar *v.* Dawson, 71 Conn. 405, 42 Atl. 78; Roth *v.* District of Columbia, 16 App. D. C. 323; Metropolitan Sav. Bank *v.* Marrien, 87 Md. 68, 39 Atl. 90; King *v.* Hamill, 97 Md. 103, 54 Atl. 625; Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672; Harvey *v.* Ice Co., 104 Tenn. 583, 58 S. W. 316. A private stable is not a nuisance *per se*. Keiser *v.* Lovett, 85 Ind. 240; Rounsville *v.* Kohlheim, 68 Ga. 668, 45 Am. Rep. 505.

95—Jones *v.* Williams, 11 M. & W. 176. Slops from a brewery thrown into a ditch and carried upon adjoining land constitute a nuisance. Beckley *v.* Skroh, 19 Mo. App. 75.

96—Smiths *v.* McConathy, 11 Mo. 517.

97—Brady *v.* Weeks, 3 Barb. 157.

may be under some circumstances,⁹⁸ and so may a tobacco mill.⁹⁹ For a slaughter house or a fat rendering establishment the only "convenient" place would seem to be at some considerable distance,¹ and the same may be said of some manufactories of manure.²

Dead animals left unburied are likely to be a nuisance;³ and a privy may be one if offensive odors arise from it which destroy the comfortable occupation of a neighboring tenement.⁴ Further illustrations of the nuisance of offensive smells will be found in cases cited in the note.⁵

98—*Cleveland v. Gas Light Co., v. Reading Fertilizing Co.*, 160 20 N. J. Eq. 201; *Pottstown Gas Pa. St. 209*, 28 Atl. 702. See Co. v. Murphy, 39 Pa. St. 257; *Duffy v. Meadows*, 131 N. C. 31, Bohan v. Port Jervis Gas Lt. Co., 42 S. E. 460.

122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; *Farley v. Gate City Gas Lt. Co.*, 105 Ga. 323, 31 S. E. 193.

99—*Hundley v. Harrison*, 123 Ala. 292, 26 So. 294; *Jones v. Howell*, Hutt. 136.

1—*Catlin v. Valentine*, 9 Paige, 575, 38 Am. Dec. 567; *Peck v. Elder*, 3 Sandf. 126; *Morley v. Pragnal*, Cro. Car. 510; *Bishop v. Banks*, 33 Conn. 118, 87 Am. Dec. 197; *Meigs v. Lister*, 23 N. J. Eq. 199; *Pruner v. Pendleton*, 75 Va. 516, 40 Am. Rep. 738; *Reichert v. Geers*, 98 Ind. 73, 49 Am. Rep. 736; *Millhiser v. Willard*, 96 Ia. 327, 65 N. W. 325; *Wilcox v. Henry*, 35 Wash. 591, 77 Pac. 1055. See *Dennis v. State*, 91 Ind. 291; *Seifried v. Hays*. 81 Ky. 377, 50 Am. Rep. 167. Bone boiling in a populous neighborhood is a nuisance. *Czarniecki's App.*, 11 Atl. Rep. 660 (Penn.).

2—*Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533; *Evans*

3—*Ellis v. Kansas City, &c.*, R. R. Co., 63 Mo. 131, 21 Am. Rep. 436; *Gulf, etc., Ry. Co. v. Cherrault*, 31 Tex. Civ. App. 558, 72 S. W. 868.

4—*Barnes v. Hathorn*, 54 Me. 124; *Whale v. Reinback*, 76 Ill. 322; *Radican v. Buckley*, 138 Ind. 582, 38 N. E. 53; *Briegel v. Philadelphia*, 135 Pa. St. 451, 19 Atl. 1038, 20 Am. St. Rep. 885.

5—*Shaw v. Cummiskey*, 7 Pick. 76; *Meigs v. Lister*, 23 N. J. Eq. 199; *Ashbrook v. Commonwealth*, 1 Bush, 139, 89 Am. Dec. 616; *Illinois, &c., R. R. Co. v. Grabill*, 50 Ill. 241; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 201; *Marshall v. Cohen*, 44 Ga. 489, 9 Am. Rep. 170; *Neal v. Henry*, *Meigs*, 17; *Davis v. Lambertson*, 56 Barb. 480; *Cooke v. Forbes*, L. R. 5 Eq. Cas. 166; *Hackney v. State*, 8 Ind. 494; *Planters W. & C. Co. v. Taylor*, 64 Ark. 307, 42 S. W. 279; *Fisher v. Zumwalt*, 128 Cal. 493, 61 Pac. 82; *Adams v. Modesto*, 131 Cal. 501, 63 Pac. 1083; *Swift v. Broyles*, 115 Ga. 885,

***Mental Disquietude.** It was decided in *Owen v. [*716] Henman* that an action would not lie for being disturbed in the hearing of a clergyman and the other exercises of a place of public worship. The plaintiff, it was said, "claims no right in the building or any pew in it, which has been invaded. There is no damage to his property, health, reputation or person. He is disturbed by noises in listening to a sermon. Could an action be brought by every person whose mind or feelings were dis-

42 S. E. 277, 58 L. R. A. 390; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; *Lippincott v. Lasher*, 44 N. J. Eq. 120, 14 Atl. 103; *Garigan v. Atlantic Ref. Co.*, 186 Pa. St. 604, 40 Atl. 834; *Garigan v. Atlantic Ref. Co.*, 3 Pa. Supr. Ct., 628; *Fort Worth v. Crawford*, 75 Tex. 404, 13 S. W. 31. A private tomb may be a nuisance. *Barnes v. Hathorn*, 54 Me. 124. Casting the refuse of a tomato canning establishment into a stream is a nuisance. *Butterfoss v. State*, 40 N. J. Eq. 325. A piggery which pollutes the air of the neighborhood is a nuisance. *Com. v. Perry*, 139 Mass. 198; so is a railroad stock yard near to dwellings if the odors prejudicial to health are not unavoidable. *Shively v. Cedar Rapids, &c., Ry. Co.*, 74 Ia. 169, 37 N. W. 133. Otherwise if the business is authorized and there is no negligence in the manner of maintaining the yard. *London, &c., Ry. Co. v. Truman*, L. R. 11 App. Cas. 45; *Dolan v. Chicago, etc., Ry. Co.*, 118 Wis. 362, 95 N. W. 385. Allowing thistles to grow which scatter seed on adjoining land held not a nuisance. *Giles v. Walker*, 24 Q. B. D. 656. A pest house is not necessarily a nuisance. *Lorain v. Rolling*, 14 Ohio C. D. 82. The keeping of pigeons which are allowed to fly abroad and which frequent the plaintiff's premises and defile them and annoy the occupants, may be a nuisance. *Taylor v. Granger*, 19 R. I. 410, 34 Atl. 153. Where defendant put up a stove near the division wall of his house which made the plaintiff's wine cellar on the other side of the wall unfit for the storage of wine, the use of the stove in the location was held a nuisance. *Reinhardt v. Mentasti*, 42 L. R. Ch. 685. Property dangerous to health, such as infected clothing, may be destroyed as a nuisance. *Savannah v. Mulligan*, 95 Ga. 323, 51 Am. St. Rep. 86, 29 L. R. A. 303. A thing is not a nuisance merely because unsightly. *Lane v. Concord*, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643. Where the plaintiff leased to defendant land for the manufacture of brick, he is not estopped from recovering for a nuisance arising from the manner in which the business was carried on and which it was reasonably practicable to avoid. *Forgarty v. Junction City Pressed Brick Co.*, 50 Kan. 478, 31 Pac. 1052, 18 L. R. A. 756. Legislative authority to carry on a business does not authorize it to be carried on at a place or in a manner to be a nuisance. *Churchill v. Bur-*

turbed in listening to a discourse, or any other mental exercise—and it must be the same whether in a church or elsewhere—by the noises, voluntary or involuntary of others, the field of

lington Water Co., 94 Ia. 89, 62 N. W. 646; Baltimore *v.* Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 67 Am. St. Rep. 344, 40 L. R. A. 494; Bacon *v.* Boston, 154 Mass. 100, 28 N. E. 9; Bohan *v.* Port Jervis Gas Lt. Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; Garvey *v.* Long Island R. R. Co., 9 App. Div. 254, 41 N. Y. S. 397; Louisville, etc., Terminal Co. *v.* Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188. A tenant or occupant of property may maintain a suit for a nuisance by reason of noise, smoke, odors, etc. State *v.* Judge, 46 La. Ann. 78, 14 So. 423; Lurssen *v.* Lloyd, 76 Md. 360, 25 Atl. 294. And any one, though having no interest in the property but living thereon, such as a child or a visitor, who is made sick by a nuisance, wrongfully maintained or suffered by the defendant, may have an action for the physical injury. Hunt *v.* Gas Lt. Co., 8 Allen, 169; Holly *v.* Gas Lt. Co., 8 Gray, 123; Fort Worth, etc., Ry. Co. *v.* Glenn, 97 Tex. 586, 80 S. W. 992. But no one other than the owner or person having a legal interest in the property can recover for a nuisance causing mere annoyance or discomfort. Thus it is held that a husband residing with his family in his wife's house, could not recover for the discomfort of himself and family, caused by fumes and gases from the defendant's factory. Kavanagh *v.* Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689, reversing Kavanagh *v.*

Barber, 59 Hun, 60, 12 N. Y. S. 603. Referring to the judgment below, the court of appeals says: "The principle upon which the judgment proceeds, if sustained, will greatly extend the class of actionable nuisances. We have found no case where a private action has been maintained for corruption of the air by offensive odors, except by a plaintiff who was the owner of or had some legal interest, as lessee or otherwise, in land, the enjoyment of which was affected by the nuisance. * * * We perceive no legal distinction between the plaintiff's situation and that of a lodger or guest in the house, or why, if the plaintiff can maintain an action, each member of the household cannot maintain one, likewise for her or his separate injury of the same kind. The plaintiff's situation appeals more strongly perhaps than the others for an extension of the rule as heretofore understood. But there was a public remedy open to him by public prosecution, and we think the public interests would not be subserved by opening the door to actions of this character, where the plaintiff has no property right to be protected by infringement." pp. 214, 215.

As to joint liability for nuisance see Harley *v.* Merrill Brick Co., 83 Ia. 73, 48 N. W. 1000; Swain *v.* Tenn. Copper Co., 111 Tenn. 430, 78 S. W. 93; West Muncie Strawboard Co. *v.* Slack, 164 Ind. 21; Bowman *v.* Humphrey,

litigation would be extended beyond endurance. The injury, moreover, is not of a temporal nature; it is altogether of a spiritual character for which no action lies."⁶ This case has been approved in a suit brought to restrain a street railway company from running its cars on Sunday; the grievance alleged being "that by reason of the said unlawful business carried on as aforesaid by the defendants, they, the complainants, have been and are and will be deprived of their right of enjoying the Sabbath as a day of rest and religious exercise, free of all disturbance from merely unnecessary and unauthorized worldly employment; that they have been and are and will be deprived from enjoying peaceably and without interruption the worship of Almighty God in their accustomed places of public worship, or in their own residences on the Sabbath day; and that the lawful peace of the said day is thereby disturbed and broken; and the right of property which they possessed in their said churches or places of public worship and in their private residences are, and will continue to be thereby infringed upon, and their said churches and residences deteriorated and lessened in value." Putting aside the question of alleged injury to property—which at the time it was not necessary to consider—the court say: "Religious meditation and devotional exercises are a duty and a privilege undoubtedly, but result nevertheless from sentiments not universal in their demonstrations, by any means, but peculiar to individuals rather than to the whole community. Of this, * * * injury to it by disturbance cannot be measured by a standard applicable to the privation of ordinary comfort. It cannot be affirmed, in regard to the devotional exercise embraced within the privilege that it is more than [*717] a mental disturbance—an inconvenience. Human tribunals cannot tell anything about the effect of mere noise occasioned by ordinary employments on the mind. The belief is reasonable that its operations are independent of such physical facts; that it is cognizant of its own impulses and emotions

124 Ia. 744, 100 N. W. 854; *Wat-* 6—*Owen v. Henman*, 1 Watts & *son v. Colusa-Parrot M. & S. Co.*, S. 548.

31 Mont. 513.

under all ordinary circumstances, when in its normal condition and free from disease. This is the rule of the criminal law, and it has never been held that a disturbance from ordinary causes excuses a criminal act." The only true rule in judging of injuries from alleged nuisances is declared to be, "such as naturally and necessarily result to all alike who come within their influence. Not to one on account of peculiar sentiments, feelings or tastes, if it would have no effect on another, or all others without these peculiar sentiments or tastes. Not to a sectarian if it would not be to one belonging to no church. It must be something about the effects of which all agree; otherwise that which might be no nuisance to the majority might be claimed to deteriorate property by particular persons. Noises which disturb sleep, bodily rest being a physical necessity, noxious gases, sickening smells, corrupted waters and the like, usually affect the mass of community in one and the same way, and may be testified to by all possessed of their natural senses, and can be judged of by their probable effect on health and comfort, and in this way damages may be perceived and estimated. Not so of that which only affects thought or meditation. What would disturb one in his reflections might not disturb another. There can be no general rule or experience as to this; it is incapable of being judged of, like those things which affect health or comfort."⁷

So in Massachusetts it has been held that, although by statute the keeping for sale of intoxicating liquors was made a common nuisance, yet that such keeping of liquors, and the sale thereof, even though made to the husbands, wives, children and servants of complaining parties, did not make it a special nuisance to ^[*718] *such persons, so as to authorize and justify them in proceeding to break into the shop or building

7—THOMPSON, J., in Sparhawk *v.* Union Passenger R. Co., 54 Pa. St. 401, 427. But a railway may be a nuisance to a religious corporation if its trains disturb worship on Sunday, and thereby deteriorate the value of the church property. First Baptist Church *v.* Schenectady, &c., R. R. Co., 5 Barb. 79. See Balt., &c., R. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Chicago Great Western Ry. Co. *v.* First M. E. Church, 102 Fed. 85, 42 C. C. A. 178.

where the liquor was kept and the sales made, and to destroy the liquor and the vessels in which it was found; but that the nuisance must be deemed a public nuisance exclusively.⁸ Here, as in the cases before referred to, the disturbance was only mental. Such cases may become common law nuisances if noisy and riotous proceedings are suffered, and if disorderly people are allowed to gather in them for their customary practices.⁹ But the nuisance is then in the disorder, not in the business itself. If the mental disquietude they occasion could give a right of action, the question of locality would be of little importance, and one might be specially inconvenienced by a nuisance in a distant town as well as by one near him.

In Indiana a duly licensed saloon next door to the plaintiff's residence in the city of Indianapolis, and in a residence locality, the effect of which was to diminish the rentable and salable value of the plaintiff's property, was held to be an actionable nuisance. The court says: "It is no mere fanciful notion dictated by dainty modes and habits of living that makes one who has located his home in a quiet, peaceful part of a city, in the immediate neighborhood of numerous churches, Sunday schools, common schools, female colleges and among neighbors who are attendants upon such places, and out of the reach of the busier haunts of the business parts of the city, protest and object to the maintenance of a saloon on the adjoining lot, and within ten feet of such residence, where drinking people are invited to, and do, assemble to drink intoxicating liquors with all the incidents usually attendant upon such a place; very few people, indeed, who would not object and protest and be seriously annoyed thereat, even the man who frequents such a place to drink would, as a general thing, object to the traffic obtruding itself within ten feet of his threshold. Especially where it is alleged and admitted, as here, that it has so injured appellant's property, both for selling and rental purposes." The court further held that being licensed it could not be enjoined, though dam-

8—*Brown v. Perkins*, 12 Gray, noisy, disorderly manner, was enjoined as a nuisance. *Kissel v. 89.*

9—A beer garden near plaintiff's residence, conducted in a

ages could be awarded, and upon the effects of the license says: "Did the license set up in the answer of Stehlin constitute a justification? We are of opinion it did not. It did not enlarge his rights, but restricted them within narrower limits than they were before, and without any statute on the subject. It was a certificate only that he had been put under bond to keep the peace, and had paid the license fees, and was thereby permitted to sell. Notwithstanding his payment of the large sum of money for license fees, both to the county and city, his license could be revoked without refunding his money."¹⁰

As any public evil or disorder which by statute is declared to be a nuisance must be held and deemed to be one, there may be many other statutory nuisances which cannot afford grounds for a private action, for the reason above assigned, namely, that the only annoyance they could cause to individuals would be such as might be caused by any breach of public order or of good morals.¹¹ A bawdy house near a residence is a nuisance for which a private action will lie.¹² A jail or city prison is not a nuisance *per se*, and its erection cannot be enjoined.¹³

Inviting One into Dangerous Places. It has been stated on a preceding page that one is under no obligation to keep his premises in safe condition for the visits of trespassers.¹⁴ On the

10—*Haggart v. Stehlin*, 137 Ind. 43, 53, 54, 35 N. E. 997, 22 L. R. A. 577. W. 551, 46 L. R. A. 552; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513.

11—The power to declare what shall be nuisances is not vested in city or town councils, and they can punish as such only what are nuisances at the common law or by statute. *Yates v. Milwaukee*, 10 Wall. 497; *Wreford v. People*, 14 Mich. 41; *Everett v. Council Bluffs*, 46 Iowa, 66. See *St. Paul v. Gilfillan*, 36 Minn. 298.

12—*Redway v. Moore*, 3 Idaho, 312, 29 Pac. 104; *Crawford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Blagen v. Smith*, 34 Ore. 394, 56 Pac. 292, 44 L. R. A. 522; *Weakley v. Page*, 102 Tenn. 178, 53 S.

W. 551, 46 L. R. A. 552; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513. 13—*Bacon v. Walker*, 77 Ga. 336; *Long v. Elberton*, 109 Ga. 28, 34 S. E. 333, 77 Am. St. Rep. 363, 46 L. R. A. 428.

14—*Ante*, p. —; *Wynn v. City, etc.*, Ry. Co., 91 Ga. 344, 17 S. E. 649; *Underwood v. Western, etc.*, R. R. Co., 105 Ga. 48, 31 S. E. 123; *Nashville, etc., Ry. Co. v. Priest*, 117 Ga. 767, 45 S. E. 35; *Wabash R. R. Co. v. Jones*, 163 Ill. 167, 45 N. E. 50; *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504, 28 L. R. A. 552; *Wagner v. Chicago, etc., Ry. Co.*, 124 Ia. 462, 100 N. W. 332; *Dalin v. Worcester Consoli-*

other hand, when he expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit. Many cases illustrate this rule.¹⁵ Thus, individuals holding a *fair and erecting structures for the [*719] purpose are liable for injuries to their patrons caused

dated St. Ry. Co., 188 Mass. 344; *Buch v. Amory Mfg. Co.*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163; *St. Louis S. W. Ry. Co. v. Mayfield*, 35 Tex. Civ. App. 82, 79 S. W. 365. But care must be exercised not to injure trespassers whose presence is known. *Martin v. Chicago, etc., Ry. Co.*, 194 Ill. 138, 62 N. E. 599; *Virginia Midland R. R. Co. v. White*, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874; *Richmond Traction Co. v. Wilkinson*, 101 Va. 394, 43 S. E. 622.

15—*Bush v. Steinman*, 1 B. & P. 404; *Burgess v. Gray*, 1 M. G. & S. 578; *Randleson v. Murray*, 8 Ad. & El. 109; *Southcote v. Stanley*, 1 H. & N. 247; S. C. 38 E. L. & Eq. 295; *Indermaur v. Dames*, L. R. 1 C. P. 274, and L. R. 2 C. P. 181; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Elliott v. Pray*, 10 Allen, 378; *Harriman v. Pittsburgh*, etc., Ry. Co., 45 Ohio St. 11, 12 N. E. 451; *Atlanta Cotton Seed Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244; *Archer v. Blalock*, 97 Ga. 719, 25 S. E. 391; *People's Bank v. Morgolofski*, 75 Md. 432, 23 Atl. 1027, 32 Am. St. Rep. 403; *Thompson v. Lowell*, etc., St. Ry. Co., 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345; *Engel v. Smith*, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549; *Emery v. Minneapolis Industrial Exposition*, 56 Minn. 460, 57 N. W. 1132; *Lepnick v. Gaddis*, 72 Miss. 200, 16 So. 213, 26 L. R. A. 686; *Phillips v. Library Co.*, 55 N. J. L. 307, 27 Atl. 478; *Newall v. Bartlett*, 114 N. Y. 399, 21 N. E. 990; *Hart v. Grennell*, 122 N. Y. 371, 25 N. E. 354; *Flynn v. Central R. R. Co.*, 142 N. Y. 439, 37 N. E. 514; *League v. Stradley*, 68 S. C. 515, 47 S. E. 975; *Clapp v. La Grill*, 103 Tenn. 164, 52 S. W. 134; *Selinas v. Vt. State Agricultural Soc.*, 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114; *Nichols v. Washington*, etc., R. R. Co., 83 Va. 99, 5 S. E. 171, 5 Am. St. Rep. 257; *Richmond*, etc., Ry. Co. v. *Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; *Barowski v. Schulz*, 112 Wis. 415, 88 N. W. 236; *Sloss Iron & Steel Co. v. Tilson*, 141 Ala. 152; *Grundel v. Union Iron Works*, 141 Cal. 564, 75 Pac. 184; *Mastin v. Levagood*, 47 Kan. 36, 764, 27 Pac. 122, 28 Pac. 977, 27 Am. St. Rep. 277; *Brown v. Stevens*, 136 Mich. 311, 99 N. W. 12; *Massey v. Seller*, 45 Ore. 267, 77 Pac. 397. “If an owner or occupier of land, either directly or by implication, induces persons to come upon his premises, he thereby assumes an obligation that such premises are

by the breaking down of these structures through such defects in construction as the exercise of proper care would have avoided.¹⁶ And, generally, where a person invites the public to a place or grounds for a fair or public exhibition of any kind, he is bound to use due care to protect those who come from injury, not only from defects in the premises but also from other dangers arising from the use of the premises by himself or his licensees.¹⁷ One who keeps a place of public amusement where

in a reasonably safe condition, so that the persons there by his invitation shall not be injured by them, or in their use for the purpose for which the invitation was extended." *Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 48 Am. St. Rep. 298, 29 L. R. A. 492. But the exercise of reasonable care is all that is required. One by inviting others upon his premises does not become an insurer of their safety. *Flynn v. Central R. R. Co.*, 142 N. Y. 439, 37 N. E. 514.

16—*Latham v. Roach*, 72 Ill. 179; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. S. 788; *Dunn v. Agricultural Society*, 46 Ohio St. 93, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754. The owner of a house who has put up a scaffold for the purpose of building an addition to it is liable to a workman who is injured by the scaffold falling because of its insufficiency. *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Bright v. Barnett & R. Co.*, 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524. A dock owner is liable to the servant of one whom he has employed to paint a vessel in his dock when injured by the breaking of an unfit rope supporting a staging. Since the man was there to do something which the dock owner

was interested in having done, the latter must be held to have invited him to use the appliances furnished for immediate use in the dock. *Heaven v. Pender*, L. R. 11 Q. B. D. 503. Where a subcontractor put up a scaffold for the use of his own men and another man employed about the building is hurt by a defect in it, while using it for his own convenience, the sub-contractor is not liable. *Maguire v. Magee*, 13 Atl. Rep. 551 (Penn.). See the general rule laid down in *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, citing *Blithe v. Topham, Cro. Jac.* 158; *Hardcastle v. Railway Co.*, 4 H. & N. 67; *Barnes v. Ward*, 9 C. B. 392; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Corby v. Hill*, 4 C. B. (N. s.) 556; *Hounsell v. Smyth*, 7 C. B. (N. s.) 730. And, see *Deford v. Keyser*, 30 Md. 179; *Godley v. Hagarty*, 20 Pa. St. 387.

17—A railing gave way in a public hall and plaintiff injured. *Schofield v. Wood*, 170 Mass. 415, 49 N. E. 636. Plaintiff hit by a hammer swung by one to test his strength on a striking machine on fair ground, which had no guard about it. *Selinas v. Vt. State Agricultural Soc.*, 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114. Plaintiff hit by fragment of bullet from shooting gallery on grounds

liquor is sold and to which an admission is charged, and who sells liquor to one known to be violent and disorderly when intoxicated, is bound to use due care to protect his patrons from the violence of such person.¹⁸ So one who keeps a bathing resort, to which the public are invited, must use due diligence to protect his patrons from injury from broken glass,¹⁹ or dangerous holes.²⁰ In one case where the defendant kept a bathing resort frequented by ten thousand people a month, it was held negligence not to have a person on the ground to give timely assistance to bathers in case of accident.²¹ A railroad company is liable to a hackman doing business with it, who steps without fault into a cavity negligently left by it in its platform, whereby he is injured.²² So a railroad company is liable to *one who is injured in attempting to cross its track, in- [*720] vited to cross by a signal indicating that it is safe to do

to which public invited by defendant. *Thompson v. Lowell, etc., St. Ry. Co.*, 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345. "The fact that the exhibition was provided and conducted by an independent contractor would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator, unless due precautions were taken to guard against harm." *Ibid.* And see, *Richmond, etc., Ry. Co. v. Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258.

18—*Mastad v. Swedish Brethren*, 83 Minn. 40, 85 N. W. 513, 85 Am. St. Rep. 446, 53 L. R. A. 803. So a saloon keeper is bound to use reasonable care to protect his patrons and guests from injury at the hands of vicious and lawless persons whom he knowingly permits to be in or about his saloon. *Curran v. Olson*, 88 Minn. 307, 92 N. W. 1124, 97 Am. St.

Rep. 517, 60 L. R. A. 733; *Rommel v. Schambacher*, 120 Pa. St. 579, 11 Atl. 779, 6 Am. St. Rep. 732.

19—*Boyce v. Union Pac. Ry. Co.*, 8 Utah, 353, 31 Pac. 450, 18 L. R. A. 509.

20—*Dinnihan v. Lake Ontario Beach Imp. Co.*, 8 App. Div. 509, 40 N. Y. S. 764.

21—*Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563, 67 N. W. 479, 58 Am. St. Rep. 709, 33 L. R. A. 598; *Brotherton v. Manhattan Beach Imp. Co.*, 50 Neb. 214, 69 N. W. 757.

22—*Tobin v. Portland, &c., R. R. Co.*, 59 Me. 183, 8 Am. Rep. 415. See *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295. So to a husband coming to meet his wife. *McKone v. Mich. Centr. R. R. Co.*, 51 Mich. 601, 47 Am. Rep. 596. So to one who had brought meals to railway mail clerks at station for eight years, and was injured by obstructions on platform. *Illinois Central R. R. Co. v. Hopkins*, 100 Ill. App. 594. To a traveller go-

so,²³ and to people who, coming to the station to welcome an arrival, are injured by the giving way of the platform.²⁴ So a brewer is liable to one who, coming on his premises to do business with him, without fault of his own, falls through an unguarded trap door.²⁵ And, generally, the keeper of a store or

ing over a way leading to the wharf of a connecting carrier. *Bennett v. Railroad Co.*, 102 U. S. 577; or going out of the station grounds where there is a hole near the path. *Cross v. Lake Shore, &c., Co.*, 69 Mich. 363, 37 N. W. 361. A Wharf owner is liable to a custom's officer injured in watching for smugglers by lack of rail on wharf. *Low v. Grand Trunk Ry. Co.*, 72 Me. 313. So a church is liable to a member of another society attending service by invitation for defects in its premises. *Davis v. Centr. Cong. Soc.*, 129 Mass. 367, 37 Am. Rep. 368. If the appearance of premises points out a certain space as the mode of approach, that space must be kept safe. Here there was a well in a passage between two houses. *Learoyd v. Godfrey*, 138 Mass. 315. A toll bridge owner is liable, if, knowing it is dangerous, he allows one to use the bridge. *Stokes v. Tift*, 64 Ga. 312, 37 Am. Rep. 75. But one who is about to do business with a railroad company at its office is a mere licensee, if injured in its yard, when his business did not call him there. *Diebold v. Penn. R. R. Co.*, 50 N. J. L. 478, 14 Atl. 576. So is one who, having missed a train, waits about a station for a horse car. *Heinlein v. Boston, &c., Ry. Co.*, 147 Mass. 136, 16 Atl. 698.

23—*Sweeny v. Old Colony R. R. Co.*, 10 Allen, 368, 87 Am. Dec.

644; see *Louisville, &c., Co. v. Thompson*, 64 Miss. 584.

24—*Gillis v. Penn. R. R. Co.*, 59 Penn. St. 129, 98 Am. Dec. 317; *Hamilton v. Texas, &c., Ry. Co.*, 64 Tex. 251, 53 Am. Rep. 756; see *Holmes v. N. E. Ry. Co.*, L. R. 4 Exch. 254; *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 S. C. Rep. 619, 38 L. Ed. 434.

If one of the public is injured from mere failure to repair a private way, there is no liability. *Gautret v. Egerton*, L. R. 2 C. P. 371; *Nugent v. Wann*, 3 Fed. Rep. 79; *Ferguson v. Virginia, &c., Co.*, 13 Nev. 184; *Birnbaum v. Crowninshield*, 137 Mass. 177. Nor though a walk originally private has become public. *Robbins v. Jones*, 15 C. B. (N. S.) 221; but see *Campbell v. Boyd*, 88 N. C. 129, 43 Am. Rep. 740. One is liable for defect in private road causing injury to one rightfully using it. *Atlanta, &c., Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759. But not for defects in premises at a place outside of ordinary paths where persons doing business thereon could not be expected to be. *Armstrong v. Medbury*, 67 Mich. 250, 34 N. W. 566. One abutter upon a private alley is not liable for maintaining over the alley a platform by which the servant of another abutter is knocked from a wagon. *Cahill v. Layton*, 57 Wis. 600, 46 Am. Rep. 46.

25—*Chapman v. Rothwell*, El. El. & El. 168. See *Nave v. Flack*,

other place of business to which the public are invited, is bound to exercise due care to keep his premises and the approaches thereto in a reasonably safe condition and will be liable for injuries sustained in consequence of a failure so to do.²⁶ The rule has been applied where a customer in the defendant's store

90 Ind. 205, 46 Am. Rep. 205; St. 464, 5 Am. Rep. 389. The owner of a hall is liable if the aisles are unsafe from lack of ordinary care. *Currier v. Boston Music Hall*, 135 Mass. 414. The rule as to invitation applies where a sidewalk is laid up to the line of a building and near its entrance close to the wall an unguarded area is left. *Crogan v. Schiele*, 53 Conn. 186, 55 Am. Rep. 88. So where defendant left out plank in private way and one rightfully there fell in. *Toomey v. Sanborn*, 146 Mass. 28, 14 N. E. 921. Where a workman was killed by the collapse of a building in process of construction by reason of insufficient foundation. *Burke v. Ireland*, 47 App. Div. 428, 62 N. Y. S. 453. But even if one is invited upon the premises, he must show negligence in the owner. *McLean v. Burnham*, 8 Atl. Rep. 25 (Penn.).
26—*Archer v. Blalock*, 97 Ga. 719, 25 S. E. 391; *Chapin v. Walsh*, 37 Ill. App. 526; *Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555; *Burk v. Walsh*, 118 Ia. 397, 92 N. W. 65; *Foren v. Rodick*, 90 Me. 276, 38 Atl. 175; *Toland v. Paine Furn. Co.*, 179 Mass. 501, 61 N. E. 52; *True v. Meredith Creamery Co.*, 72 N. H. 154, 55 Atl. 893; *Larkin v. O'Neill*, 48 Hun, 591, 1 N. Y. S. 232; *Clapp v. Mear*, 134 Pa. St. 203, 19 Atl. 504; *League v. Stradley*, 68 S. C. 515, 47 S. E. 975; *Rosenbaum v. Shoffner*, 98 Tenn. 624, 40 S. W. 1086.

had her eye put out by a pin snapped by a cash boy. It appeared that the cash boys in the store had been in the habit of snapping pins at persons and things for months, that the defendant knew or ought to have known of the practice and that he had taken no steps to put a stop to it.²⁷ In such cases the plaintiff must not only show an invitation express or implied, but also that at the time the injury was received he was in a part into which he was invited to go and that he was using the premises in a manner authorized by the invitation.²⁸

27—*Swinarton v. Le Boutillier*, 7 Misc. 639, 28 N. Y. S. 53. The court says: “Had plaintiff sustained the injury from a defect in the premises, or in the machinery upon them, assuming negligence in keeping them, the liability of the defendant would be beyond dispute. But here the injury was inflicted by the act of a boy with a propensity to do mischief, in the employ of the defendant and by him placed on the premises, in a position to do the injury. Why does not such boy so employed and placed constitute a danger upon the premises as effectual for evil as a trap door, or pitfall, or a dilapidated stairway? * * * The case at bar may be new in the instance, but not in the principle, and in the absence of authority to the contrary, upon the analogies of the law and the dictates of common sense, we adjudge that the presence of the boy upon the premises with his propensity to evil-doing was a danger against which it was the duty of the defendant by the exercise of proper care to protect the plaintiff.

“We hold, furthermore, that having invited the plaintiff into his store for his benefit, and having authorized and induced her to con-

fide in the good conduct of his servants to whom, in the transaction of his business, he committed her, he thereby assumed the duty, by the exercise of reasonable care, of protecting her from injury by the misconduct of such servants; and that he is answerable to her for any injury she has sustained by such misconduct, which, in the exercise of reasonable care, he might have prevented.”

28—*Ryerson v. Bathgate*, 67 N. J. L. 337, 51 Atl. 708, 57 L. R. A. 307. Where a girl of six went to defendant's store with her father and, while he was making some purchases, went to a coffee grinder, put her hand up the spout and lost her fingers, the defendant was held not liable. *Holbrook v. Aldrich*, 168 Mass. 15, 46 N. E. 115, 60 Am. St. Rep. 364, 36 L. R. A. 493. “The keeper of a public place of business is bound to keep his premises and the passageways to and from it in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. But this rule only applies to such parts of the building as are a part of, or used to gain access to, or constitute a passageway to or from the business

An invitation may be inferred when there is a common interest or mutual advantage, a license when the object is the mere pleasure or benefit of the person using it.²⁹ A United States revenue officer assigned to duty at a distillery and required to visit all parts of the same daily, is there at the implied invitation of the owner.³⁰ Though one is invited to go upon the defendant's premises on business, yet if a part is given over to repairs or building operations, the invitation is impliedly withdrawn as to such part, and one goes there at his own risk.³¹

One is not invited into danger when his entrance upon dangerous premises is simply not opposed and prevented. Thus, one whose unenclosed grounds people cross without ob-

portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurement of the owner, express or implied, to enter therein." *Schmidt v. Bauer*, 80 Cal. 565, 567, 568, 22 Pac. 256, 5 L. R. A. 580.

29—*Archer v. Union Pac. R. R. Co.*, 110 Mo. App. 349. Where a city and light company use each others' poles for electric wires, there is an implied invitation by each to the servants of the other to use its poles and care is owed accordingly. *Barker v. Boston Elec. Lt. Co.*, 178 Mass. 503, 60 N. E. 2. And see *Mackie v. Heywood & M. Rattan Co.*, 88 Ill. App. 119.

30—*Anderson & Nelson Distilleries Co. v. Hair*, 103 Ky. 196, 44 S. W. 658.

31—Defendant had a wharf where the public were invited to go on business. At the time in question it was engaged in building a terminal station and other works. The plaintiff went on the

wharf and, though there was a safe way open to him, went through the part where the operations were going on, and was injured. In holding that he could not recover, the court says: "The implied invitation from the owners of the wharf to the public to use it as a safe place to walk upon had been impliedly revoked by the work openly carried on and the disturbed condition of things obvious to every observer. If there was still any implied invitation to use the wharf, owing to the fact that use was not prevented, the invitation was necessarily not to use it as a place of safety, but to use it as it obviously was, a place of more or less danger. An invitation by mere sufferance of passage over a place, where building operations are going on, carries with it no assurance of safety. All it means is the equivalent of saying, 'If you will go through, we will not object, but you must run your own risk of the operations you see in progress.'" *Downes v. Elmira Bridge Co.*, 179 N. Y. 136, 141, 71 N. E. 743.

[*721] jection is *not liable to one who falls into an unguarded cistern there.³² The owner of a vessel is not liable to a

32—Hargreaves *v.* Deacon, 25 Mich., 1; or into a pond of surface water. Klix *v.* Nieman, 68 Wis. 271, 32 N. W. 223; Schmidt *v.* Kansas City, &c., Co., 90 Mo. 284, 59 Am. Rep. 16; Overholt *v.* Vieths, 93 Mo. 422, 6 S. W. 74; or a pit, Morgan *v.* Penn, &c., Co., 19, Blatchf. 239; Gramlich *v.* Wurst, 86 Pa. St. 74, 27 Am. Rep. 684; Early *v.* Lake Shore, &c., Co., 66 Mich. 349, 33 N. W. 813. But see Mackey *v.* Vicksburg, 64 Miss. 777; Evansville, &c., Co. *v.* Griffin, 100 Ind. 221, 50 Am. Rep. 783; Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365; Union Stk. Yard Co. *v.* Bourke, 10 Ill. App. 474. Nor is he liable if in a storm a part of an old building is blown against an intruder. Lary *v.* Cleveland, &c., R. R. Co., 78 Ind. 323, 41 Am. Rep. 572. Merely abstaining from driving children off a lot is not an invitation to come upon it. Galligan *v.* Metacomet, &c., Co., 143 Mass. 527. If one comes on premises to see for his own benefit a person employed there, he is not invited to enter. Galveston Oil Co. *v.* Morton, 70 Tex. 400, 7 S. W. 756; Dixon *v.* Swift, 98 Me. 207, 56 Atl. 761. The owner is not liable however frequently his premises are used by others for their own convenience unless he leads them to believe a way is intended to be created there for travelers. Evansville, &c., R. R. Co. *v.* Griffin, 100 Ind. 221, 50 Am. Rep. 783. Where a hole is dug across a path long used as part of a sidewalk, he is liable. Graves *v.* Thomas, 95 Ind. 361. And see Bransom *v.* Labrot, 81 Ky. 638. One who goes on land to seek employment may not recover for injury from a machine not obviously dangerous, which he passes in his course, even if the defect might with reasonable care have been discovered. Larmore *v.* Crown Point, &c., Co., 101 N. Y. 391, 54 Am. Rep. 718. Nor if he is a mere licensee. Batchelor *v.* Fortescue, L. R. 11 Q. B. D. 474. Landlord is not liable if one not a guest takes refuge from a storm under a piazza which breaks from the crowd on it. Converse *v.* Walker, 30 Hun, 596; distinguishing a case where a guest walked off an unguarded piazza; Camp *v.* Wood, 76 N. Y. 92, 32 Am. Rep. 282. Where to avoid skids, lawfully across the sidewalk one got upon the steps of a building and slipped, the occupant is not liable. Welsh *v.* Wilson, 101 N. Y. 254, 54 Am. Rep. 698. But if a railroad company has long permitted persons to cross its track or go upon it at a certain point, a duty to use reasonable care not to injure them is imposed. Byrne *v.* New York, &c., R. R. Co., 104 N. Y. 362, 58 Am. Rep. 512; Taylor *v.* Dela., &c., Co., 113 Penn. St. 162, 57 Am. Rep. 446; Davis *v.* Chicago, &c., Co., 58 Wis. 646; Virginia, &c., R. R. Co. *v.* White, 84 Va. 498, 5 S. E. 573; Harriman *v.* Pittsburgh, &c., R. R. Co., 45 Ohio St. 11, 12 N. E. 451; Georgia, &c., R. R. Co. *v.* Blanton, 84 Ala. 154, 4 So. 621. Compare Memphis, &c., R. R. Co. *v.* Womack, Id. 618. But in Mass. there can in such case be no recovery, unless the injury is wanton or willful. Wright

servant employed upon it who, in wandering about the vessel from curiosity, falls through a scuttle.³³ On the request of the principal of a school, the graduating class was permitted to visit the defendant's power house in order to examine its works and machinery. One of the class fell into a vat of hot water in a dimly lighted part of the building. The visitors were held to be mere licensees and the defendant was held to owe them no duty to make the premises safe for their use.³⁴ "The owner or occupant of premises is not under any legal duty to keep them free or safe from the danger of obstructions, pitfalls, excavations, trap-doors or openings in floors for persons who go upon, into or through the premises, not by his invitation, express or implied, but for their own pleasure or convenience, though by his acquiescence or permission, and who, therefore, are mere licensees. Such a visitor enjoys the license subject to the attendant risk."³⁵

v. Boston, &c., Co., 142 Mass. 296. If tracks are allowed to be used by other companies for switching, it is an invitation to the servants of such companies. Ind., &c., R. R. Co. *v.* Barnhart, 115 Ind. 399, 16 N. E. 121.

33—*Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514. See, for cases like this in principle, *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; and *Caniff v. Blanchard Nav. Co.*, 66 Mich. 638, 33 N. W. 744. So if without invitation a stranger goes aboard. *Metcalf v. Cunard, S. S. Co.*, 147 Mass. 66, 16 N. E. 701.

34—*Benson v. Baltimore Traction Co.*, 77 Md. 535, 26 Atl. 973, 39 Am. St. Rep. 436, 20 L. R. A. 714.

35—*Faris v. Hoberg*, 134 Ind. 269, 276, 33 N. E. 1028, 39 Am. St. Rep. 261. "One who puts a building or part of a building to use in a business, and fits it up so as to show the use to which it is adapted, impliedly invites all

persons to come there whose coming is naturally incident to the prosecution of the business. If the place is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. The mere fact that premises are fitted conveniently for use by the owner or his tenants, and by those who come to transact such business as is carried on there, does not constitute an implied invitation to strangers to come and use the place for purposes of their own. To such persons it gives no more than an implied license to come for any other purpose." *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463. The plaintiff wishing to visit a friend went to the wrong building. In going to see if his friend was there he fell into an open elevator shaft. Held a licensee. *McCarvell v. Sawyer*, 173 Mass. 540, 54 N.

Firemen who enter a building in case of fire are licensees merely and the owner or occupant is not liable for their injury by reason of any defects or unguarded pitfalls, or other dangers.³⁶ The general rule supported by the authorities is that the owner or occupant of premises owes no duty to licensees and trespassers, further than to refrain from willful acts of injury.³⁷

E. 259, 73 Am. St. Rep. 318. The servant of an independent contractor engaged in papering certain rooms in the defendant's house, stepped out on a balcony, where his work did not require him to go but solely for his own convenience in calling to another workman, and was injured by the fall of the balcony. Held no liability. *Smith v. Trimble*, 111 Ky. 861, 64 S. W. 915.

36—*Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; *Woodruff v. Bowen*, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; *Baker v. Otis Elevator Co.*, 78 App. Div. 513, 79 N. Y. S. 663; *Eckes v. Stetler*, 98 App. Div. 76, 90 N. Y. S. 473; *Beehler v. Daniels*, 18 R. I. 563, 29 Atl. 6, 49 Am. St. Rep. 790, 27 L. R. A. 512. It is held to make no difference that the negligence alleged is in leaving an elevator shaft unguarded in violation of an ordinance or statute, as such regulation is not for the benefit of firemen. *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350.

37—*Louisville, etc., R. R. Co. v. Sides*, 129 Ala. 399, 29 So. 798;

Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 Pac. 1001; *Butler v. Lewman*, 115 Ga. 752, 42 S. E. 98; *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, 36 Am. St. Rep. 376, 17 L. R. A. 588; *Ellott v. Carlson*, 54 Ill. App. 470; *Lackart v. Lutz*, 94 Ky. 287, 22 S. W. 218; *Mergenthaler v. Kirby*, 79 Md. 182, 28 Atl. 1065, 47 Am. St. Rep. 371; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Sullivan v. Boston, etc., R. R. Co.*, 156 Mass. 378, 31 N. E. 128; *Hart v. Cole*, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557; *Blatt v. McBarron*, 161 Mass. 21, 36 N. E. 468, 42 Am. St. Rep. 385; *Shea v. Gurney*, 163 Mass. 184, 39 N. E. 996, 47 Am. St. Rep. 446; *Blackston v. Chelmsford Foundry Co.*, 170 Mass. 321, 49 N. E. 635; *Moffatt v. Kenny*, 174 Mass. 311, 54 N. E. 850; *Fornall v. Standard Oil Co.*, 127 Mich. 496, 86 N. W. 946; *Trask v. Shotwell*, 41 Minn. 66, 42 N. W. 699; *Fredenburg v. Baer*, 89 Minn. 241, 94 N. W. 683; *Mathews v. Bensel*, 51 N. J. L. 30, 16 Atl. 195; *Fitzpatrick v. Cumberland Glass Mfg. Co.*, 61 N. J. L. 378, 39 Atl. 675; *Cusick v. Adams*, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772; *Emry v. Roanoke Nav., etc., Co.*, 111 N. C. 94, 16 S. E. 18, 17 L. R. A. 699; *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677; *Gramlich v. Wurst*, 86 Pa. St. 74,

Some cases make an exception to the general rule in case of children of tender years, where the owner or occupant of premises maintains or permits thereon something attractive to children and also dangerous to them if meddled with, and in a locality frequented by them, without anything to warn them or keep them out of the danger. What are known as the "turn-table cases" are of this character. A railroad turntable is a machine attractive to children and a dangerous plaything, and to leave one in a place frequented by children unlocked and unguarded is held to be negligence, that will render the company liable to a child injured while playing thereon and who is too

27 Am. Rep. 684; Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365; Horstick *v.* Dunkle, 145 Pa. St. 220, 23 Atl. 378, 27 Am. St. Rep. 685; Magner *v.* Frankford Baptist Church, 174 Pa. St. 84, 34 Atl. 456; Clapp *v.* La Grill, 103 Tenn. 164, 52 S. W. 134; Williams *v.* Nashville, 106 Tenn. 533, 63 S. W. 231; Brehmer *v.* Lyman, 71 Vt. 98, 42 Atl. 613; Anderson *v.* Northern Pac. Ry. Co., 19 Wash. 340, 63 Pac. 345; Woolwine *v.* Chesapeake, etc., Ry. Co., 36 W. Va. 329, 15 S. E. 81, 32 Am. St. Rep. 859, 16 L. R. A. 271. In Louisiana it is held that where one knowingly leaves open his land under circumstances calculated to lead others to think that they are invited to use it, he impliedly invites the public to such use and is under a duty to keep it reasonably safe. Lawson *v.* Shreveport W. W. Co., 111 La. 73, 35 So. 390. Where the plaintiff's eye was put out by the explosion of a giant fire cracker in a show tent, the explosion being a part of the performance, it was held to be no defense that the plaintiff was a trespasser in the tent, he being one of the audience

and his presence known. Herrick *v.* Wixom, 121 Mich. 384, 81 N. W. 333. The explosion of the cracker, under the circumstances, might be regarded as so reckless as to amount to a willful injury.

As to trespassers on railroad tracks and cars, see: Georgia Pac. R. R. Co. *v.* Blanton, 84 Ala. 154, 4 So. 621; Columbus, etc., Ry. Co. *v.* Wood, 86 Ala. 164, 5 So. 463; Bentley *v.* Georgia Pac. Ry. Co., 86 Ala. 484, 6 So. 37; Louisville, etc., R. R. Co. *v.* Black, 89 Ala. 313, 8 So. 246; Toomey *v.* Southern Pac. R. R. Co., 86 Cal. 374, 24 Pac. 1074, 10 L. R. A. 139; Snyder *v.* Natchez, etc., R. R. Co., 42 La. Ann. 302, 7 So. 582; Kelly *v.* Mich. Cent. R. R. Co., 65 Mich. 186, 31 N. W. 904, 8 Am. St. Rep. 876; Hepfel *v.* St. Paul, etc., Ry. Co., 49 Minn. 263, 51 N. W. 1049; Barker *v.* Hannibal, etc., R. R. Co., 98 Mo. 50, 11 S. W. 254; Smalley *v.* Southern Ry. Co., 57 S. C. 243, 35 S. E. 489; Seaboard, etc., R. R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773; Tucker *v.* Norfolk, etc., R. R. Co., 92 Va. 549, 24 S. E. 229; Washington *v.* Quayle, 95 Va. 741, 30 S. E. 391; O. R. & N. Co. *v.* Egley, 2 Wash. 409, 26 Pac.

young to appreciate the danger and take care of himself.³⁸ The rule has been extended to dangerous machinery in general.³⁹ "To impose the duty of care, the machine must be such that it is dangerous for very young children to play with or about it; it must be of such a character that such children would naturally be attracted to play with or about it, and it must be where they are likely to come for that purpose, so that an ordinarily prudent person would anticipate that they might come for that purpose."⁴⁰ The exception has been extended in some cases to a pond of water or to any dangerous agency permitted to exist

973. Where people are accustomed to cross a track on the private property of the company with its knowledge, they are not trespassers. *Cahill v. Chicago, etc., R. R. Co.*, 74 Fed. 285, 20 C. C. A. 184; *Felton v. Ambrey*, 74 Fed. 350, 20 C. C. A. 436.

38—*Barrett v. Southern Pac. Co.*, 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; *Callahan v. Eel River, etc., R. R. Co.*, 92 Cal. 89, 28 Pac. 104; *Ferguson v. Columbus, etc., Ry. Co.*, 77 Ga. 102; *Kansas Central Ry. Co. v. Fitzsimmons*, 22 Kan. 686; *Keffe v. Milwaukee, etc., Ry. Co.*, 21 Minn. 207; *O'Malley v. St. Paul, etc., Ry. Co.*, 43 Minn. 289, 45 N. W. 440; *Koons v. St. Louis, etc., R. R. Co.*, 65 Mo. 592; *Nagel v. Missouri Pac. R. R. Co.*, 75 Mo. 653; *Chicago, etc., R. R. Co. v. Krayenbuhl*, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920; *Railroad Co. v. Cargille*, 105 Tenn. 628, 59 S. W. 141; *Evanisch v. Gulf, etc., Ry. Co.*, 57 Tex. 126; *Houston, etc., R. R. Co. v. Simpson*, 60 Tex. 103; *Gulf, etc., R. R. Co. v. Styson*, 66 Tex. 421; *Gulf, etc., Ry. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755; *Ilwaco Ry. & Nav. Co. v. Hedrich*, 1 Wash. 446, 25 Pac. 335, 346, 22 Am. St. Rep. 169; *Railroad Co. v.*

Stout, 17 Wall. 657. In *San Antonio, etc., Ry. Co. v. Morgan*, 92 Tex. 98, 46 S. W. 28, it was held that it must be shown in such cases that the turntable was especially and unusually attractive to children. The declaration, it was held, must show by circumstances set forth, that there was an invitation, and a demurrer was sustained to the declaration, though it was alleged that the turntable in question was calculated to attract and did attract children.

39—*Osage City v. Larkin*, 40 Kan. 206, 19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56. "And it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment opposes no warning or defense." *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 303, 27 Pac. 666, 25 Am. St. Rep. 186. And see *Consolidated Elec. L. & P. Co. v. Healy*, 65 Kan. 798, 70 Pac. 884.

40—*O'Malley v. St. Paul, etc., Ry. Co.*, 43 Minn. 289, 291, 292, 45 N. W. 440.

on one's lot and calculated to attract children.⁴¹ Other cases go further and hold that an owner or occupant of property is liable for injuries to children trespassing upon his private ground, when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature and exposed and open condition of something thereon, which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs.⁴²

41—*Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114; *Omaha v. Richards*, 50 Neb. 804, 70 N. W. 363. In the Illinois case it is said: “Where the land of a private owner is in a thickly settled city, adjacent to a public street or alley, and he has upon it, or suffers to be upon it, dangerous machinery or a dangerous pit or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class, we think that he is under obligations to use reasonable care to protect them from injury when coming upon said premises, even though they may be technical trespassers. * * * Unguarded premises which are thus supplied with dangerous attractions, are regarded as holding out implied invitations to such children.” p. 148. And further: “The question, whether a defendant has or has not been guilty of negligence in case of such an accident upon his land to a child of tender years, is for the jury. Involved in this question is the further question whether or not the premises were sufficiently

attractive to entice children into danger, and to suggest to the defendant the probability of the occurrence of such accident; and, therefore, such further question is also a matter to be determined by the jury.” pp. 152, 153.

42—*Brinkley Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216; *S. C. Brinkley Car Co. v. Cooper*, 70 Ark. 331, 67 S. W. 752, 57 L. R. A. 724. Here a child was scalded in a pool of hot water. So where a boy fell into a barrel set into the ground for receiving exhaust steam. *Kinchlow v. Midland Elevator Co.*, 57 Kan. 374, 46 Pac. 703. Or into a pit filled with burning embers. *Penso v. McCormick*, 125 Ind. 116, 25 N. E. 156, 9 L. R. A. 313. Or into a well. *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321. In the last case the court says: “If I know that there is an open well upon my premises and know that children of such tender years as to have no notion of their danger are continually playing around it and I can obviate the danger with very little trouble to myself and without injuring the premises or interfering with my own free use thereof, I owe an active duty to those children, and if I neglect that duty and they fall into the well and are killed it is through

But the trend of authority is against any extension of the exception exemplified in the turntable cases,⁴³ and many courts repudiate even that exception.⁴⁴ The Supreme Court of Texas,

my negligence; I cannot urge their negligence as a defense, even though I have never invited or encouraged them expressly or impliedly to go upon the premises." p. 73. And see *Holt v. Spokane, etc., Ry. Co.*, 3 Idaho, 703, 35 Pac. 39.

43—*Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106; *Loftus v. Dehail*, 133 Cal. 214, 65 Pac. 379; *O'Connor v. Brucker*, 117 Ga. 451, 43 S. E. 731; *American A. & D. P. Co.*, 100 Ill. App. 452; *Northwestern El. R. R. Co. v. O'Malley*, 107 Ill. App. 599; *Talty v. Atlantic*, 92 Ia. 135, 60 N. W. 516; *Schauf's Admr. v. Paducah*, 106 Ky. 228, 50 S. W. 42, 90 Am. St. Rep. 220; *Sullivan v. Boston, etc., R. R. Co.*, 156 Mass. 378, 31 N. E. 128; *Formall v. Standard Oil Co.*, 127 Mich. 496, 86 N. W. 946; *Ryan v. Towah*, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310; *Peninsular Trust Co. v. Grand Rapids*, 131 Mich. 571, 92 N. W. 38; *Rattle v. Dawson*, 50 Minn. 450, 52 N. W. 965; *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 72 Am. St. Rep. 597, 42 L. R. A. 88; *Dehanitz v. St. Paul*, 73 Minn. 385, 76 N. W. 48; *White v. Stifel*, 126 Mo. 295, 28 S. W. 891, 47 Am. St. Rep. 668; *Moran v. Pullman P. C. Co.*, 134 Mo. 641, 36 S. W. 659, 56 Am. St. Rep. 543, 33 L. R. A. 755; *Arnold v. St. Louis*, 152 Mo. 173, 53 S. W. 900, 75 Am. St. Rep. 447, 48 L. R. A. 291; *Driscoll v. Clark*, 32 Mont. 172; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Omaha R. R. Co.*, 154 Mass. 349, 28 N. E. v. *Bowman*, 52 Neb. 293, 72 N. W. 316, 66 Am. St. Rep. 506, 40 L. R. A. 531; *Haack v. Brooklyn Labor Lyceum Ass.*, 44 Misc. 273, 89 N. Y. S. 888; *Ann Arbor R. R. Co. v. Kinz*, 68 Ohio St. 210, 67 N. E. 479; *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365; *Rodgers v. Lees*, 140 Pa. St. 475, 21 Atl. 399, 23 Am. St. Rep. 250, 12 L. R. A. 216; *Paolino v. McK Kendall*, 24 R. I. 432, 53 Atl. 268, 96 Am. St. Rep. 736, 60 L. R. A. 133; *Cooper v. Overton*, 102 Tenn. 211, 52 S. W. 183, 73 Am. St. Rep. 864, 45 L. R. A. 591; *Missouri, etc., Ry. Co. v. Edwards*, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 911; *North Tex. Construction Co. v. Bostick*, 98 Tex. 239; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955; *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep. 747. And see *Heimann v. Kinnare*, 190 Ill. 156, 60 N. E. 215, 83 Am. St. Rep. 123, 52 L. R. A. 652; *Norman v. Bartholomew*, 104 Ill. App. 667; *Douk Bros. C. & C. Co. v. Leavitt*, 109 Ill. App. 385; *Chicago, etc., R. R. Co. v. Bockhoven*, 53 Kan. 279, 36 Pac. 322; *Price v. Atchison Water Co.*, 58 Kan. 551, 50 Pac. 882, 62 Am. St. Rep. 625; *Kaumeier v. City Elec. Ry. Co.*, 116 Mich. 306, 74 N. W. 481, 72 Am. St. Rep. 525, 40 L. R. A. 385; *Gunderson v. N. W. Elevated Co.*, 47 Minn. 161, 49 N. W. 694.

44—*Daniels v. New York, etc.*, 449, 28 N. E.

after having sustained a recovery for injuries to children upon railroad turntables, has repudiated the ground upon which such recovery is based. In a suit for the death of a child drowned in a ditch on a railroad right of way the court says: "The common law imposes no duty upon the owner to use care to keep his property in such condition that persons going thereon without his invitation may not be injured. In considering the question as to whether a duty exists there is no distinction between a case where an infant is injured and one where the injury is to an adult, though where the duty is imposed the law may exact more vigilance in its discharge as to the former. If there be no duty the question of negligence is not reached, for negligence can in law only be predicated upon a failure to use the degree of care required of one by law in the discharge of a duty imposed thereby." And referring to *Railway Co. v. Stout*,⁴⁵ *Pekin v. McMahon*,⁴⁶ and similar cases the court further says: "The difficulty about these cases is that they either impose upon owners of property a duty not before imposed by law or they leave to a jury to find legal negligence in cases where there is no legal duty to exercise care. In these cases the courts, yielding to the hardships of individual instances where owners have been guilty of moral though not legal wrongs in permitting attractive and dangerous turntables and water holes to remain unguarded on their premises in populous cities to the destruction of little children, have passed beyond the safe and ancient landmarks of the common law and assumed legislative functions in imposing a duty where none existed."⁴⁷

- 283; *Frost v. Eastern R. R. Co.*, 87 N. W. 644, 92 Am. St. Rep. 64 N. H. 220, 9 Atl. 790; *Turess v. New York, etc.*, R. R. Co., 61 N. J. L. 314, 40 Atl. 614; *Delaware, etc. v. R. R. Co. v. Reich*, 61 N. J. L. 635, 40 Atl. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831; *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, 39 N. E. 1068, 45 Am. St. Rep. 615, 27 L. R. A. 724; *Bates v. Railway Co.*, 90 Tenn. 36, 15 S. W. 1069, 25 Am. St. Rep. 665. And see *Ryan v. Towar*, 128 Mich. 463,
- 45—17 Wall. 657, turntable case.
46—154 Ill. 141, boy drowned in pond on defendant's lot.
47—*Dobbins v. Missouri, etc.*, Ry. Co., 91 Tex. 60, 61, 64, 41 S. W. 62, 66 Am. St. Rep. 856, 38 L. R. A. 573.

One who publicly exposes a machine on market day is [*722] *not responsible for injuries to boys who meddle with it without permission.⁴⁸ The liability in any such case must spring from negligence; and therefore, if the injury arises from some danger not known to the owner, and not open to observation, he is not responsible, because he is not in fault.⁴⁹

The duty in all such cases must in general pertain to occupancy, not to ownership,⁵⁰ but sometimes it is assumed by others. Thus, if a landlord, by his covenants with tenants, assumes the obligation of repairs, he is responsible for any injuries consequent upon his failure to make them, not to the tenants merely, but to third persons lawfully coming upon the premises.⁵¹ And so if there are concealed defects about the prem-

48—*Mangan v. Atterton*, L. R. 1 Exch. 239. Compare *Keffe v. Milwaukee, &c.*, R. R. Co., 21 Minn. 207, 18 Am. Rep. 393; *Coppner v. Penn, &c.*, Co., 12 Ill. App. 600; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, and cases p. *822, *post*.

49—As where a mash tub in a brewery gave way and injured a servant, being weakened by natural decay. *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573. The question in every such case must be whether the defect was one that ought to have been detected and remedied, and would have been by the exercise of due care. If so, the owner should be responsible; otherwise, not.

50—See *Rich v. Basterfield*, 4 M., G. & S. 783.

51—*Campbell v. Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Stack v. Harris*, 111 Ga. 149, 36 S. E. 615. A landlord who undertakes to protect his building against excavations on the adjoining lot, but by the negli-

gence of whose workmen the wall falls, rendering the building untenable, is liable to the tenant for damages, and the latter may abandon. *McHenry v. Marr*, 39 Md. 510. See *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54; *Marshall v. Cohen*, 44 Ga. 489. A tenant having the right to use a staircase leading to another part of the building may recover of the owner if injured by its defects. *Loooney v. McLean*, 129 Mass. 33, 39 Am. Rep. 295. A landlord owes no duty to a child of his tenant's visitor to protect a skylight in a roof overlooked by the tenant's window, the roof being used by the tenant to dry clothes upon, and the child falling out of the window. *Miller v. Woodhead*, 104 N. Y. 471. Nor if a tenant using a roof by license to dry clothes upon is injured from lack of a rail is the landlord liable. *Ivay v. Hedges*, L. R. 9 Q. B. D. 80. A landlord is not liable for premises being out of repair to a sub-tenant when the lease forbids subletting and the subletting is unknown to

ises which are known to the lessor and which a careful examination would not disclose to the lessee.⁵² And, according to some authorities, the landlord will be liable though he did not know of the defect, if he might have known by the exercise of reasonable care.⁵³ Other cases hold that the owner in such cases is not liable if he did not have knowledge and there was no concealment on his part.^{53a} "The owner of private property, un-

the landlord. Cole v. McKey, 66 Wis. 500, 57 Am. Rep. 293, discussing many cases. Donaldson v. Wilson, 60 Mich. 86.

52—Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117. House infected with disease. Cutter v. Hamlen, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; Martin v. Richards, 155 Mass. 381, 29 N. E. 591, 16 L. R. A. 400. With sewer gas. Sunasack v. Morey, 196 Ill. 569, 63 N. E. 1039. In the last case the court says: "Where there are concealed defects in the demised premises, attended with danger to occupants, which a careful examination would not disclose but which are known to the landlord, the latter is under obligation imposed upon him by law, to reveal them to the tenant in order that he may guard against them, and upon the landlord's failure to perform such duty he will become liable for whatever damages actually result to the tenant therefrom." p. 571. *Contra*, Land v. Fitzgerald, 68 N. J. L. 28, 52 Atl. 229. If the defects are obvious the lessor is not liable. Davidson v. Fischer, 11 Colo. 583, 19 Pac. 652, 7 Am. St. Rep. 267; Freeman v. Hunnewell, 163 Mass. 210, 39 N. E. 1012; Booth v. Merriam, 155 Mass. 521, 30 N. E. 85; Eyre v. Jordan, 111 Mo. 424, 19 S. W. 1095, 33 Am. St. Rep. 543.

53—State v. Boyce, 73 Md. 469, 21 Atl. 322; Quigley v. Johns Mfg. Co., 26 App. Div. 434, 50 N. Y. S. 98; Hines v. Willcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824; S. C. on rehearing, 96 Tenn. 328, 34 S. W. 420; Sternberg v. Willcox, 96 Tenn. 163, 33 S. W. 917, 34 L. R. A. 615; S. C. on rehearing, 96 Tenn. 328, 34 S. W. 420; Willcox v. Hines, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761; Willcox v. Hines, 100 Tenn. 538, 46 S. W. 297, 66 Am. St. Rep. 770, 41 L. R. A. 278. The above cases from Tennessee arose out of the same accident in which a tenant and members of his family and guests were injured by the fall of a back porch and a recovery was sustained. It is said that these cases go to the limit and that if the lessor is ignorant of the defect without fault he is not liable. Schmalzried v. White, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782. The guest of a tenant has no greater right than the tenant. Roche v. Sawyer, 176 Mass. 71, 57 N. E. 216, 78 Am. St. Rep. 471; Jordan v. Sullivan, 181 Mass. 348, 63 N. E. 909. So of a servant of the tenant. Whitmore v. Orono Pulp & Paper Co., 91 Me. 297, 39 Atl. 1032, 64 Am. St. Rep. 229, 40 L. R. A. 377. 53a—Whitley v. McLaughlin, 183 Mo. 160, 81 S. W. 1094, 66 L. R.

affected by any public use, owes to a prospective lessee or his servant no duty of exercising ordinary care to ascertain and apprise him of unknown defects in the property to be leased, where such prospective lessee has equal opportunity to ascertain the defects.^{53b}

The mere letting without additional stipulations by the lessor, simply implies that he holds the title and that the lessee shall quietly enjoy the use and occupation during his tenancy; and not that the premises are or shall be in any particular condition or state of repair, or that they are suitable for the purpose for which they were let.⁵⁴ In case of office and apartment buildings the landlord must exercise due care to keep the halls, stairs, passage ways and like appurtenances reasonably safe for the tenants and their families and servants and for those who come to visit or transact business with them.⁵⁵

A. 484; Shinkle, W. & K. Co. v. v. Boehm, 58 N. J. L. 475, 34 Atl. Birney, 68 Ohio St. 328, 67 N. E. 886; Miller v. Hancock, (1893) 2 715; Whitmore v. Orono Pulp & Q. B. 177; Washington Market Co. Paper Co., 91 Me. 297, 39 Atl. v. Clagett, 19 App. D. C. 12; Hirst 1032, 64 Am. St. Rep. 229, 40 L. v. Ringen Real Est. Co., 169 Mo. R. A. 377; Shackford v. Coffin, 194, 69 S. W. 368; Davis v. Pacific 95 Me. 69, 49 Atl. 57. Power Co., 107 Cal. 563, 40 Pac.

950, 48 Am. St. Rep. 156. The tenant takes the risk of such obvious 53b—Whitmore v. Orono Pulp & defects in such halls and passage- Paper Co., 91 Me. 297, 39 Atl. ways as exist at the time of the 1032, 64 Am. St. Rep. 229, 40 L. demise. Quinn v. Perham, 151 R. A. 377. See McConnell v. Lemley, 48 La. Ann. 1433, 20 So. 887, Mass. 162, 23 N. E. 735. Landlord 55 Am. St. Rep. 319, 34 L. R. A. need not keep halls lighted in 609; Griffin v. Jackson Lt. & P. absence of statute. Hilsenbeck v. Co., 128 Mich. 653, 87 N. W. 888, Guhring, 181 N. Y. 674, 30 N. E. 92 Am. St. Rep. 496, 55 L. R. A. 580; Brugher v. Buchtenkirch, 167 318.

54—McKenzie v. Cheetham, 83 Me. 543, 22 Atl. 469.

55—Fisher v. Jansen, 30 Ill. App. 91; Foren v. Rodick, 90 Me. 276, 38 Atl. 175; People's Bank v. Morgolofski, 75 Md. 432, 23 Atl. 1027, 32 Am. St. Rep. 403; O'Malley v. Twenty-five Associates, 170 Mass. 471, 49 N. E. 641; Little v. Holyoke, 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 417; Gleason

Hart v. Cole, 156 Mass. 475, 31 N. E. 644, 16 L. R. 847. But see Brugher v. Buchtenkirch, 29 App. Div. 342, 51 N. Y. S. 464. Those who go into such a building out of curiosity, or for some purpose of their own not connected with the occupants or with any business carried on there are mere licensees. Hart v. Cole, 156 Mass. 475, 31 N. E. 644, 16 L. R.

Nuisances Which Threaten Calamity. Many things are nuisances because they threaten calamity to the [*723] persons or property of others, and thereby cause injury, though the calamity feared may never befall. A building so negligently constructed or so greatly decayed that it is likely to fall upon an adjoining tenement, or upon persons lawfully making use of easements near it, is a nuisance of this sort,⁵⁶ and so is a decayed tree,⁵⁷ or a wall made unsafe and dangerous by fire,⁵⁸ and so is powder or any other dangerous explosive stored and imperfectly guarded in the vicinity of residences.⁵⁹ Where

- A. 557; *Ganley v. Hall*, 168 Mass. 513, 47 N. E. 416. Brewing Co., 12 S. D. 397, 81 N. W. 725; *Waterhouse v. Schlitz Brewing Co.*, 16 S. D. 592, 94 N. W. 587; *Patterson v. Schlitz Brewing Co.*, 16 S. D. 33, 91 N. W. 336; *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744. A dilapidated building in a city, unused and a resort for tramps may be destroyed as a nuisance. *Nazworthy v. Sullivan*, 55 Ill. App. 48.
- 57—*Gibson v. Denton*, 4 App. Div. 198, 38 N. Y. S. 554.
- 58—*Schwarz v. Adsit*, 91 Ill. App. 576; *Mickel v. York*, 175 Ill. 62, 51 N. E. 848; *Beidler v. King*, 209 Ill. 302, 70 N. E. 763; *Factors & Traders Ins. Co. v. Werlein*, 42 La. Am. 1046, 8 So. 435, 11 L. R. A. 361; *Lauer v. Palms*, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67; *Olsen v. Meyer*, 46 Neb. 240, 64 N. W. 954; *Simmons v. Everison*, 124 N. Y. 319, 26 N. E. 911. 21 Am. St. Rep. 676; *Engel v. Eureka Club*, 59 Hun, 593, 14 N. Y. S. 184; *Covington, etc., Bridge Co v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375.
- 59—*Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Cheatham v. Shearon*, 1 Swan, 213; *Emory v. Hazard Powder Co.*, 22 S. C. 476, 53 Am. Rep. 730; *Kinney v. Koop-*

nitroglycerine stored on the defendant's premises exploded and shattered the plaintiff's windows a mile away, the defendant was held liable for the damage. Nitroglycerine being highly explosive and dangerous and a menace to all property in the vicinity of the place where it is stored, the court held that one who keeps it is liable for injuries caused to surrounding property by its explosion, though he violates no provision of law regulating its storage and is guilty of no negligence, and that the right of action exists in favor of all property within the circle of danger, whether adjacent or not.⁶⁰ A building in-

man, 116 Ala. 310, 22 So. 593, 67 Am. St. Rep. 119, 37 L. R. A. 497; Rudder *v.* Koopman, 116 Ala. 332, 22 So. 601, 37 L. R. A. 489; Lafin & R. Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; Lafin & R. Powder Co. *v.* Tearney, 30 Ill. App. 321; Chicago, etc., Coal Co. *v.* Glass, 34 Ill. App. 364; Cameron *v.* Kenyon, etc., Co., 22 Mont. 312, 56 Pac. 358, 74 Am. St. Rep. 602, 44 L. R. A. 508; Comminge *v.* Stevenson, 76 Tex. 642, 13 S. W. 556; Barnes *v.* Zettlemayer, 23 Tex. Civ. App. 468, 62 S. W. 111. In Wright *v.* Chicago, etc., Ry. Co., 27 Ill. App. 200, which was a suit for the destruction of the plaintiff's property by fire communicated by the explosion of petroleum kept by the defendant in its warehouse across the alley, the court says: "The law requires a man to guard against all dangers that are to be reasonably anticipated; it is a class of dangers that are to be guarded against, and he is not excused because any particular danger within the class could not be foretold. We are content with the rule that the keeping of explosives unsafely guarded, in such quantities as to be dangerous

to persons or property, near a frequented street, or other public place, or in the vicinity of residences or places of business of others, under circumstances that threaten calamity to the person or property of others, the consequences thereof being an explosion of such articles, which causes damage to the person or property of another, gives the latter a right of action to recover from the person keeping the explosives such damages as would not have happened in their absence." p. 212.

Although explosives may be necessary to do a work pursued under legislative authority, yet keeping such substances in large quantities near habitations is a nuisance, irrespective of negligence. McAndrews *v.* Collerd, 42 N. J. L. 189. Whether a magazine is a nuisance depends not on negligence, but on all the surrounding circumstances of a case. Heeg *v.* Licht, 80 N. Y. 579, 36 Am. Rep. 654. See Dilworth's App. 91 Pa. St. 247.

60—Bradford Glycerine Co. *v.* St. Mary's Woolen Mfg. Co., 60 Ohio St. 560, 54 N. E. 528, 71 Am. St. Rep. 740, 45 L. R. A. 658. Where plaintiff's vessel was set on

fected with disease, and rented in that condition without notifying the tenant of the fact, is a nuisance.⁶¹ "It is the rule that, where the owner of a house, office or other tenement, knowing that it is so affected by the smallpox, or any other contagious disease as to be unfit for occupation, and to endanger the health and lives of the occupants, and concealing this knowledge from the person invited, induces him to hire, occupy or visit it, and the person so hiring or invited takes a disease by reason of the infection, the owner is guilty of actionable negligence. In such case, however, it must be shown that the owner knew that the house, office or tenement was so infected as to endanger the health or life of any person who might visit or occupy it."⁶²

So it is a nuisance if one who is constructing a brick building abutting on a highway shall put his servants at work without providing any protection against the accident of a brick falling upon passing travelers, and he may be held responsible for such an accident, even if the servants have observed due care.⁶³ So the

fire by an explosion of oil at the defendant's refinery, liability was held to depend upon whether or not the explosion was due to negligence. *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475. It was further held that negligence could not be presumed from the explosion. But where the plaintiff's buildings were destroyed by the explosion of the defendant's dynamite factory, negligence was presumed from the fact of explosion. *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718. The fact that the plaintiff had granted the premises to the defendant for a dynamite factory was no defense to a suit based upon negligence in the conduct of the business. *Ibid.* Where gunpowder is stored in a proper place and quantity for use in making fuse, there is no

liability for an explosion unless there was negligence. *Kleebauer v. Western Fuse, etc., Co.*, 138 Cal. 497, 71 Pac. 617, 94 Am. St. Rep. 62, 60 L. R. A. 377.

61—*Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122; *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164. See *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *King v. Vantandillo*, 4 M. & S. 73.

62—*Long v. Chicago, etc., R. R. Co.*, 48 Kan. 28, 28 Pac. 977, 30 Am. St. Rep. 271, 12 L. R. A. 319.

63—*Jager v. Adams*, 123 Mass. 26, 25 Am. Rep. 7. And see cases p. 1277, n. 56. A building so constructed that snow and ice are likely to slide from the roof into the street is not necessarily a nuisance, and the owner is only liable if he fails to observe due care in respect to it. *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164.

blasting of rocks sufficiently near the dwellings of others to endanger them is a nuisance.⁶⁴ So is a mill dam from which pestilential vapors arise,⁶⁵ and any business which endangers the neighbor*hood by the noxious vapors which come from the place where it is carried on.⁶⁶ In these cases the party injured or endangered need not wait for the calamity to happen, but may bring suit at once, and take proceedings for abating the nuisance. An unguarded excavation or

64—*Scott v. Bay*, 3 Md. 431; *Wilkins v. Monson Consolidated Slate Co.*, 96 Me. 385, 52 Atl. 755. Whether the damage is by flying rocks or concussion of the air. *Colton v. Onderdonk*, 65 Cal. 155, 58 Am. Rep. 556. So where one blasting on his own land projects a piece of wood upon a traveler in a highway. *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 76 Am. St. Rep. 274, 47 L. R. A. 715. See *Gates v. Latta*, 117 N. C. 189, 23 S. E. 173, 53 Am. St. Rep. 584. A contractor who uses dynamite in the construction of a tunnel is liable for all damages to property caused by the concussion of air or earth. *Fitz Simons & Connell Co. v. Braun*, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421. In these cases it is held that the defendant is not liable for damages by blasting unless he is negligent. *Cameron v. Vandergriff*, 53 Ark. 381, 13 S. W. 1092; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451; *Booth v. Rome*, etc., R. R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; *Bennet v. Atlantic Dredging Co.*, 134 N. Y. 156, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L. R. A. 220; *French v. Vix*, 143 N. Y. 90, 37 N. E. 612; *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149; *Blackwell v. Lynchburg, etc.*, R. R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729; *Fox v. Borkey*, 126 Pa. St. 164, 17 Atl. 604; *Baker v. Hagey*, 177 Pa. St. 128, 35 Atl. 705, 55 Am. St. Rep. 712; *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838; *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936; *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621. As to liability for blasting by contractor see *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451; *Roemer v. Striker*, 142 N. Y. 134, 36 N. E. 808.

65—*State v. Rankin*, 3 Sou. Car. 438, 16 Am. Rep. 737; *Adams v. Popham*, 76 N. Y. 410; *Richards v. Dougherty*, 133 Ala. 569, 31 So. 934; *De Vaughn v. Minor*, 77 Ga. 809, 1 S. E. 433; *Leonard v. Spencer*, 108 N. Y. 338, 15 N. E. 397.

66—*Cooke v. Forbes*, L. R. 5 Eq. Cas. 166; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Penn. Lead Co.'s App.*, 96 Pa. St. 116, 42 Am. Rep. 534; *Attorney General v. Heatley*, (1897) 1 Ch. 560. But the injury must be substantial and not caused by peculiar susceptibility in the one complaining. *Price v. Grantz*, 118 Pa. St. 402, 11 Atl. 794.

opening so near the street as to endanger travel is a nuisance.⁶⁷ So of structures near or over the street which by reason of decay or otherwise endanger travel.⁶⁸ So of anything done in the street itself which is liable to injure those who use it.⁶⁹

Diseased Beasts. Domestic animals which have an infectious or contagious disease become a nuisance when the care and management of them by their owners is such as to expose the

67—*Hulson v. King*, 95 Ga. 271, 22 S. E. 615; *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 23 Am. St. Rep. 846, 9 L. R. A. 640; *Cannon v. Lewis*, 18 Mont. 402, 45 Pac. 572; *South Omaha v. Cunningham*, 31 Neb. 316, 47 N. W. 930; *Sutphen v. Hedden*, 67 N. J. L. 324, 51 Atl. 721; *Healy v. Vordran*, 65 App. Div. 353, 72 N. Y. S. 877; *Oklahoma City v. Meyers*, 4 Okl. 686, 46 Pac. 552. See *McIntire v. Roberts*, 149 Mass. 450, 22 N. E. 13, 14 Am. St. Rep. 432, 4 L. R. A. 519; *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365; *Horstick v. Dunkle*, 145 Pa. St. 220, 23 Atl. 378, 27 Am. St. Rep. 685.

68—*Railway Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189; *Detzur v. Stroh Brewing Co.*, 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500; *Village v. Kallagher*, 52 Ohio 183, 39 N. E. 144; *Palmore v. Morris*, 182 Pa. St. 82, 37 Atl. 995, 61 Am. St. Rep. 693; *Harold v. Whatney*, (1898) 2 Q. B. 320. See *Davis v. Rich*, 180 Mass. 235, 62 N. E. 375; *Brown v. Wysong*, 1 App. Div. 423, 37 N. Y. S. 281. Barbed wire fence on line of street. *Loveland v. Gardner*, 79 Cal. 317, 21 Pac. 766; *Sisk v. Crump*, 112 Ind. 504; *Bower v. Watsontown*, 11 Pa. Co. Ct. 110. Building constructed so that snow will slide into street. *Smethurst v. Boston Square Church*, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 350, 2 L. R. A. 695; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279; *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475; *Hannem v. Pence*, 40 Minn. 127, 41 N. W. 657, 12 Am. St. Rep. 717.

69—*Lynn v. Hooper*, 93 Me. 46, 44 Atl. 127, 47 L. R. A. 752; *Maher v. Stener*, 170 Mass. 454, 49 N. E. 741; *Leonard v. Doherty*, 174 Mass. 565, 55 N. E. 461; *Smith v. Davis*, 22 App. D. C. 298; *Kramer v. Southern Ry. Co.*, 127 N. C. 328, 37 S. E. 468, 52 L. R. A. 359; *Kessler v. Berger*, 205 Pa. St. 289, 54 Atl. 887, 61 L. R. A. 611; *Rachmel v. Clark*, 205 Pa. St. 313, 54 Atl. 1126; *Busse v. Rogers*, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183. See *Jackson v. Castle*, 82 Me. 579, 20 Atl. 237; *McGuiness v. Butler*, 159 Mass. 233, 34 N. E. 259, 38 Am. St. Rep. 412; *Gay v. Essex Elec. St. Ry. Co.*, 159 Mass. 242, 34 N. E. 258; *Gay v. Essex Elec. St. Ry. Co.*, 159 Mass. 238, 34 N. E. 186, 38 Am. St. Rep. 415, 21 L. R. A. 448; *Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381. Where a street car company plowed snow up alongside its tracks so as to impede access to property it was held a nuisance. *Ogston v. Aberdeen Dist. Tramways Co.*, (1897) A. C. 111. So

domestic animals of others to the infection or contagion,⁷⁰ or when they are sold to be put with others, to one who is not informed of their condition.⁷¹ The question of liability is one of negligence,⁷² and of the want of good faith.⁷³

Who Responsible. A party is responsible for a nuisance on the ground either, *first*, that he purposely or negligently created it, or, *second*, that he continues it.⁷⁴ And here, as elsewhere in the law of torts, there may be distinct parties equally liable; one, perhaps, for the positive wrong of creating, and the other for the negative wrong of failing to abate.

In general, that party only is responsible for the continuance of a nuisance who has possession and control where it is, and upon whom, therefore, the obligation to remove seems properly to rest. It follows that, as between landlord and tenant, the

salting the tracks and thereby creating a slush injurious to animals. *Ibid.*

70—*Mills v. New York, &c.*, R. R. Co., 2 Rob. 326; affirmed 41 N. Y. 619, note; *Hite v. Blandford*, 45 Ill. 9; *Railway Co. v. Goolsby*, 58 Ark. 401, 24 S. W. 1071; *Costello v. Ten Eyck*, 86 Mich. 348, 49 N. W. 152, 24 Am. St. Rep. 128; *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 756, 47 Am. St. Rep. 653, 26 L. R. A. 638; *Grayson v. Lynch*, 163 U. S. 468, 16 S. C. Rep. 1064, 41 L. Ed. 230. See *Anderson v. Buckton*, 1 Stra. 192; *Barnum v. Vandusen*, 16 Conn. 200. One who is induced to keep a horse with his own, on the false statement that he is not diseased, when he is, may have an action for the communication of the disease to those with which he was placed. *Fultz v. Wycoff*, 25 Ind. 321. The legislature may provide for the killing of diseased animals without compensation but those who execute the law must be prepared to show that animals killed were in the use alone, but also in the fact diseased or they will be liable. *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 850, 10 L. R. A. 116; *Sahr v. Scholle*, 89 Hun, 42, 35 N. Y. S. 97. See *Barrett v. Mobile*, 129 Ala. 179, 30 So. 36, 87 Am. St. Rep. 54.

71—*Mullett v. Mason*, L. R. 1 C. P. 559. See *Jeffrey v. Bigelow*, 13 Wend. 518.

72—See *Fisher v. Clark*, 41 Barb. 329; *Kemmish v. Ball*, 30 Fed. Rep. 759; *Bradsford v. Floyd*, 80 Mo. 207; *Hawks v. Locke*, 139 Mass. 205, 52 Am. Rep. 702; *Selveye v. St. Louis, etc., Ry. Co.*, 135 Mo. 163, 36 S. W. 652; *Croff v. Cresse*, 7 Okl. 408, 54 Pac. 558; *Clarendon Land, etc., Co. v. McClelland Bros.*, 86 Tex. 179, 23 S. W. 576, 1106, 22 L. R. A. 105; *Clarendon Land, etc., Co. v. McClelland Bros.*, 89 Tex. 483, 34 S. W. 98, 35 S. W. 474, 59 Am. St. Rep. 70, 31 L. R. A. 669.

73—See *ante*, p. 917.

74—Where a nuisance is not in

party presumptively responsible is the tenant.⁷⁵ But *the facts when developed, remove many cases from this [*725] presumption, for the very satisfactory reason that there are many cases in which the party out of possession is either in part or exclusively the party in fault. Thus, if the owner of lands, through which a water course runs, erects a dam across it which sets the water back upon the proprietor above, and then leases the lands with the nuisance upon it, he gives with the lease implied permission for the lessee to keep up the dam, and he thus becomes a participant with the lessee in the wrong while the dam is maintained as it was when he gave the tenant possession.⁷⁶ "He transferred it with the original wrong, and his demise affirms the continuance of it. He has also his rent as a consideration for the continuance, and therefore ought to answer the damage it occasions."⁷⁷ And as a general rule the

creation of the structure, the liability attaches to those who caused the erection. *Chenango Bridge Co. v. Lewis*, 63 Barb. 111. Jennings *v. VanSchaick*, 108 N. Y. 530, 15 N. E. 424.

75—*Todd v. Flight*, 9 C. B. (n. s.) 377; *Rich v. Basterfield*, 4 C. B. 783; *Russell v. Shenton*, 8 Q. B. 449; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295. If a tenant before the expiration of his term puts up a fence which injures a child, his surrender does not exonerate him. *Hussey v. Ryan*, 64 Md. 426. A landlord is not liable for injury to tenant's guest's child injured by falling in a hole dug at the tenant's request. *Moore v. Logan, &c., Co.*, 7 Atl. Rep. 198 (Penn.). A tenant from month to month is not liable for nuisance from decay of a privy vault. *Griffith v. Lewis*, 17 Mo. App. 605. But see *Deutsch v. Abeles*, 15 Mo. App. 398. The owner of an apartment house whose janitor opens coal hole for tenant's coal and negligently leaves it unguarded, is liable to a passer by, who falls in.

76—*Roswell v. Prior*, 12 Mod. 635; S. C. 2 Salk, 460, and 1 Ld. Raym. 713; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *Smith v. Elliott*, 9 Penn. St. 345; *Helwig v. Jordan*, 53 Ind. 21, 21 Am. Rep. 189. See *House v. Metcalf*, 27 Conn. 632; *People v. Irwin*, 4 Denio, 129; *Rex v. Pedley*, 1 Ad. & El. 822; S. C. 3 N. & M. 627. If one buys leased land with a nuisance on it of which he knows, and takes rent from the tenant, he is liable for the nuisance. *Pierce v. German, &c., Soc.*, 72 Cal. 180, 13 Pac. 478.

77—*SAFFOLD, J.*, in *Grady v. Wolsner*, 46 Ala. 381, 382. Lessor held liable for a sink in a foot pavement left open in cleaning. *Owings v. Jones*, 9 Md. 108. See *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391. If premises are so constructed or in such condition that the continuance of their use must result in a nuisance the

landlord is liable for a nuisance existing on the premises at the time of the demise.⁷⁸ And so if the premises by reason of defective construction or otherwise are in a condition dangerous to the public.⁷⁹ It has been held to be otherwise, however, where the landlord requires the lessee to covenant to keep the premises in repair, and the injury is one which, though attributable to the condition of the premises when the landlord delivered possession, might have been avoided by care on the part of the tenant.⁸⁰ As is *said in one case, in order to [*726] render a landlord liable in a case of this sort, there must be some evidence that he authorized the continuance of the nuisance; for instance, that he assumed the obligation to re-

landlord is liable. *Fow v. Roberts*, 108 Penn. St. 489; *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159; *Jackman v. Arlington Mills*, 137 Mass. 277. See *Nugent v. Boston, &c., Corp.*, 80 Me. 62, 12 Atl. 797.

78—*Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800; *Harrington v. Douglas*, 181 Mass. 178, 63 N. E. 334; *Hannem v. Pence*, 40 Minn. 127, 41 N. W. 657, 12 Am. St. Rep. 717; *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845; *Wunder v. McLean*, 134 Pa. St. 334, 19 Atl. 749, 19 Am. St. Rep. 702; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 617.

79—*Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. S. 788; *Waterhouse v. Schlitz Brewing Co.*, 12 S. D. 397, 81 N. W. 725; *Waterhouse v. Schlitz Brewing Co.*, 16 S. D. 592, 94 N. W. 587; *Patterson v. Schlitz Brewing Co.*, 16 S. D. 33, 91 N. W. 336.

80—*Phelan v. Fitzpatrick*, 188 Mass. 237; *Cummings v. Ayer*, 188 Mass. 292; *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956. In *Leonard v. Storer*, 115 Mass. 83, 15 Am.

Rep. 76, the roof was so constructed that snow and ice, unless removed, were likely to slide from it into the street, and the injury was actually caused by its sliding off upon a passing traveler. Compare *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318. Where by the burning of a steam mill operated by a lessee other property is damaged, the landlord is liable if when delivered to the lessee the mill was in fact a nuisance, and was under the contract to be used substantially as it then was. He is not, if at that time it was not a nuisance and the repairs were to be made by the lessee. *Burbank v. Bethel, &c., Co.*, 75 Me. 373, 46 Am. Rep. 400. If the injury is caused by the use of premises made by the lessee, as in overcrowding a gallery, sufficient so far as the owner knew, the latter is not liable. *Edwards v. New York, &c., R. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659. The landlord is not liable for a nuisance created by the act or neglect of the tenant. *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304; *Rider v. Clark*, 132 Cal. 382, 64

pair the premises might be a circumstance to show that he authorized its continuance. But there is no such obligation where the landlord has required the tenant himself to assume it.⁸¹ For similar reasons it has been held that one who floods his neighbor's lands by a dam erected on his own, and then conveys his lands with covenants of seizin and of quiet enjoyment, "with the right to flow as far as has hitherto been necessary for the use of the mills on the premises conveyed, the dam remaining at its present height," is liable for the continuance of the nuisance, as having expressly affirmed and encouraged it.⁸² It would

Pac. 564; *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582; *Johnson v. McMillan*, 69 Mich. 36, 36 N. W. 803; *Fehlhauer v. St. Louis*, 178 Mo. 635, 77 S. W. 843; *Langabaugh v. Anderson*, 68 Ohio St. 131, 67 N. E. 286; *Fleischner v. Citizens' Invest. Co.*, 25 Ore. 119, 35 Pac. 174; *Wunder v. McLean*, 134 Pa. St. 334, 19 Atl. 749, 19 Am. St. Rep. 702; *De Laney v. Georgia*, etc., Ry. Co., 585 S. C. 357, 36 S. E. 699, 79 Am. St. Rep. 843; *Texas Loan Agency v. Fleming*, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279. See *Haizlip v. Rosenberg*, 63 Ark. 430, 39 S. W. 60; *Kenny v. Barns*, 67 Mich. 336, 34 N. W. 587; *Spencer v. McManus*, 82 Hun. 318, 31 N. Y. S. 185.

81—*Pretty v. Bickmore*, L. R. 8 C. P. 401. See *Gwynnell v. Eamer*, 32 Law T. Rep. 835; *Todd v. Flight*, 9 C. B. (n. s.) 377; *Harris v. Cohen*, 50 Mich. 324; *Johnson v. McMillan*, 69 Mich. 36, 36 N. W. 803. Nor for danger caused by structure put on by tenant, owner having delivered the premises in safe condition. *Ryan v. Wilson*, 87 N. Y. 471, 41 Am. Rep. 384. See *Texas, &c., Ry. Co. v. Mangum*, 68 Tex. 342, 4 S. W. 617. If a tenant has created a nuisance

during the term, and after it, without abating the nuisance and without entry, the landlord relents to the same tenant, he is liable, though the tenant may agree to repair. *Ingwerson v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109.

82—*Waggoner v. Jermaine*, 3 Denio, 306. See *Lohmiller v. Indian Ford, &c., Co.*, 51 Wis. 683; *Staple v. Spring*, 10 Mass. 72; *Chall v. Eastman*, 18 Minn. 324; *Eastman v. Amoskeag Co.*, 44 N. H. 143, 82 Am. Dec. 201; *Ferman v. Lombard Invest. Co.*, 56 Minn. 166, 57 N. W. 309; *Palmore v. Morris*, 182 Pa. St. 82, 37 Atl. 995, 61 Am. St. Rep. 693; *Townes v. City Council*, 52 S. C. 396, 29 S. E. 851. Where parts of a building are let to several tenants, the landlord is liable to them severally for a water-closet nuisance therein. *Marshall v. Cohen*, 44 Ga. 489. Landlord is liable to subtenant for damage from overflow caused by his servant. *Pike v. Brittan*, 71 Cal. 159, 60 Am. Rep. 527. But he is not liable to one tenant for overflow of properly constructed water closet caused by negligence of another tenant. *Allen v. Smith*, 76 Me. 335.

have been otherwise had the possession passed to others without any evidence of any conveyance or demise; for in such case the evidence that the will of the party accompanied and encouraged the continuance of the nuisance would be want-

[*727] *ing, and the law must refer it to the will of the possessor.⁸³ So the mere letting of a house with a chimney in

it which the owner has constructed, does not render him responsible for a nuisance caused to the occupant of an adjoining tenement by the smoke issuing from the chimney from fires built by this tenant. "It being quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance * * the utmost that can be imputed to the defendant is that he enabled the tenant to make fires if he pleased."⁸⁴

The fact that the party erecting the nuisance remains responsible for its continuance does not excuse the actual possessor. The continuance and every use of that which is in its erection a nuisance is a new nuisance.⁸⁵ And persons may be

83—Blunt *v.* Akin, 15 Wend. 522. This case examines and comments upon Roswell *v.* Prior, 1 Ld. Raym. 713; Beswick *v.* Cander, Cro. Eliz. 402, 520; Cheetham *v.* Hampson, 4 T. R. 318, and they in turn, as well as the principal case, are examined and distinguished in Waggoner *v.* Jermaine, 3 Denio, 306. In Bizer *v.* Ottumwa, &c., Co., 70 Ia. 145, it is held that the injury done by a dam being permanent, the builder solely is liable and that his grantee is not.

84—Rich *v.* Basterfield, 4 M. G. & S. 783, 801. This case examines very fully all preceding cases which might be supposed to have a bearing, and especially Bush *v.* Steinman, 1 B. & P. 404; Burgess *v.* Gray, 1 M. G. & S. 578; Randle-

son *v.* Murray, 8 Ad. & El. 109; Laugher *v.* Pointer, 5 B. & C. 547, and 8 D. & R. 556; Quarman *v.* Burnett, 6 M. & W. 499, and Leslie *v.* Pounds, 4 Taunt. 649, cases where the responsibility of the owner of property for injuries done or occasioned by it was in question. Compare Little Schuykill, &c., Co. *v.* Richards, 57 Pa. St. 142; Moore *v.* Langdon, 2 MacKey 127, 47 Am. Rep. 262. To hold a landlord for the indecent conduct of his tenants, he must have let the premises for a bawdy house or have continued the lease knowing the use. Givens *v.* Van Studiford, 86 Mo. 149, 56 Am. Rep. 421.

85—Staple *v.* Spring, 10 Mass. 72, 74; McDonough *v.* Gilman, 3

*liable for the continuance of a nuisance who have created it on the land of another, even though they have no right to enter to abate it. "That is a consequence of their original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes by showing their inability to remove it without exposing themselves to another action."⁸⁶

A party who comes into possession of lands as grantee or lessee, with a nuisance already existing upon it is not, in general, liable for the continuance of the nuisance until his attention has been called to it, and he has been requested to abate it. "This rule is very reasonable. The purchaser of property might be subjected to very great injustice if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. They are often such as cannot be easily known, except to the party injured. A plaintiff ought not to rest in silence, and presently surprise an unsuspecting purchaser by an action for damages; but should be presumed to acquiesce until he requests a removal of the nuisance."⁸⁷ But

Allen, 264, 267, 80 Am. Dec. 72; the tenant under city authority Nichols *v.* Boston, 98 Mass. 39, 43, 93 Am. Dec. 132; Hadley *v.* Taylor, L. R. 1 C. P. 53; Clancy *v.* Byrne, 56 N. Y. 129, 15 Am. Rep. 391; Pillsbury *v.* Moore, 44 Me. 154, 69 Am. Dec. 91; Morris Canal *v.* Ryerson, 27 N. J. 457; Wasmer *v.* Del., &c., R. R. Co., 80 N. Y. 212, 36 Am. Rep. 608. Where the lessee of premises makes use of an excavation in a sidewalk which was made for the benefit of the premises, but insufficiently covered, he is responsible either severally or jointly with the lessor for a damage to one who is injured by falling into it. Irvine *v.* Wood, 51 N. Y. 224, 10 Am. Rep. 603. But the owner is not liable for the breaking by third persons of the cover of such excavation when it has been properly dug by

86—Thompson *v.* Gibson, 7 M. & W. 456, 462. If one's chimney is negligently weakened, so that it falls upon a passer-by, the owner may be liable, though the weakening was through the unauthorized act of another. But he will have a remedy over. Gray *v.* Boston, &c., Co., 114 Mass. 149, 19 Am. Rep. 324.

87—SHERMAN, J., in Johnson *v.* Lewis, 13 Conn. 307, 33 Am. Dec. 405. See, also, Penruddock's Case, 5 Co. 101; Winsmore *v.* Greenbank, 1 Willes, 577; Woodman *v.* Tufts, 9 N. H. 88; Plummer *v.* Harper, 3 N. H. 88; Carleton *v.*

it seems that if one has already been notified *to remove [*729] the nuisance, and the party giving the notice then sells to another, his alienee may sue without giving notice himself.⁸⁸ And notice is not necessary in any case where the alienee is chargeable with some personal duty or obligation cast upon him by law, or where the nuisance is immediately dangerous to life or health.⁸⁹

Redington, 21 N. H. 291; Noyes *v.* Stillman, 24 Conn. 15; Snow *v.* Cowles, 26 N. H. 275; Eastman *v.* Amoskeag Co., 44 N. H. 143, 82 Am. Dec. 201; Pierson *v.* Glenn, 14 N. J. 36; Beavers *v.* Trimmer, 25 N. J. 97; Walter *v.* County Commissioners, 35 Md. 385; Bonner *v.* Wilborn, 7 Ga. 296; Dodge *v.* Stacy, 39 Vt. 548; Conhocton Stone Road *v.* Buffalo, &c., R. R. Co., 51 N. Y. 573, 10 Am. Rep. 646; Groff *v.* Ankenbrandt, 19 Ill. App. 148; Groff *v.* Ankenbrandt, 124 Ill. 51, 15 N. E. 40, 7 Am. St. Rep. 342; Fenter *v.* Toledo, etc., R. R. Co., 29 Ill. App. 250; Staples *v.* Dickson, 88 Me. 362, 34 Atl. 168; Sloggy *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; Ferman *v.* Lombard Invest. Co., 56 Minn. 166, 57 N. W. 309; Townes *v.* City Council, 52 S. C. 396, 29 S. E. 851; Philadelphia, etc., R. R. Co. *v.* Smith, 64 Fed. 679, 12 C. C. A. 384; but if he has notice of it, a request to abate is unnecessary. Dickson *v.* Chicago, &c., Co., 71 Mo. 575; Buesching *v.* St. Louis, &c., Co., 73 Mo. 219, 39 Am. Rep. 503, case of unguarded area near street line. But where a pipe, which one neither uses nor repairs, was upon premises when bought, and water from another's part of the building is discharged by it on a sidewalk and there freezes, the

owner is not liable to one injured by slipping on the ice, unless he has been requested to abate the pipe. Wenzlick *v.* McCotter, 87 N. Y. 122. And where there is a pit near a highway when it is dedicated, there is no duty in the owner to abate it, for neglect of which an indictment lies. State *v.* Society, &c., 44 N. J. L. 502.

88—Caldwell *v.* Gale, 11 Mich. 77. See Brown *v.* Cayuga, &c., R. R. Co., 12 N. Y. 486.

89—Jones *v.* Williams, 11 M. & W. 176; Irvine *v.* Wood, 51 N. Y. 224, 10 Am. Rep. 603. Where a nuisance consists in continuing the obstruction of a stream by a highway, an action will not lie against the county commissioners unless there has been on their part some active participation in its continuance, or some positive act evidencing its adoption. Walter *v.* County Commissioners, 35 Md. 385. See Bond *v.* Smith, 44 Hun, 219; Buesching *v.* St. Louis, &c., Co., 73 Mo. 219, 39 Am. Rep. 503. The rule as to notice does not apply where the nuisance is an obstruction in a highway. Matthews *v.* Miss., &c., Ry. Co., 26 Mo. App. 75. Where an unsecured awning over a street is forbidden, a landlord is liable if one put up by a former owner is used by his tenant. Jessen *v.* Sweigert, 66 Cal. 182.

Where the nuisance consists in a dangerous building, which was originally constructed properly, and the condition of the structure has been changed so as to render it injurious or dangerous by *vis major*, as by fire, or by the act of a third person, which the owner had no reason to anticipate, he cannot be held liable, or bound to make the structure safe until he has had a reasonable time after it has so become dangerous, to take the necessary precaution.⁹⁰

A mere agent or servant is not liable for the continuance of a nuisance on the land of his master or employer,⁹¹ unless he is guilty of some distinct wrongful act, or of personal negligence, from which injury flows.⁹²

Who May Complain. The party who at the time suffers the inconvenience of a nuisance is entitled to complain of it, and it is immaterial whether it was or was not a nuisance to him in its origin. Therefore, it is of no importance to the right of *action that the plaintiff has come into the neighborhood since the nuisance was created; he has the right to locate himself wherever he can do so to his satisfaction, and no one can have the authority to set limits to his choice of location by interposing something which is offensive. Moreover, it would detract very seriously from the value of property if the owner, desiring to dispose of it, could not transfer all his rights, including his right to protection in its complete enjoyment, but must, when a nuisance is created near him, either await the result of proceedings for its abatement, or dispose of his land with the nuisance practically assented to, and for a price which the nuisance has assisted in establishing. Nothing can be plainer than if the grantor could have complained when he conveyed, the grantee may complain afterwards; and to

90—*Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6, citing L. R. 10 Exch. 255, and 1 Exch. Div. 1; *Gray v. Harris*, 107 Mass. 492.

91—*Brown Paper Co. v. Dean*, 123 Mass. 267; *Stone v. Cartwright*, 6 T. R. 411.

92—*Carleton v. Reddington*, 21 N. H. 291; *Brown v. Lent*, 20 Vt. 529. An independent contractor is liable as well as the owner if an injury is caused by a falling wall in a building put up contrary to an ordinance. *Walker v. McMillan*, 6 Can. S. C. R. 241.

whatever use the grantor might have put the land, as being suitable and proper for the locality, the grantee is at liberty to choose and adopt.⁹³ Nevertheless, if one were to purchase an estate in the neighborhood of a nuisance, for the express purpose of litigation, and should demand the extraordinary process of injunction to put a stop to another's business, it may be that the court of equity, in its discretion, would refuse him this relief, while conceding his undoubted right to a remedy in damages.⁹⁴ It is held that a railroad company cannot enjoin the maintenance of saloons near its road as a nuisance, on the ground that its employes are made drunk by the liquor sold there and unfit for work, for the reason that a corporation can only enjoin a nuisance on the ground of an injury to its property.^{94a}

It is a familiar principle that no lapse of time can confer the right to maintain a nuisance as against the State.⁹⁵ On the other hand where a nuisance is purely private and concerns only the one person or the few who are injured, its maintenance for the period of prescription, without interruption will bar any subsequent suit.⁹⁶ There still remains the case of a public

- 93—*St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Bliss v. Hall*, 4 Bing. (N. C.) 183; *King v. Morris, &c.*, R. R. Co., 18 N. J. Eq. 397; *Gilbert v. Showerman*, 23 Mich. 448; *Bushnell v. Robeson*, 62 Ia. 540; *Angel v. Penn. R. R. Co.*, 38 N. J. Eq. 58; *Hurlbut v. McKone*, 55 Conn. 31, 44, 10 Atl. 164, 3 Am. St. Rep. 17; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 25 Am. St. Rep. 595, 9 L. R. A. 737; *People v. Detroit White Lead Works*. 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722. If one's act contributes to the creation of the nuisance complained of, he cannot recover. *Richards v. Waupun*, 59 Wis. 45.
- 94—*Edwards v. Allouez Min-*
- ing Co.
- 94a—*Northern Pac. R. R. Co. v. Whalen*, 149 U. S. 157, 13 S. C. Rep. 822, 37 L. Ed. 686.
- 95—*United States v. Hoar*, 2 Mason, 311; *State v. Rankin*, 3 S. C. (N. s.) 438, 16 Am. Rep. 737; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709; *Commonwealth v. Upton*, 6 Gray, 473; *Commonwealth v. McDonald*, 16 S. & R. 390; *Commonwealth v. Alburger*, 1 Whart. 469; *State v. Phipps*, 4 Ind. 515; *Elkins v. State*, 2 Humph. 543; *State v. Franklin Falls Company*, 49 N. H. 240, 6 Am. Rep. 513; *Philadelphia, &c., R. R. Co. v. State*, 20 Md. 157; *Driggs v. Phillips*, 103 N. Y. 77.
- 96—*Elliotson v. Feeltham*, 2

nuisance, *not complained of by the State but by those [*731] to whom it works a special and peculiar injury; and whether the right to maintain it as against such persons can be gained by lapse of time may possibly be open to some question. It would seem plain that it could not be as against any one who had not personally been a sufferer from the nuisance for the whole period and while the nuisance was maintained without change. In other words, the prescription would run against individuals, and one could lose his action only because he had failed to complain, having had the whole period of prescription in which he was at liberty to do so. Therefore persons coming newly within the evil influence of the nuisance might complain when others could not. Moreover, if the injury was not constant, but could only arise occasionally, there would be no room for the application of the doctrine of prescription. Thus, if the nuisance consisted in an obstruction to navigation, no one could maintain a personal action until he had occasion to make use of the public right and found it obstructed; and his failing to bring suit for that particular injury would be a waiver only of such right of action as he then had, but nothing more, and if another injury should be received more than twenty years subsequently, the fact that he had once abstained from bringing suit for a similar wrong could have no bearing whatever upon his right of action. And in any case of a public nuisance from which individual injury was received, it would seem anomalous —to say the least—that a portion of the sufferers should be at liberty to bring private suits and another portion not, or that a land owner who had long lived near it should be precluded, but might sell to another who should come in with ample right. On the whole the better doctrine would seem to be, that the acquisition of rights by prescription can have nothing to do with the case of public nuisances, either when the State or when individuals complain of them.⁹⁷

Bing. (N. C.) 134; Carlyon v. 40 Md. 1; Crosby v. Bessey, 49 Me. Lovering, 1 H. & N. 784; Johns v. 539, 77 Am. Dec. 271; Baldwin v. Stevens, 3 Vt. 308; Bolivar Manuf. Calkins, 10 Wend. 167; Stiles v. Co. v. Neponset Manuf. Co., 16 Hooker, 7 Cow. 266. Pick. 241; Gladfelter v. Walker, 97—See Folkes v. Chad, 3 Doug.

[*732] ***Private Injury from Public Nuisance.** When the complaint is that the plaintiff has been injured in respect to his right to enjoy in common with all others some public easement or privilege, it becomes necessary for him to show, *first*, that the public easement or privilege exists; and, *second*, that he has been hindered or obstructed in the common right to enjoy it. To show both is necessary to his action, because the public wrong must be redressed at the suit of the State and not of an individual, and the fact that a public wrong is suffered creates no presumption of individual injury.⁹⁸

It being found that a public easement exists, it may then appear, perhaps, that what is complained of has been authorized by the State. If so, no action can be maintained on the assumption that what is thus allowed is a public nuisance, for that cannot be a public nuisance that the State assents to and authorizes. It would be a contradiction in terms to say that the State assents to a certain act, and yet that the act constitutes an offense against the State.⁹⁹ Therefore, the State having, in some form, provided for and created a certain easement, may at its will aban-

340; *Weld v. Hornby*, 7 East, Houck *v. Wachter*, 34 Md. 265, 6 195; *Simmons v. Cornell*, 1 R. I. 519; *Knox v. Chaloner*, 42 Me. 150; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *Renwick v. Morris*, 3 Hill, 621; S. C. 7 Hill, 575; *Kellogg v. Thompson*, 66 N. Y. 88; *Veazie v. Dwinel*, 50 Me. 479; *Lewis v. Stein*, 16 Ala. 214, 1 Am. Rep. 177; *Stoughton v. Baker*, 4 Mass. 522; *Arundel v. McCulloch*, 10 Mass. 70; *Woodruff v. North Bloomfield, &c., Co.*, 18 Fed. Rep. 753, and cases cited at p. *788. In *New Salem v. Eagle Mills Co.*, 138 Mass. 8, it is held that while a private nuisance may be prescribed for though it is a public nuisance as well, yet a public nuisance from which special injury is suffered may not be.

98—*Brown v. Perkins*, 12 Gray, 89; *Fort v. Groves*, 29 Md. 188; *Everett v. Marquette*, 53 Mich. 450.

99—*Commonwealth v. Reed*, 34 Pa. St. 275, 75 Am. Dec. 661; *Danville, &c., R. R. Co. v. Commonwealth*, 73 Pa. St. 29; *People v. Gaslight Co.*, 64 Barb. 55. A city may not abate as a nuisance an opening in a sidewalk which it has authorized, though afterward it has ordered it closed.

don it, or change it to some other easement, or restrict or enlarge the use of it, and generally do with the creature of its authority what it pleases. A common highway may thus be qualified by the laying of a railway track upon it;¹ a

1—Danville, &c., R. R. Co. v. Commonwealth, 73 Pa. St. 29; Commonwealth v. Erie & N. E. R. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Commonwealth v. Old Colony, &c., R. R. Co., 14 Gray, 93; Milburn v. Cedar Rapids, 12 Iowa, 246; Randle v. Pacific R. R. Co., 65 Mo. 325; Williams v. N. Y. Cent. R. R. Co., 16 N. Y. 97; Wager v. Troy Union R. R. Co., 25 N. Y. 526; Sou. Car., &c., R. R. Co. v. Steiner, 44 Ga. 546; Easton v. New York, &c., R. R. Co., 24 N. J. Eq. 49; Chicago, &c., Co. v. Loeb, 118 Ill. 203; State v. Louisville, &c., Co., 86 Ind. 114; Garnett v. Jacksonville, &c., Co., 20 Fla. 889; Cook v. Burlington, 36 Ia. 357; Moses v. Pittsburgh, etc., R. R. Co., 21 Ill. 516; Porter v. North Missouri R. R. Co., 33 Mo. 128; Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. 332; Weriges v. St. Louis, etc., R. R. Co., 35 La. Ann. 641; Hepting v. New Orleans Pac. R. R. Co., 36 La. Ann. 898; Morris, etc., R. R. Co. v. Newark, 10 N. J. Eq. 352. A lot owner who does not own the fee of the street has an easement of light therefrom which he may not be deprived of without compensation by the building of an elevated railroad. Story v. New York El. R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146. Abutting owners have easements of light, air and access which cannot be interfered with without making compensation. Haynes v. Thomas, 7 Ind. 38; Indiana, etc., Ry. Co. v. Eberle, 110 Ind. 542; Chicago v. Union Bldg. Ass., 102 Ill. 379; Crawford v. Delaware, 7 Ohio St. 459; Jackson v. Jackson, 16 Ohio St. 163; Lackland v. North Mo. R. R. Co., 31 Mo. 180; Anderson v. Turbeville, 6 Coldw. 150; People v. Kerr, 27 N. Y. 188; Lahr v. Met. El. R. R. Co., 104 N. Y. 268; Burlington, etc., R. R. Co. v. Rein-hacke, 15 Neb. 279; Denver v. Bayer, 7 Colo. 113. The erection of telephone poles in a city street is not a new servitude of which an abutter can complain. Julia Bld. Ass. v. Bell Telephone Co., 88 Mo. 258, 57 Am. Rep. 398; Pierce v. Drew, 136 Mass. 75; St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S. W. 197; Irwin v. Great So. Tel. Co., 37 La. Ann. 63; People v. Eaton, 100 Mich. 208, 59 N. W. 145; Hershfield v. Rocky Mt. Bell Tel. Co., 12 Mont. 102, 39 Pac. 883; Cater v. N. W. Tel. Exch. Co., 60 Minn. 539. But the weight of authority is opposed to these cases and holds that a line of poles and wires is a new servitude on a street. Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; Eels v. Am. Tel. & Tel. Co., 143 N. Y. 133, 38 N. E. 202; Stowers v. Postal Tel. Cable Co., 68 Miss. 559, 9 So. 356; Dailey v. State, 51 Ohio St. 348, 37 N. E. 710; Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 106; Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690; Nicoll v. New York, etc., Co., 62 N. J. L. 733, 62 N. J. L. 156; Pacific Postal Tel. Cable Co. v.

[*733] navigable stream may be *bridged or dammed;² awnings may be permitted above a city street and covered areas below it; navigation companies may be given special privileges in the public streams of the State,³ and so on. In these cases the State only restricts or narrows its own right, and the right of the individual, which is only a part of the public right, can be no broader than that which the State has retained.

But while the State may restrict its own right, it cannot restrict or take away the rights which are purely individual, even though they are intimately associated with the public right. An example has been given in another place of a railroad laid down in a public highway by State consent, and it was stated that this consent would not empower the railroad company to cut off an adjacent land owner from convenient access to the street. This right of access is an individual, not a public right, and the land owner, in claiming damages for being deprived of

it, is complaining not of a public but of a private [*734] nuisance.⁴ So no regulation *of the right of navigation can lawfully take from a riparian proprietor his

Irvine, 49 Fed. 113. See generally, 1 Lewis Em. Dom. chap. V. Nor is the digging by municipal authorities of a ditch in a public street for the purpose of laying water pipe a nuisance *per se*. Smith *v.* Simmons, 103 Pa. St. 32. One buying land adjoining a street takes subject to the use of the street for all appropriate purposes, e. g., the lawful use of it by a ditch company. State, &c., Ditch Co. *v.* Anderson, 8 Col. 131; but not subject to a subsequent use of it by the city for the erection of a tank and pumping engine. Morrison *v.* Hinkson, 87 Ill. 587, 29 Am. Rep. 77.

A pier built in navigable water without legal authority is a nuisance *per se*. People *v.* Vanderbilt, 38 Barb. 282. See Plankford Co. *v.* Elmer, 9 N. J. Eq. 754;

Franklin Wharf Co. *v.* Portland, 67 Me. 46, 24 Am. Rep. 1.

A street railway constructed without authority of law is a nuisance. Denver, &c., R. Co. *v.* Denver City R. Co., 2 Col. 673.

2—Arimond *v.* Green Bay, &c., Co., 31 Wis. 316; Trenton Water Power Co. *v.* Raff, 36 N. J. 335; Lee *v.* Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59. See 1 Lewis Em. Dom. chap. IV.

3—Muskegon Booming Co. *v.* Evart Booming Co., 34 Mich. 462; People *v.* Ferry Co., 68 N. Y. 71.

4—See Stone *v.* Fairbury, &c., R. R. Co., 68 Ill. 394, 18 Am. Rep. 556; Grand Rapids, &c., R. R. Co. *v.* Heisel, 38 Mich. 62; Elizabeth, &c., R. R. Co. *v.* Combs, 10 Bush, 382, 19 Am. Rep. 67; Goggans *v.* Myrick, 131 Ala. 286, 31 So. 22; Gardner *v.* Stroever, 89 Cal. 26,

water front and the right to make use of it for the purposes of navigation;⁵ nor can any special privilege which is conferred, to make use of public waters, empower the beneficiaries to flood the lands of individuals.⁶ The State in all these cases precludes

26 Pac. 618; *Hargso v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106; *Jacksonville, etc., Ry. Co. v. Thompson*, 34 Fla. 346, 16 So. 282, 26 L. R. A. 410; *Brunswick, etc., R. R. Co. v. Hardey*, 112 Ga. 604, 37 S. E. 888, 52 L. R. A. 396; *Harvey v. Railroad Co.*, 90 Ga. 66, 15 S. E. 783; *Stufflebaum v. Montgomery*, 3 Idaho, 20, 26 Pac. 125; *O'Brien v. Central Iron & S. Co.*, 158 Ind. 218, 63 N. E. 302, 92 Am. St. Rep. 305, 57 L. R. A. 508; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858. If a track has been laid lawfully in part of a street, the laying of additional tracks which cut off access to a lot is actionable. *Pittsburg, etc., R. R. Co. v. Reich*, 101 Ill. 157. Permission to use a street for a track does not cover the use of the street as a switching yard. *Penn. R. R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1. See *Bell v. Edwards*, 37 La. Ann. 475; *Mahady v. Bushwick, etc., R. R. Co.*, 91 N. Y. 148, 43 Am. Rep. 661; *Kavanaugh v. Mobile, etc., Co.*, 78 Ga. 271, 2 S. E. 636; and see cases p. 741, n. 74.

5—*Ryan v. Brown*, 18 Mich. 196. See *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573; *Arundel v. McCulloch*, 10 Mass. 70; *Washburn, etc., Co. v. Worcester*, 116 Mass. 458; *Wood v. Esson*, 9 Can. S. C. R. 239.

6—*Trenton Water Power Co. v. Raff*, 36 N. J. 335; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich.

308; *Middleton v. Booming Co.*, 27 Mich. 533; *Thunder Bay, etc., Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Muskegon Booming Co. v. Evart Booming Co.*, 34 Mich. 462; *Brown v. Dean*, 123 Mass. 254; *Lee v. Pembroke Iron Co.*, 57 Me. 481, 2 Am. Rep. 59. In *Harold v. Jones*, 86 Ala. 274, 5 So. 438, 3 L. R. A. 406, the court says: “The right to use water courses as highways, and the right to use highways upon land, are analogous, and depend on the same general principles. The general rule is not controverted, that an individual may maintain an action to recover damages, who has suffered special injury in consequence of obstructions to a highway, whether upon land or water, which constitute public nuisances. Any and all of the public have an equal right to the reasonable use of a highway; but the enjoyment by one necessarily interferes to some extent, for the time being, with its free and unimpeded use by others. No precise definition of what constitutes a reasonable use, adapted to all cases, can be laid down. Whether or not any particular use is reasonable, depends on the character of the highway, its location and purposes, and the necessity, extent and duration of the use, under all the attendant and surrounding circumstances. The general limitations upon the use are, that when it constitutes an obstruction to the highway, it must be of

complaint for anything which, but for the license, would be a State offense, but it cannot go further.⁷

Objects in the highway, which do not prevent passage,^[*735] *sage, but render it dangerous from the tendency to frighten horses, are nuisances.⁸ And so are obstructions

a partial and temporary character, justified by necessity and convenience, and in the ordinary and contemplated use of the highway. It must not be incompatible with the reasonable free use of others, who may have occasion to travel or transport over it, and the obstruction must not be continued longer than the continuance of the necessity and a reasonable time for its removal." p. 276-7.

7—Danville, &c., R. R. Co. v. Com. 73 Pa. St. 29; Williams v. N. Y. Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Wager v. Troy Union R. R. Co., 25 N. Y. 526; People v. Kerr, 27 N. Y. 188; Starr v. Camden, &c., R. R. Co., 24 N. J. 592; Trenton Water Power Co. v. Raff, 36 N. J. 335. It is no nuisance for a railroad to cross a highway at grade where the proper authority has been obtained therefor, even though the railroad might have been carried above or below the highway. Town Council of Johnston v. Providence, &c., R. R. Co., 10 R. I. 365. Nor, when a railroad company is empowered to operate its road in the highway, is it any nuisance to stop a train therein for the purpose of loading or unloading a car, provided it be done in such a prudent manner as not unreasonably to interfere with the rights of those having occasion to use the highway for ordinary purposes of travel. Math-

ews v. Kelsey, 58 Me. 56, 4 Am. Rep. 248.

If by legislative authority a dam is erected across tide waters, which causes injury to an ancient mill, the proprietor is entitled to redress at the common law, if the statute provides for none. Lee v. Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59, citing many cases.

If a stream is navigable for a single purpose only—for example for rafting—the bank proprietor, as against the public, is only bound not to obstruct it in that regard. Morgan v. King, 18 Barb. 277. And see, as to obstructing streams Knox v. Chaloner, 42 Me. 150; Veazie v. Dwinel, 50 Me. 479; Parks v. Morse, 52 Me. 260; Amoskeag Manuf. Co. v. Goodale, 46 N. H. 53. Obstructions to navigation by the casting of slabs into the stream to float away, may give rise to private rights of action. Washburn v. Gilman, 64 Me. 163, 18 Am. Rep. 246; Haskins v. Haskins, 9 Gray, 390.

8—See Cook v. Charlestown, 98 Mass. 80; Kingsbury v. Dedham, 13 Allen, 186, 90 Am. Dec. 191; Horton v. Taunton, 97 Mass. 266, n.; Foshay v. Glen Haven, 25 Wis. 288, 3 Am. Rep. 73; Dimock v. Suffield, 30 Conn. 129; Young v. New Haven, 39 Conn. 435; Ayer v. Norwich, 39 Conn. 376, 12 Am. Rep. 396; Morse v. Richmond, 41 Vt. 435, 98 Am. Dec. 600; Piollet v. Simmers, 106 Pa. St. 95, 51 Am.

which render the highway unsafe.⁹ But when the object is something employed to facilitate travel or traffic on the highway, the question whether it is a nuisance is seen to be one which is not susceptible of being determined on the single consideration of its tendency to frighten horses of even ordinary gentleness. A traction steam engine on the common highway, for example, is no more a wrong because of its tendency to frighten horses than is a bridge over a navigable river a wrong because of its tendency to delay vessels. The one may be a wrong under some circumstances, and so may the other; but it is equally true that both may be proper and lawful under other circumstances. It would be difficult to pass through the streets of any considerable city without encountering objects moving along them which are well calculated to frighten horses of ordinary gentleness until they have become accustomed to them, but which, nevertheless, are used and moved about for proper and lawful purposes. The steam engine for protection against fire may be mentioned as one of these; and though this is usually owned and moved about by public authority, there can be no doubt of the right of a private individual to keep and use one for his own purposes, and to take it through the streets when necessary. But other things which are sometimes moved on

Rep. 496; *Wilkins v. Day L. R.*, 12 Q. B. D. 110; *Brownell v. Troy, &c., R. R. Co.*, 55 Vt. 218; *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383; *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17; *Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 124; *Wabash, &c., Ry. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696; *Lynn v. Hooper*, 93 Me. 46, 44 Atl. 127, 47 L. R. A. 752. Where the defendant allowed his pigs to run at large in the street and, one coming suddenly out of the bushes frightened the plaintiff's horse, he was held liable. *Leonard v. Doherty*, 174 Mass. 565, 55 N. E. 461. The habitual failure of a railroad company to make signals at dangerous crossings may be a nuisance. *Louisville, &c., R. R. Co. v. Commonwealth*, 13 Bush, 388. 9—*Smith v. Davis*, 22 App. D. C. 298; *Mahar v. Stener*, 170 Mass. 454, 49 N. E. 741; *Sullivan v. Manus*, 19 App. Div. 167, 45 N. Y. S. 1079; *Lawton v. Olmstead*, 40 App. Div. 544, 58 N. Y. S. 36; *Kramer v. Southern Ry. Co.*, 127 N. C. 328, 37 S. E. 468, 52 L. R. A. 359; *Kessler v. Berger*, 205 Pa. St. 289, 54 Atl. 887, 61 L. R. A. 61; *Busse v. Rogers*, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183. A door or gate which swings across the sidewalk is a nuisance. *Holroyd v. Sheridan*, 53 App. Div. 14, 65 N. Y. S. 442.

wheels along the streets are equally alarming to horses when first used. Wild beasts collected and moved about the country for exhibition are even more likely to frighten domestic animals. So steam power is admitted as a matter of necessity on street railways; even on the roads where cars move above the heads of the people and over the common vehicles; and these are

not nuisances, but if injury occurs from their use, the [*736] question the injury presents is *whether, under the circumstances, there is fault imputable to some one, and if so, who should be held accountable for it.¹⁰

What is a Special Injury. It is a special injury if one has a dock on navigable water, and the city, by running a sewer into it, causes it to be filled up, or the entrance materially obstructed.¹¹ So it is a special injury to the plaintiff if having occasion to pass along a navigable stream, he finds a barge moored across it which prevents his boat passing,¹² or a bridge which has been constructed without permission and which renders his passage inconvenient or impossible,¹³ or if in passing

10—*Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522, where in a note the following cases under English statutes regulating the use of steam engines for the protection of travel on the highway are referred to. *Watkins v. Reddin*, 2 F. & F. 629; *Smith v. Stokes*, 4 B. & S. 84; *Harrison v. Leaper*, 5 Law Times Rep. (n. s.) 640. Compare *Favor v. Boston, &c., R. R. Co.*, 114 Mass. 350, 19 Am. Rep. 364.

11—*Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654; *S. C. 9 R. I.* 455; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470. See *French v. Conn. River, &c., Co.*, 145 Mass. 261, 14 N. E. 113. See *Garritee v. Baltimore*, 52 Md. 422; *Langdon v. New York*, 93 N. Y. 129; *Butcher's Ice & C. Co. v. Philadelphia*, 156 Pa. St. 54, 27 Atl. 376.

12—*Rose v. Miles*, 4 M. & S. 101. See *Walker v. Shepardson*, 2 Wis. 282. Or a boom. *Dudley v. Kennedy*, 63 Me. 465; *Union Mill Co. v. Shores*, 66 Wis. 476; *Gifford v. McArthur*, 55 Mich. 535. See *McPheters v. Moose River, &c., Co.*, 78 Me. 329; *Page v. Mille Lacs Lumber Co.*, 53 Minn. 492, 55 N. W. 608, 1119.

13—*Arundel v. McCulloch*, 10 Mass. 70; *Gates v. Nor. Pac. R. R. Co.*, 64 Wis. 64; *Little Rock, &c., R. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277. See *Alabama v. Sipsey Riv. Nav. Co. v. Ga. Pac. Ry. Co.*, 87 Ala. 154, 6 So. 73; *Clark v. Chicago, etc., Ry. Co.*, 70 Wis. 593, 36 N. W. 326, 5 Am. St. Rep. 187. So if driftwood gathers against bridge piers. *St. Louis Co. v. Meese*, 44 Ark. 414. But, see *Clark v. Chicago, &c., Ry. Co.*, 70 Wis. 593,

along the highway he finds himself stopped by a fence put up without authority,¹⁴ or kept up after the authority once given has expired.¹⁵ When an obstruction in a street interferes with access to the plaintiff's property, there is a special damage.¹⁶ And if a street is obstructed to one side of the plaintiff's property and thereby his business is injured or his property diminished in value, he has suffered a special damage, though immediate access to his property to and from the highway is not affected.¹⁷ So the public nuisance of an offensive mill dam is a

36 N. W. 326; *Blackwell v. Old Colony R. R. Co.*, 122 Mass. 1. 26 Pac. 125; *Rigney v. Chicago, 14—Goggans v. Myrick*, 131 Ala. 286, 31 So. 22; *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341; *Knowles v. Pennsylvania R. R. Co.*, 175 Pa. St. 623, 34 Atl. 974, 52 Am. St. Rep. 860; *Gregory v. Commonwealth*, 2 Dana, 417. But see *Sohn v. Cambern*, 106 Ind. 302; *Powell v. Bunger*, 91 Ind. 64; *Holmes v. Corthell*, 80 Me. 31, 12 Atl. 730, and note; *Zettel v. West Bend*, 79 Wis. 316, 48 N. W. 379, 24 Am. St. Rep. 715.

15—*Adams v. Beach*, 6 Hill, 271. See *Allen v. Lyon*, 2 Root, 213; *Columbus v. Jaques*, 30 Ga. 506.

16—*Gardner v. Stroever*, 89 Cal. 26, 26 Pac. 618; *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264; *Brakken v. Minn., &c.*, Ry. Co., 29 Minn. 41; *Wilder v. DeCou*, 26 Minn. 10.

17—*Harvey v. Georgia Southern, etc.*, R. R. Co., 90 Ga. 66, 15 S. E. 783; *Brunswick, etc., R. R. Co. v. Hardy*, 112 Ga. 604, 37 S. E. 888, 52 L. R. A. 396; *Stuffelbaum v. Montgomery*, 3 Idaho, 20,

102 Ill. 64; *Winnetka v. Clifford*, 201 Ill. 475, 66 N. E. 384; *O'Brien v. Central Iron & S. Co.*, 158 Ind. 218, 63 N. E. 302, 92 Am. St. Rep. 305, 57 L. R. A. 508; *Brakken v. Minneapolis, etc.*, R. R. Co., 29 Minn. 41, 31 Minn. 45; *Glaessner v. Anheuser-Busch Brewing Co.*, 100 Mo. 508, 13 S. W. 707; *Republican Val. R. R. Co. v. Fellons*, 16 Neb. 169; *Atchison, etc., R. R. Co. v. Boener*, 34 Neb. 240, 51 N. W. 842; S. C. 45 Neb. 453, 63 N. W. 787; *O'Brien v. Pennsylvania, etc.*, R. R. Co., 119 Pa. St. 184, 13 Atl. 74; *Mellor v. Philadelphia*, 160 Pa. St. 614, 28 Atl. 991; *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214; *Union Pac. R. R. Co. v. Benson*, 19 Colo. 285, 35 Pac. 544. But see *San Jose Ranch Co. v. Brooks*, 74 Cal. 463, 16 Pac. 250; *Jacksonville, etc., Ry. Co. v. Thompson*, 34 Fla. 346, 16 So. 282, 26 L. R. A. 410; *Davis v. County Comrs.*, 153 Mass. 218, 26 N. E. 848; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Fairchild v. St. Louis*, 97 Mo. 85, 11 S. W. 60; *Canman v. St. Louis*, 97 Mo. 92, 11 S. W. 60; *Gates v. Kansas City, etc.*, R. R. Co., 111 Mo. 28, 19 S. W. 957; *Chicago v. Union Bldg. Ass.*, 102 Ill. 379. See *Barnum v. Minn., &c., Ry. Co.*, 33 Minn. 365;

special and peculiar injury to the man whose residence is near it, and the comfort of whose home is destroyed thereby.¹⁸ So any dangerous excavation made in the public way is a nuisance. It is only necessary for the plaintiff in these cases to show how he has been injured by the nuisance, and to distinguish his injury from that suffered by the public at large, and he brings

himself within the rules entitling him to redress.¹⁹ So [*737] if one's premises are situate *upon public navigable water, whatever obstruction in the stream tends specially to interfere with his access to the water is an actionable injury.²⁰ And in general it may be sufficient to say that to entitle

Sheedy v. Union, &c., Works, 25 v. Detroit, &c., R. R. Co., 56 Mich. Mo. App. 527; *Crook v. Pitcher*, 61 172.

Md. 510. It is not a special injury if a street in front of a lot is narrowed. *Bigley v. Nunan*, 53 Cal. 403; *Brown v. Board of Supervisors*, 124 Cal. 274, 57 Pac. 82. *Contra, Rensselaer v. Leopold*, 106 Ind. 29; *Lawrence v. Moyer*, etc., of New York, 2 Barb. 577; Mt. Carmel *v. Bell*, 52 Ill. App. 427; Mt. Carmel *v. Shaw*, 52 Ill. App. 429. See *Williams v. Casey*, 73 Ia. 194, 34 N. W. 813. Nor if the adjacent sidewalk is encroached upon. *Marini v. Graham*, 67 Cal. 130, and cases. Nor if a landing on a street used by a ferryman without any contract right is obstructed by a bridge. *Pittsburgh, &c., R. R. Co. v. Jones*, 111 Pa. St. 204. But it is held a special injury if, in case of a store, an obstruction diverts travel from the street. *Platt v. Chicago, &c., Ry. Co.* 74 Ia. 127, 37 N. W. 107; or if a lot is lowered in value by the obstruction. *Shepard v. Barnett*, 52 Tex. 638. If a railroad train obstructs a road crossing in violation of statute, one thereby hindered from taking another train suffers special injury. *Patterson*

18—*Nuisances producing noxious gases and odors*. *Lind v. San Luis Obispo*, 109 Cal. 340, 42 Pac. 437; *Fisher v. Zumwalt*, 128 Cal. 493, 61 Pac. 82; *Harley v. Merrill Brick Co.*, 83 Ia. 73, 48 N. W. 1000; *Milhisier v. Willard*, 96 Ia. 327, 65 N. W. 325.

19—See case of a warehouse projecting into the street and obstructing the view from the plaintiff's warehouse. *Stetson v. Paxton*, 19 Pick 147, 31 Am. Dec. 123. Of a bridge built so as to prevent entrance to a building. *Knox v. New York*, 55 Barb. 404. Of a wall extended into the street. *Schulte v. N. P. T. Co.*, 50 Cal. 592.

20—*Dobson v. Blackmore*, 9 Q. B. 991; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Larson v. Furlong*, 63 Wis. 323; *Wood v. Esson*, 9 Can. S. C. R. 239, where the obstruction was under an invalid government permission. *Gould on Waters*, sec. 122-127. Where the defendant obstructed a stream by a bridge which prevented the plaintiff from navigating below to its manufacturing plant above, it was held that the plaintiff

lim to an action it is only necessary that he suffer some peculiar injury, differing from that suffered by the community at large.²¹ "The injury which may entitle a private person to maintain an action to abate a public nuisance must be an injury to plaintiff's private property, or to a private right incidental to such private property; and where the injury is of this nature the injured person may maintain the action, although the private rights of an indefinite number of other persons may be infringed and injured in the same way by the same nuisance."²²

***Continuity of the Wrong.** A nuisance continued is [*738] a fresh nuisance every day it is suffered to remain unabated. New suits for the damage caused by its continuance may therefore be brought from day to day.²³

suffered a special damage. Farmers Co-Op. Mfg. Co. v. Albemarle, etc., R. R. Co., 117 N. C. 579, 23 S. E. 43, 53 Am. St. Rep. 606, 29 L. R. A. 700. See generally on the right to recover for interfering with access to the plaintiff's property by water, whether immediately in front of it or otherwise. 1 Lewis Em. Dom. §§ 65-85.

21—Holmes v. Cortell, 80 Me. 31, 12 Atl. 730; Mellick v. Pennsylvania R. R. Co., 203 Pa. St. 457, 53 Atl. 340; Rhymer v. Fritz, 206 Pa. St. 230, 55 Atl. 959, 98 Am. St. Rep. 777. See Venard v. Cross, 8 Kan. 248; Green v. Nunnenmacher, 36 Wis. 50; Yolo v. Sacramento, 36 Cal. 193. But a special injury to plaintiff's property in the street, by a crowd gathered to hear a speech, is not a special injury from the public nuisance of obstructing the street. Fairbanks v. Kerr, 70 Pa. St. 86, 10 Am. Rep. 664. The difference must be in kind, not merely in degree. Thelan v. Farmer, 36 Minn. 225; East St. Louis v. O'Flynn, 119 Ill. 200, 59 Am. Rep. 795; Givens v. Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421; Nottingham v. Balt., &c., Co., 3 Mac- Arthur. 517; Hogan v. Centr. Pac. R. R. Co., 71 Cal. 83. Use of public square by hucksters is such to owner of dwelling near by. McDonald v. Newark, 42 N. J. Eq. 138. So erection by municipal authority of dangerously inflammable building near dwellings. Blanc v. Murray, 36 La. Ann. 162. The injury to a man by the obstruction of a road which passes his farm is not special. Atwood v. Partree, 56 Conn. 80, 14 Atl. 85. See Potter v. Howe, 141 Mass. 357; also Chicago v. Union Bldg. Ass., 102 Ill. 379, for a clear statement of the cases in which damages may be recovered for the obstruction of a public right.

22—Lind v. San Luis Obispo, 109 Cal. 340, 344, 42 Pac. 437.

23—Shadwell v. Hutchinson, 4 C. & P. 333; Holmes v. Wilson, 10 Ad. & El. 503; Howell v. Young, 5 B. & C. 259; Gillon v. Boddington, Ry. & M. 161; Bowyer v. Cook, 5 C. B. 236; Allen v. Wor-

Nuisances by Municipal Corporations. As the wrongs for which municipal corporations may be responsible are more often than otherwise in the nature of nuisances, the present seems a suitable place for according to them brief notice.

Municipal corporations are to be considered *first*, as parts of the governmental machinery of the State, legislating for their corporators, and planning and providing for the customary local conveniences, for their people; *second*, as corporate bodies through proper agencies putting into execution their plans, and discharging such duties as they have imposed upon themselves or as the State has imposed upon them; and, *third*, as artificial persons owning and managing property. In this last

capacity they are chargeable with all the duties and [*739] obligations of other owners of property, and must *respond for creating or suffering nuisances under the same rules which govern the responsibility of natural persons.²⁴

thy, L. R. 4 Q. B. 163; Queen *v.* Waterhouse, L. R. 7 Q. B. 545; Beckwith *v.* Griswold, 29 Barb. 291; Conhocton Stone Co. *v.* Buffalo, &c., R. R. Co., 52 Barb. 390; Vedder *v.* Vedder, 1 Denio, 257; Mahon *v.* New York Cent. R. R. Co., 24 N. Y. 658; Slight *v.* Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476; Philsbury *v.* Moore, 44 Me. 154; Staple *v.* Spring, 10 Mass. 72; Byrne *v.* Minn., &c., Ry. Co., 38 Minn. 212, 36 N. W. 339; Crawford *v.* Rambo, 44 Ohio St. 279; Reid *v.* Atlanta, 73 Ga. 523. The mere continuance of a building wrongfully erected on the land of another is a continual wrong, for which the owner of the land may bring new suits after recovery and satisfaction for the original erection. Russell *v.* Brown, 63 Me. 203. The diversion of spring water is a continuing wrong. Colrick *v.* Swinburne, 105 N. Y. 503. So is flooding land. New Salem *v.* Eagle Mills Co., 138 Mass. 8; Van Hoozier *v.* Hannibal, &c., R. R. Co., 70 Mo. 145; Dickson *v.* Chicago, &c., R. R. Co., 71 Mo. 575; Valley Ry. Co. *v.* Franz, 43 Ohio St. 623, 4 N. E. 88; Omaha, &c., Ry. Co. *v.* Standard, 22 Neb. 343, 35 N. W. 183. See Chicago, &c., Ry. Co. *v.* Schaffer, 124 Ill. 112, 16 N. E. 239. So is the wrongful use of a side track in a street in front of a lot. Cain *v.* Chicago, &c., Co., 54 Ia. 255. For a continuing nuisance an action may be maintained against the original wrongdoer or his grantees continuing it after request to abate. Prentiss *v.* Wood, 132 Mass. 486. See cases pp. 1283, n. 76 and 77, 1286, n. 83. But see Bizer *v.* Ottumwa, &c., Co., 70 Ia. 145. If the cause of action is not a nuisance but negligence in the course of a permanent public improvement, a second action will not lie. North Vernon *v.* Voegler, 103 Ind. 314.

24—See Clark *v.* Peckham, 9 R.

Under this head, therefore, nothing more need be said in this place.

For taking or neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever except the political responsibility to their corporators and to the State. The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore, one shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire,²⁵ or because

I. 455. *Pennoyer v. Saginaw*, 8 Mich. 455; *Cumberland, &c., Co. v. Portland*, 62 Me. 504; *Rowland v. Kalamazoo Sup'ts*, 49 Mich. 553; *Moulton v. Scarborough*, 71 Me. 267, 36 Am. Rep. 308. If a municipality uses a public building for profit and one is injured by negligence of the municipality, it is liable. *Worden v. New Bedford*, 131 Mass. 23, 41 Am. Rep. 125. If the use is not for profit, it is not liable. *Larrabee v. Peabody*, 128 Mass. 561; *Snider v. St. Paul*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151 (negligence in operating elevator in city hall); *Cunningham v. St. Louis*, 96 Mo. 53, 8 S. W. 787. See *Board of Commissioners v. Dailey*, 132 Ind. 73, 31 N. E. 531. A city or county is not liable for the sickness of a prisoner caused by the condition of the jail. *Morris v. Board of Commissioners*, 131 Ind. 285, 31 N. E. 77; *White v. Board of Commissioners*, 129 Ind. 396, 28 N. E. 846; *Pfefferle v.*

Lyon Co., 39 Kan. 432, 18 Pac. 506; *La Clef v. Concordia*, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; *Hite v. Whitney Co. Ct.*, 91 Ky. 168, 15 S. W. 57, 11 L. R. A. 122; *Webster v. Hillsdale*, 99 Mich. 259, 58 N. W. 317.

25—*Davis v. Montgomery*, 51 Ala. 139, 23 Am. Rep. 545; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Patch v. Covington*, 17 B. Mon. 722, 66 Am. Dec. 186. See, also, *Howard v. San Francisco*, 51 Cal. 52; *Joliet v. Verley*, 35 Ill. 58; *Russell v. New York*, 2 Denio, 461; *O'Meara v. New York*, 1 Daly, 425; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Grant v. Erie*, 69 Penn. St. 420, 8 Am. Rep. 272.

For *ultra vires* acts done under supposed authority, a city is not liable. *Cavanagh v. Boston*, 139 Mass. 426. See *Wakefield v. Newport*, 60 N. H. 374; *Seele v. Deer-*

cattle are not prohibited from running at large,²⁶ or because "coasting" in the highways is not prevented,²⁷ or because the operation of an ordinance which prohibits the explosion of fire works within the city is temporarily suspended,²⁸ or [*740] because *provision is not made for lighting the streets,²⁹ or because the drains which it orders and constructs are insufficient to carry off the surface water,³⁰ or because the plan

ing, 79 Me. 343, 10 Atl. 45. Compare *Stanley v. Davenport*, 54 Ia. 463.

26—*Kelly v. Milwaukee*, 18 Wis. 83. See Mich., &c., R. R. Co. v. Fisher, 27 Ind. 96; *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787. *Contra*, *Cochran v. Frostburg*, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728.

27—*Hutchinson v. Concord*, 41 Vt. 271, 98 Am. Dec. 584. See *Altwater v. Baltimore*, 31 Md. 462; *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105; *Lafayette v. Timberlake*, 88 Ind. 330; *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Taylor v. Mayor, &c., of Cumberland*, 64 Md. 68; *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779.

28—*Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451. See *McDade v. Chester*, 12 Atl. Rep. 421 (Penn.); *Ball v. Woodbine*, 61 Ia. 83; *Wheeler v. Plymouth*, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837; *Lincoln v. Boston*, 148 Mass. 578, 20 N. E. 329, 12 Am. St. Rep. 601, 3 L. R. A. 257; *O'Rourke v. Sioux Falls*, 4 S. D. 47, 54 N. W. 1044, 46 Am. St. Rep. 760, 19 L. R. A. 789. A city having no power to give a display of fire works, was held not liable for negligence in giving the display. *Love v. Raleigh*, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192. For failure to

exercise power to remove a ruinous wall it is not liable to one injured upon adjoining premises by its fall. *Cain v. Syracuse*, 95 N. Y. 83; *Kiley v. Kansas City*, 87 Mo. 103. Otherwise if one injured is in the street. *Duffy v. Dubuque*, 63 Ia. 171.

29—*Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407.

30—See *Roberts v. Chicago*, 26 Ill. 249, and cases cited in next note. "In the construction or maintenance of a sewer or drainage system a municipal corporation exercises a part of the governmental powers of the state for the customary local convenience and benefit of all the people, and in the exercise of these discretionary functions the municipality cannot be required to respond in damages to individuals for injury to health, resulting either from omissions to act or the mode of exercising the power conferred on it for public purposes to be used, at discretion for the public good." *Hughes v. Auburn*, 161 N. Y. 96, 105, 55 N. E. 289, 46 L. R. A. 636. In this case the defendant city was held not liable for the death of a child caused by the unsanitary condition of its sewers. *Ibid.* Where a child of nine was drowned in an open street drain four feet wide and two feet deep, it was held

of a bridge or sewer, or any other public work does not provide against accidental injury to individuals as completely as it might have done.³¹ A municipal corporation is not liable for a failure to perform a legislative, judicial or discretionary act.³² Hence a city is not liable for a failure to abate a nuisance,³³ or to pass and enforce proper police regulations.³⁴ Nor is a

that there was no liability, the drain being proper and necessary. *Rome v. Cheney*, 114 Ga. 194, 39 S. E. 933, 55 L. R. A. 221. Where a city constructs a system of gutters and drains whereby waters may be accumulated in a given locality, it must provide adequate means for carrying off the water or it will be liable for the consequences. *Seaman v. Marshall*, 116 Mich. 327, 74 N. W. 484.

31—Governor, &c., *v. Meredith*, 4 T. R. 794; *Wilson v. New York*, 1 Denio, 595; *Mills v. Brooklyn*, 32 N. Y. 489; *White v. Yazoo*, 27 Miss. 357; *Lambar v. St. Louis*, 15 Mo. 610; *Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507; *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Toolan v. Lansing*, 38 Mich. 315; *Foster v. St. Louis*, 71 Mo. 157; *Johnston v. Dist. of Columbia*, 118 U. S. 19; *Rozell v. Anderson*, 91 Ind. 591; *Packard v. Valtz*, 94 Ia. 277, 62 N. W. 757, 58 Am. St. Rep. 396; *Paine v. Delhi*, 116 N. Y. 224, 22 N. E. 405, 5 L. R. A. 797; *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72; *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; but see same case, 97 N. Y. 238. See *Cotes v. Davenport*, 9 Iowa, 227; *Carr v. Northern Liberties*, 35 Pa. St. 324, 78 Am. Dec. 342; *Pontiac v. Carter*, 32 Mich. 164. For negligence in devising a plan a city is liable. *North Vernon v. Voeg-*

ler, 103 Ind. 314. And see *Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496; *Lehn v. San Francisco*, 66 Cal. 76; *State v. Portland*, 74 Me. 269, 43 Am. Rep. 586; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664. A city is not liable for a change in a street grade. *Heisser v. Mayor, &c.*, New York, 104 N. Y. 68; *Henderson v. Minneapolis*, 32 Minn. 319; *North Vernon v. Voegler*, 103 Ind. 314; *Olney v. Wharf*, 115 Ill. 519, 56 Am. Rep. 178. But see *Sheehy v. Kansas City, &c., Co.*, 94 Mo. 574, 7 S. W. 579; *Morris v. Council Bluffs*, 67 Ia. 343, 56 Am. Rep. 343.

32—*Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 10 Am. St. Rep. 35, 2 L. R. A. 712.

33—*Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 10 Am. St. Rep. 35, 2 L. R. A. 712; *James v. Harrodsburg*, 85 Ky. 191, 3 S. W. 135, 7 Am. St. Rep. 589; *Chattanooga v. Reid*, 103 Tenn. 616, 53 S. W. 937; *Miller v. Newport News*, 101 Va. 432, 44 S. E. 712.

34—*Veraguth v. Denver*, 19 Colo. App. 473, 76 Pac. 539; *Harman v. St. Louis*, 137 Mo. 494, 38 S. W. 1102; *Butz v. Cavanagh*, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504; *McDade v. Chester City*, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. Rep. 681; *Smith v. Selinsgrove*, 199 Pa. St. 615, 49 Atl. 213. But a different doctrine

municipal corporation liable for any neglect when acting in its public or governmental capacity,³⁵ and so is not liable for the negligence of its policemen³⁶ or firemen,³⁷ in the discharge of

is maintained in Maryland where a municipal corporation has been held liable for a failure to suppress the nuisance of coasting. *Taylor v. Cumberland*, 64 Md. 68, 20 Atl. 1027; or of cattle running at large. *Cochran v. Frostburg*, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728. Also for a failure to enforce an ordinance against the fast riding of bicycles. *Hagerstown v. Klotz*, 93 Md. 437, 49 Atl. 836, 86 Am. St. Rep. 437, 54 L. R. A. 940. In this case the court says that a municipal corporation, having power to suppress such nuisances "is bound to exercise them for the public good and to protect persons and property, and its duty is not discharged by merely passing ordinances upon the subject. It can relieve itself of responsibility only by a vigorous attempt to enforce them." p. 440.

35—*Stockwell v. Rutland*, 75 Vt. 76, 53 Atl. 132.

36—*Culver v. Streator*, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; *Culver v. Streator*, 34 Ill. App. 77; *Craig v. Charleston*, 180 Ill. 154, 54 N. E. 184; *Peters v. Lindsberg*, 40 Kan. 654, 20 Pac. 490; *Jolly's Admr. v. Hawesville*, 89 Ky. 279, 12 S. W. 313; *Calwell v. Boone*, 51 Ia. 687, 33 Am. Rep. 154; *Attaway v. Cartersville*, 68 Ga. 740; *Norristown v. Fitzpatrick*, 94 Pa. St. 121, 39 Am. Rep. 771; *Robinson v. Greenville*, 42 Ohio St. 625. In the last two cases there was a failure to stop firing of cannon.

37—*Davis v. Lebanon*, 108 Ky. 688, 57 S. W. 471; *Alexander v. Vicksburg*, 68 Miss. 564, 10 So. 62; *Thomas v. Findlay*, 6 Ohio C. C. 241; *Irvine v. Chattanooga*, 101 Tenn. 291, 47 S. W. 419; *Dodge v. Granger*, 17 R. I. 664, 24 Atl. 100, 15 L. R. A. 781; *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382; *Greenwood v. Louisville*, 13 Bush, 226, 26 Am. Rep. 263; *Torbush v. Norwich*, 33 Conn. 225, 9 Am. Rep. 395; *Smith v. Rochester*, 76 N. Y. 506; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Robinson v. Evansville*, 87 Ind. 334, 44 Am. Rep. 770; *Grube v. St. Paul*, 34 Minn. 402; *Burrill v. Augusta*, 78 Me. 118, 57 Am. Rep. 188. Nor to a fireman injured by a defective reel. *Peterson v. Wilmington*, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959. Nor a town for the negligence of the town surveyor or his assistant. *Barney v. Lowell*, 98 Mass. 570; *Walcott v. Swampscott*, 1 Allen, 101; *Pratt v. Weymouth*, 147 Mass. 245, 17 N. E. 538; *Judge v. Meriden*, 38 Conn. 90. See, further, *Sherbourn v. Yuba County*, 21 Cal. 113, 81 Am. Dec. 151; *Rudolphe v. New Orleans*, 11 La. Ann. 242; *Mitchell v. Rockland*, 41 Me. 363; and 45 Me. 496; *Dargan v. Mobile*, 31 Ala. 469, 70 Am. Dec. 505; *Richmond v. Long*, 17 Grat. 375; *Stewart v. New Orleans*, 9 La. Ann. 461; *Pollock's Admr. v. Louisville*, 13 Bush, 221. A county is not liable for the acts of its officers in the course of a public improvement by which land is flooded by a stream. *Downing v.*

their duties. There is the same exemption from liability in respect to the sanitary service or hospitals,³⁸ and the maintenance of schools.³⁹ Neither is a municipal corporation responsible for the failure of its officers to discharge properly and effectually their official duties; for in respect to these the officers are not properly the servants or agents of the corporation, but act upon their own official responsibility, except as they may be specially directed by the corporate authority.⁴⁰ Neither is it *responsible for the destruction of property by a mob, [*741] unless expressly made so by statute, as in some States it

Mason Co., 87 Ky. 208, 8 S. W. Rep. 31; Love *v.* Atlanta, 95 Ga. 264, citing Brabham *v.* Supervisors, 54 Miss. 363; Kincaid *v.* Hardin Co., 53 Ia. 430; Dosdall *v.* Olmsted Co., 30 Minn. 96. As to liability of municipality maintaining a water system for negligence in respect thereto, see Hourigan *v.* Norwich, 77 Conn. 358; O'Leary *v.* Board of Commissioners, 79 Mich. 281, 44 N. W. 608, 19 Am. St. Rep. 169, 7 L. R. A. 170; Gross *v.* Water Commissioners, 68 N. H. 389, 44 Atl. 529; Esberg Cigar Co. *v.* Portland, 34 Ore. 282, 55 Pac. 961, 43 L. R. A. 445, 75 Am. St. Rep. 651; Wilkins *v.* Rutland, 61 Vt. 336, 17 Atl. 735; Chicago *v.* Selz, 202 Ill. 545, 67 N. E. 386; Harvey *v.* Hillsdale, 86 Mich. 330, 49 N. W. 141. City held liable for negligence in making repairs on fire alarm system. Wagner *v.* Portland, 40 Ore. 389, 60 Pac. 985, 67 Pac. 300, 91 Am. St. Rep. 485.

38—Ogg *v.* Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Murtagh *v.* St. Louis, 44 Mo. 479; Brown *v.* Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; White *v.* Marshfield, 48 Vt. 20; Summers *v.* Board, &c., 103 Ind. 262, 53 Am. Rep. 512; Bryant *v.* St. Paul, 33 Minn. 289, 53 Am.

Rep. 31; Love *v.* Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64.

39—Kinnare *v.* Chicago, 171 Ill. 332, 49 N. E. 536; Howard *v.* Worcester, 153 Mass. 426, 27 N. E. 11, 25 Am. St. Rep. 651, 12 L. R. A. 160. See Rock Island L. & M. Co. *v.* Elliott, 59 Kan. 42, 51 Pac. 894; State *v.* School Commissioners, 94 Md. 334, 51 Atl. 289; Bank *v.* Brainerd School District, 49 Minn. 106, 51 N. W. 814; Ford *v.* School District, 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607. Street sprinkling held governmental duty and city not liable for negligence of driver of sprinkling cart. Conelly *v.* Nashville, 100 Tenn. 262, 46 S. W. 565. But where a city derives a revenue from a service it will be liable for negligence therein. Bodge *v.* Philadelphia, 167 Pa. St. 492, 31 Atl. 728.

40—Thayer *v.* Boston, 19 Pick. 511; Pelrey *v.* Georgetown, 7 Gray, 464; Barney *v.* Lowell, 98 Mass. 570; Bigelow *v.* Randolph, 14 Gray, 541; Hayes *v.* Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Young *v.* Comr. of Roads, 2 N. & McC. 537; Martin *v.* Brooklyn, 1 Hill, 545; Lorillard *v.* Monroe, 11 N. Y. 392; Sherman *v.* Grenada,

has been.⁴¹ But municipal corporations are responsible for due care in the execution of any work ordered by them,⁴² [*742] and if the work is one for *the special benefit of its own people, it must not negligently be allowed to get

51 Miss. 186; *Mitchell v. Rockland*, 52 Me. 118; *Barbour v. Ellsworth*, 67 Me. 294; *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585; *Judge v. Meriden*, 38 Conn. 90; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Hyde v. Jamaica*, 27 Vt. 443; *Hunt v. Boonville*, 65 Mo. 620, 27 Am. Rep. 299; *Rowland v. Gallatin*, 75 Mo. 134; *Shieb v. Collier*, 11 Atl. Rep. 366 (Penn.); *Cooney v. Hartland*, 95 Ill. 516; *Wakefield v. Newport*, 60 N. H. 374; *Little v. Madison*, 49 Wis. 605; *Wallace v. Menasha*, 48 Wis. 79; *Chope v. Eureka*, 78 Cal. 588, 21 Pac. 364, 12 Am. St. Rep. 113, 4 L. R. A. 325; *Arnold v. San Jose*, 81 Cal. 618, 22 Pac. 877; *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949; *McCann v. Waltham*, 163 Mass. 344, 40 N. E. 20; *Horton v. Newell*, 17 R. I. 571, 23 Atl. 910; *Bates v. Rutland*, 62 Vt. 178, 20 Atl. 278, 22 Am. St. Rep. 95, 9 L. R. A. 363. Otherwise if in obedience to orders an officer seizes goods upon a void special street assessment. *Durkee v. Kenosha*, 59 Wis. 123, 48 Am. Rep. 480. See *Worley v. Columbia*, 88 Mo. 106; *Nicholson v. Detroit*, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601.

41—*Fischer Land & Imp. Co. v. Bordelon*, 52 La. Ann. 429, 27 So. 59; *Western College, &c., v. Cleveland*, 12 Ohio St. 375. See *in re Pennsylvania Hall*, 5 Pa. St. 204; *Darlington v. New York*, 31 N. Y. 164; *Folsom v. New Or-*

leans, 28 La. Ann. 936; *Underhill v. Manchester*, 45 N. H. 214; *Chadbourne v. New Castle*, 48 N. H. 196.

42—See *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Hannon v. St. Louis*, 62 Mo. 313; *Broadwell v. Kansas*, 25 Mo. 213; *Semple v. Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181; *Logansport v. Dick*, 70 Ind. 65; *Princeton v. Gieske*, 93 Ind. 102; *Kranz v. Baltimore*, 64 Md. 491; *Hardy v. Brooklyn*, 90 N. Y. 435, 43 Am. Rep. 182; *Ironton v. Kelly*, 38 Ohio St. 50; *Fort Worth v. Crawford*, 64 Tex. 202; *Mootry v. Danbury*, 45 Conn. 550, 29 Am. Rep. 703; *Suffolk v. Parker*, 79 Va. 660, 52 Am. Rep. 640; *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421. There must be willful misconduct or culpable neglect. *Hunt v. New York*, 109 N. Y. 134, 16 N. E. 320. If in blasting in the performance of a public duty one is injured, there can be no recovery in the absence of negligence in the city's agent. *Murphy v. Lowell*, 128 Mass. 396, 35 Am. Rep. 381. *Contra*, *Joliet v. Harwood*, 86 Ill. 110. *Blumb v. Kansas*, 84 Mo. 112 (distinguishing *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325) decides that an individual injured cannot recover, on the ground that the duty is to the public. Compare *Cunningham v. St. Louis*, 96 Mo. 53, 8 S. W. 787.

If the benefit of the agent's act accrues solely to an individual the city is not liable for his negligence. *Waller v. Dubuque*, 69 Ia.

out of repair to the injury of individuals.⁴³ Where a public work, such as a sewer, as the same was originally planned and constructed, is found to result in direct and physical injury to the property of another, that would not otherwise have happened, and which, from its nature, is liable to be repeated and continuous, but is remediable by a change of plan or the adoption of preventive measures, the corporation is liable for such damages as occur in consequence of the original cause, after notice and an omission to use ordinary care to remedy the evil.⁴⁴

541. If the duty is one to the public imposed on the municipality by law, there is no liability in the absence of statute. So held after elaborate discussion where a child was injured by the unsafe condition of a school building which the city was obliged to maintain. *Hill v. Boston*, 122 Mass. 344. Followed where the duty was assumed, not imposed, under a general statute. *Wixon v. Newport*, 13 R. I. 454, 43 Am. Rep. 35. See also, *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Benton v. Trustees Boston City Hosp.*, 140 Mass. 13, 54 Am. Rep. 436; *Condict v. Jersey City*, 46 N. J. L. 157; *Wild v. Paterson*, 47 N. J. L. 406.

43—Thus, a city is liable if one of its drains or sewers is suffered to become obstructed, whereby the lands of individuals are flooded. *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Ashley v. Port Huron*, 35 Mich. 296, 20 Am. Rep. 629; *Taylor v. Austin*, 32 Minn. 247; *Vanderslice v. Philadelphia*, 103 Pa. St. 102; *Fort Wayne v. Coombs*, 107 Ind. 75; *Arnd v. Cullman*, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922; *Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; *Judd v. Hartford*, 72 Conn. 350, 44 Atl. 510, 77 Am. St. Rep. 312; *District of Columbia v. Gray*, 6 App. D. C. 314; *Murphy v. Indianapolis*, 158 Ind. 238, 63 N. E. 469; *Frostburg v. Dufty*, 70 Md. 47, 16 Atl. 642; *Frostburg v. Hutchins Bros.*, 70 Md. 56, 16 Atl. 380; *Bates v. Westborough*, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156; *Haney v. Kansas City*, 94 Mo. 334, 7 S. W. 417; *Paine v. Delhi*, 116 N. Y. 224, 22 N. E. 405, 5 L. R. A. 797; *Kiesel v. Ogden City*, 8 Utah, 237, 30 Pac. 758. Or by overloading. *Hughes v. Auburn*, 21 App. Div. 311, 47 N. Y. S. 235; *King v. Granger*, 21 R. I. 93, 79 Am. St. Rep. 779. Held liable for permitting sewer to become a nuisance. *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72. So for negligently permitting coal gas to escape into a sewer, causing explosion. *Kibele v. Philadelphia*, 105 Pa. St. 41. Negligently raising sewer grades at junction point. *Defer v. Detroit*, 67 Mich. 346, 34 N. W. 680; *Rice v. Flint*, 67 Mich. 401, 34 N. W. 719.

44—*Tate v. St. Paul*, 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep.

Municipal corporations are generally required to construct and keep in repair the public ways within their limits. These, however, are for the use, not of their own citizens merely, but of all the people of the State, and any duty they owe to keep them in repair is a duty to the State, and not to individuals. It is well settled, therefore, that at the common law a municipal corporation is not liable to an individual for neglect to keep a highway in repair, whereby he suffers an injury in using it.⁴⁵

501; *Seifert v. Brooklyn*, 101 N. Y. 136; *Kiernan v. Jersey City*, 13 Atl. Rep. 170 (N. J.).

Quasi public corporations such as counties, school districts and the like are not liable for negligence in the exercise of their powers, or for negligence of their officers, agents and servants unless made so by statute. *Pitkin County v. Ball*, 22 Colo. 125, 43 Pac. 1000, 55 Am. St. Rep. 117; *Bailey v. Fulton County*, 111 Ga. 313, 36 S. E. 596; *Board of Commissioners v. Daily*, 132 Ind. 73, 31 N. E. 531; *Rock Island L. & M. Co. v. Elliott*, 59 Kan. 42, 51 Pac. 894; *Williams v. Kearney County*, 61 Kan. 708, 60 Pac. 1046; *Downing v. Mason County*, 87 Ky. 208, 8 S. W. 264, 12 Am. St. Rep. 473; *Sherman v. Vermillion*, 51 La. Ann. 880, 25 So. 538; *Carter v. Worcester County*, 94 Md. 621, 51 Atl. 830; *State v. School Commissioners*, 94 Md. 334, 51 Atl. 289; *Taylor v. Avon*, 73 Mich. 604, 41 N. W. 703; *Bank v. Brainard School District*, 49 Minn. 106, 51 N. W. 814; *Gaare v. Clay County Comrs.*, 90 Minn. 530, 97 N. W. 422; *Le-frois v. Monroe County*, 162 N. Y. 563, 57 N. E. 185; *Reynolds v. Board of Education*, 33 App. Div. 88, 53 N. Y. S. 75; *Threadgill v. Anson County Comrs.*, 99 N. C. 352, 6 S. E. 189; *Schroeder v. Multnomah County*, 45 Ore. 92, 76 Pac. 772; *Ford v. School District*, 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607; *Chick v. Newberry County*, 27 S. C. 419, 3 S. E. 787; *McAndrews v. Hamilton County*, 105 Tenn. 399, 58 S. W. 483; *Rhea County v. Snead*, 105 Tenn. 581, 58 S. W. 1063; *Fry v. Albemarle County*, 86 Va. 195, 9 S. E. 1004, 19 Am. St. Rep. 879.

45—*Russell v. Men of Devon*, 2 T. R. 667; *Young v. Comr. of Roads*, 2 N. & McC. 537; *Morey v. Newfane*, 8 Barb. 645; *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Niles v. Martin*, 4 Mich. 557; *Perry v. John*, 79 Pa. St. 411; *State v. Cumberland*, 7 R. I. 75; *Huffman v. San Joaquin Co.*, 21 Cal. 426; *Sutton v. Board of Police*, 41 Miss. 236; *Freeholders v. Strader*, 18 N. J. 108; *Livermore v. Freeholders*, 31 N. J. 507; *Barbour Co. v. Horn*, 48 Ala. 649; *Detroit v. Blacheby*, 21 Mich. 84, 4 Am. Rep. 450; *Yeager v. Tippecanoe*, 81 Ind. 46; *Eikenberry v. Bazaar*, 22 Kan. 556, 31 Am. Rep. 198; *Frazer v. Lewiston*, 76 Me. 531; *Peters v. Fergus Falls*, 35 Minn. 549; *Swineford v. Franklin Co.*, 6 Mo. App. 39; *Abbett v. Johnson Co.*, 16 N. E. Rep. 127; *Haines v. Lewiston*, 84 Me. 18, 24 Atl. 429; *Roberts v. Detroit*, 102 Mich. 64, 60 N. W. 450, 25 L. R. A.

In some of the States, however, the liability is expressly imposed upon towns by statute,⁴⁶ and in the note *cases [*743] are referred to which have been decided under these statutes.⁴⁷

572; *Carter v. Rahway*, 55 N. J. L. 177, 26 Atl. 96; *Vail v. Amenia*, 4 N. D. 239, 59 N. W. 1092. Counties having control of roads or bridges are not liable for their want of repair or defective condition unless made so by statute. *Lee County v. Yarborough*, 85 Ala. 590, 5 So. 341; *Tyler v. Thama County*, 109 Cal. 618, 42 Pac. 240; *Millwood v. De Kalb County*, 106 Ga. 743, 32 S. E. 577; *Board of Commissioners v. Arnett*, 116 Ind. 438, 19 N. E. 299; *Cones v. Board of Commissioners*, 137 Ind. 404, 37 N. E. 272; *Board of Commissioners v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; *Pundman v. St. Charles County*, 110 Mo. 594, 19 S. W. 733; *Markey v. Queens County*, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46; *Heigel v. Wichita County*, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 63.

46—The statutes extend the obligation so far as to require the supplying of suitable fences, protections and guards at the sides, and the following are cases where towns were prosecuted for failure to perform this duty. *Collins v. Dorchester*, 6 Cush. 396; *Sparhawk v. Salem*, 1 Allen, 30, 79 Am. Dec. 700; *Alger v. Lowell*, 3 Allen, 402; *Stevens v. Boxford*, 10 Allen, 25, 87 Am. Dec. 616; *Burnham v. Boston*, 10 Allen, 290; *Murdock v. Warwick*, 4 Gray, 178; *Palmer v. Andover*, 2 Cush. 600; *Hayden v. Attleborough*, 7 Gray, 338; *Titus v. Northbridge*, 97 Mass. 258; *Horton v. Taunton*, 97 Mass. 266, note; *Cobb v. Standish*, 14 Me. 198; *Blaisdell v. Portland*, 39 Me. 113; *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281; *Moulton v. Sanford*, 51 Me. 127; *Hey v. Philadelphia*, 81 Pa. St. 44; *Winship v. Enfield*, 42 N. H. 197; *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *Hunt v. Pownal*, 9 Vt. 411; *Weeks v. Conn., &c.*, *Turnpike Co.*, 20 Conn. 134. See *Barnes v. Ward*, 9 C. B. 392; *Toms v. Whitby*, 35 Up. Can. Q. B. 195; *Hyatt v. Rondout*, 44 Barb. 385; *Palmer v. Andover*, 2 Cush. 600; *Winship v. Enfield*, 42 N. H. 197. The measure of duty as to keeping bridges in repair is ordinary care. *Stebbins v. Keene*, 55 Mich. 552; *Medina v. Perkins*, 48 Mich. 67. Not bound to provide for passage of an extraordinary load. *Wilson v. Granby*, 47 Conn. 59; *McCormick v. Washington*, 112 Pa. St. 185. If one makes use of the railings of a bridge to lean against or rest upon, he does it at his own risk. *Orcutt v. Kittery Point Bridge Co.*, 53 Me. 500. See *Stickney v. Salem*, 3 Allen, 374.

47—The obligation to repair is in the main confined to that part of the road usually traveled. *Philbrick v. Pittston*, 63 Me. 477, and cases cited. See *Keyes v. Marcelius*, 50 Mich. 439, 45 Am. Rep. 5; *Fitzgerald v. Berlin*, 64 Wis. 203.

This is varied somewhat by custom and the circumstances. *Cobb v. Standish*, 14 Me. 198. If a municipality has assumed the duty of keeping up a sidewalk within

the corporate limits, but outside of street, it must repair. *Mansfield v. Moore*, 16 N. E. Rep. 246. That stumps and logs left in the road may constitute defects, see *Ward v. Jefferson*, 24 Wis. 342; *Coggswell v. Lexington*, 4 Cush. 307; *Snow v. Adams*, 1 Cush. 443. Compare *Rogers v. Newport*, 62 Me. 101; *Springer v. Bowdoinham*, 7 Me. 442; *Bigelow v. Weston*, 3 Pick. 267; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687. So may a tent set up in the road which frightens horses. *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396. Or a steam roller, suffered to remain in it over Sunday. *Young v. New Haven*, 39 Conn. 435. See *Keith v. Easton*, 2 Allen, 552; *Rushville v. Adams*, 107 Ind. 475, 57 Am. Rep. 124; *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17; *North Manheim v. Arnold*, 119 Pa. St. 380, 13 Atl. 444; *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383; *Maxwell v. Clarke Tp.*, 4 Ont. App. 460. Or a dangerous awning over a walk. *Drake v. Lowell*, 13 Met. 292.

But a town is not liable for an injury occasioned by the falling of a sign which has been fastened to an adjacent building. *Taylor v. Peckham*, 8 R. I. 349. Nor is it liable as for a defect in the highway for the fall upon a traveler of an insufficiently guyed derrick in use in repairing a road. *Pratt v. Weymouth*, 147 Mass. 245, 17 N. E. 538. Nor for injury occasioned by a ditch dug by a citizen under municipal authority to lay pipe in a street. *Susquehanna Depot v. Simmons*, 112 Penn. St. 384, 56 Am. Rep. 317. Nor for an injury occasioned by the [*744] *jubilating of a mob in the

street. *Campbell's Admr. v. Montgomery*, 53 Ala. 527. Nor for an injury suffered by unmanageable and unruly horses, where the road is in such condition that horses under control would have been driven with safety. *Jackson v. Bellevue*, 30 Wis. 250. Nor for an injury caused by the earth giving way under the feet of the horses, in consequence of a defect not discoverable. *Prindle v. Fletcher*, 39 Vt. 255. Nor for an injury caused by a locomotive of a railway company whose track illegally crossed the street. *Vinal v. Dorchester*, 7 Gray, 421. Nor for an injury caused by the traveler leaving the beaten track in order to have the benefit of snow. *Kelly v. Fond du Lac*, 31 Wis. 179; *Rice v. Montpelier*, 19 Vt. 470. See *Rowell v. Lowell*, 7 Gray, 100. Compare *Cassidy v. Stockbridge*, 21 Vt. 391. Nor for an injury occasioned by the defect in a bridge of a railroad crossing the street, and which the railroad company is bound to repair. *Sawyer v. Northfield*, 7 Cush. 490. See *Flanders v. Norwood*, 141 Mass. 17. Compare *Currier v. Lowell*, 16 Pick. 170; *Wellcome v. Leeds*, 51 Me. 313; *Sides v. Portsmouth*, 59 N. H. 24; *Tierney v. Troy*, 41 Hun, 120. Nor for one caused by running upon stones outside the traveled way and beyond the gutter. *Howard v. North Bridgewater*, 16 Pick. 189. Objects within the limits of the highway, but outside the traveled way, are held in Massachusetts not to be defects, merely from their tendency to frighten horses; and the towns are held, therefore, not liable for injuries occasioned by teams becoming frightened by them and

running away. *Keith v. Easton*, 2 Allen, 552; *Kingsbury v. Dedham*, 13 Allen, 186; *Horton v. Taunton*, 97 Mass. 266; *Cook v. Charlestown*, 98 Mass. 80; but in Connecticut and Vermont the contrary doctrine is maintained. *Young v. New Haven*, 39 Conn. 435; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396; *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600, where the Massachusetts cases are reviewed. See also *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383. Where a statute provided that "any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair," it was held that the husband's loss by reason of the injury of his wife by a defective road was not within the statute. *Lounsbury v. Bridgeport*, 66 Conn. 360, 34 Atl. 93.

fast, 61 Me. 569; and the same doctrine is held in Upper Canada. *Sherwood v. Hamilton*, 37 Up. Can. Q. B. 410. See, also, Lower Macungie *v. Merkhoffer*, 71 Penn. St. 276; *Crawfordsville v. Smith*, 79 Ind. 308, 61 Am. Rep. 612; *Balt., &c., Co. v. Bateman*, 68 Md. 389, 13 Atl. 54; *Lane v. Wheeler*, 35 Hun, 606. The rule is the other way in Massachusetts and Maine. *Davis v. Dudley*, 4 Allen, 557; *Titus v. Northbridge*, 97 Mass. 258; *Horton v. Taunton*, 97 Mass. 266; *Fogg v. Nahant*, 98 Mass. 578; *Murdock v. Warwick*, 4 Gray, 178; *Wright v. Templeton*, 132 Mass. 49; *Moore v. Abbot*, 32 Me. 46; *Farrar v. Greene*, Id. 574; *Coombs v. Topsham*, 38 Me. 204; *Anderson v. Bath*, 42 Me. 346; *Moulton v. Sanford*, 51 Me. 127; *Spaulding v. Winslow*, 74 Me. 528; *Aldrich v. Gorham*, 77 Me. 287; *Whitman v. Lewiston*, 97 Me. 519, 57 Atl. 787. But if a horse takes

Whether one can recover where the injury is the combined result of neglect of duty on the part of the town and of accident, has been, and still is, a disputed question. In Vermont, New Hampshire, Missouri and Wisconsin it is held he may. *Hunt v. Pownal*, 9 Vt. 411; *Kelsey v. Glover*, 15 Vt. 708; *Allen v. Hancock*, 16 Vt. 230; *Hull v. Kansas City*, 54 Mo. 598; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, 41 N. H. 317; *Winship v. Enfield*, 42 N. H. 197; *Dreher v. Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91; *Ward v. Milwaukee, &c.*, R. R. Co., 29 Wis. 144; *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *Olsen v. Chippewa Falls*, 71 Wis. 558, 37 N. W. 575. Compare *Willey v. Bel-*

fright from the carriage striking an *obstruction in [*745] a road, and becomes unmanageable and runs away, throwing out the driver and injuring him, the obstruction is to be deemed the proximate cause of the injury. *Clark v. Lebanon*, 63 Me. 393. But not if frightened at cows before striking the obstruction. *Perkins v. Fayette*, 68 Me. 152.

The following statement of cases in Vermont may be of interest: *Hunt v. Pownal*, 9 Vt. 411, a nut fastening the tongue of the vehicle to the axle-tree gave way, and the vehicle was thrown over a bank not sufficiently guarded; *Kelsey v. Glover*, 15 Vt. 708, a runaway team was turned upon the plaintiffs by the projection of a tree top into the highway; *Allen v.*

Hancock, 16 Vt. 230, a horse smooth shod was not able to hold back a load, and plaintiff's team was thrust over an unguarded bank; Fletcher *v.* Barnet, 43 Vt. 192, plaintiff's gig was broken in passing a depression in the highway, the gig, being defective; Hodge *v.* Bennington, 43 Vt. 450, the injury was the combined result of the defect in the way and of the breaking of a defective axle. In all these cases the principle is applied that where the traveler on the highway, in the exercise of ordinary care and prudence, receives an injury, which is the combined result of accident and insufficiency of the highway, and the injury is attributable to such insufficiency co-operating with the accidental cause, the town is liable. This doctrine approved in Joliet *v.* Verley, 35 Ill. 58. In Toms *v.* Whitby, 35 U. C. Q. B. 195, the approach to a bridge was not protected, and the plaintiff's horse, being driven over the bridge, shied, and backed the carriage over the bank. The town was held liable. A county, liable for a defective bridge, is not liable for injury from the backing of a team before reaching a bridge from fright at a plank standing upright in it. Board of Fulton Co. *v.* Rickel, 106 Ind. 501. If the injury is caused by fright at a defect, the defect must be such as to frighten an animal of ordinary gentleness. Kennedy *v.* Com'r's of Cecil Co., 69 Md. 65, 14 Atl. 524.

If a highway at a railway crossing is defective, it is no defense that the defect was one that the railroad company ought to have remedied. Wellcome *v.* Leeds, 51 Me. 318, citing State *v.* Gorham,

37 Me. 451; Currier *v.* Lowell, 16 Pick. 170. See Sides *v.* Portsmouth, 59 N. H. 24; Tierney *v.* Troy, 41 Hun, 120. Compare Sawyer *v.* Northfield, 7 Cush. 490.

The liability of the town always presupposes the existence of fault; and therefore, if the defect is caused suddenly, by *vis major*, or accident, or the wrongful act of an individual, the town is not liable until the proper authorities have notice of it, or until after such delay that notice must be presumed. Reed *v.* Northfield, 13 Pick. 94, 23 Am. Dec. 662; Green *v.* Danby, 12 Vt. 338; Springer *v.* Bowdoinham, 7 Me. 442; Hamden *v.* New Haven, &c., Co., 27 Conn. 158; Bragg *v.* Bangor, 51 Me. 532; Holt *v.* Penobscot, 56 Me. 15; Colley *v.* Westbrook, 57 Me. 181. See Chicago *v.* McCarthy, 75 Ill. 602; Chicago *v.* Langlass, 66 Ill. 361; Peru *v.* French, 55 Ill. 317; Rowell *v.* Williams, 29 Iowa, 210. As to what is constructive notice, Galesburg *v.* Higley, 61 Ill. 287; Springfield *v.* Doyle, 76 Ill. 202; Atlanta *v.* Perdue, 53 Geo. 607; Alexander *v.* Mt. Sterling, 71 Ill. 366. But it is no defense to an action for an injury that the town used ordinary care and diligence in repairing, if notwithstanding the road continues defective. Horton *v.* Ipswich, 12 Cush. 488. And snow and ice may become defects, giving rise to a cause of action when allowed to continue an unreasonable time. McLaughlin *v.* Corry, 77 Pa. St. 109, 18 Am. Rep. 432; Green *v.* Danby, 12 Vt. 338. See Seeley *v.* Litchfield, 49 Conn. 134. That a road is let to a contractor to keep in repair does not affect the liability of the town. Mahanoy *v.*

***Defects in Sidewalks.** The statutes rendering towns [*746] liable for defects in highways are generally held to include defects in sidewalks also.⁴⁸

Streets and Highways in Incorporated Cities, etc. It is a principle of nearly universal acceptation in this country, when a town is incorporated and is given control over the streets and walks within its corporate limits, and is empowered to provide the means to make and repair them, that the corporation not only assumes this duty, but by implication agrees to perform it for the benefit and protection of all who may have occasion to make use of these public easements; and that for any failure in the discharge of this duty the corporation is responsible to the party injured.⁴⁹ This rule applies to injuries sustained

Scholly, 84 Pa. St. 136. If an individual causes the defect, he will be responsible; but so will the town for suffering or not preventing it. Rowell *v.* Williams, 29 Iowa, 210; Smith *v.* Leavenworth, 15 Kan. 81; Centerville *v.* Woods, 57 Ind. 192; Boucher *v.* New Haven, 40 Conn. 456. And it will be liable, though under proper authority it has imposed the obligation to repair upon the adjacent land owners. Wallace *v.* New York, 2 Hilt. 440; Rockford *v.* Hildebrand, 61 Ill. 155. If the municipality is compelled to make compensation for an injury for which some individual is primarily liable, it is entitled to indemnity under the principles heretofore laid down. See ante 254, et seq. Also, Patterson *v.* Colebrook, 29 N. H. 94; Elliott *v.* Concord, 27 N. H. 204; Willard *v.* Newbury, 22 Vt. 458; Newbury *v.* Conn., etc., R. R. Co., 25 Vt. 377; Robbins *v.* Chicago, 4 Wall. 657; Portland *v.* Richardson, 54 Me. 46; 89 Am. Dec. 720; Centerville *v.* Woods, 57 Ind. 192.

48—Bacon *v.* Boston, 3 Cush. 174; Brady *v.* Lowell, 3 Cush. 121; Raymond *v.* Lowell, 6 Cush. 524; Lowell *v.* Spaulding, 4 Cush. 277, 50 Am. Dec. 775; Kirby *v.* Market Assn., 14 Gray, 249; Manchester *v.* Hartford, 30 Conn. 118; Hubbard *v.* Concord, 35 N. H. 52, 69 Am. Dec. 520; Coombs *v.* Purrington, 42 Me. 332; Stewart *v.* Ripon, 38 Wis. 584; Smith *v.* Wendell, 7 Cush. 498; Winn *v.* Lowell, 1 Allen, 177; Loan *v.* Boston, 106 Mass. 450; Weare *v.* Fitchburg, 110 Mass. 334; Harriman *v.* Boston, 114 Mass. 241; McAuley *v.* Boston, 113 Mass. 503; Street *v.* Holystone, 105 Mass. 82, 7 Am. Rep. 500; Drake *v.* Lowell, 13 Met. 292; Hixon *v.* Lowell, 13 Gray, 59; Providence *v.* Clapp, 17 How. 161, (from R. I.). See Monies *v.* Lynn, 121 Mass. 442.

49—See Weightman *v.* Washington, 1 Black, 39; Chicago *v.* Robbins, 2 Black, 418; Nebraska *v.* Campbell, 2 Black, 590; Manchester *v.* Ericsson, 105 U. S. 347; Grant *v.* Stillwater, 35 Minn. 242; Galveston *v.* Posnainsky, 62 Tex.

118; *Kent v. Worthing Local Am. St. Rep.* 17; *Thomas v. Springfield City*, 9 Utah, 426, 35 Pac. 503; *Clark v. Richmond*, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281; *Roanoke v. Shull*, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791; *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76. See *Veeder v. Little Falls*, 100 N. Y. 343; *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804. *Contra*, *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; *Young v. Charleston*, 20 S. C. 116, 47 Am. Rep. 827. This subject cannot be pursued here; it is of course treated fully in the exhaustive treatise of Judge DILLON on the Law of Municipal Corporations. A city does not escape liability by employing an independent contractor. *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Jacksonville v. Drew*, 19 Fla. 106, 45 Am. Rep. 5; *Mayor, &c., of Baltimore v. O'Donnell*, 53 Md. 110. As to liability for unguarded area near street lines, see *Clarke v. Richmond*, 83 Va. 355, 5 S. E. 369; *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522; *Monk v. New Utrecht*, Id. 552. Liable for fall of dangerous building on street line. *Duffy v. Dubuque*, 63 Ia. 171. Not liable for defect nor obstruction in untraveled part of a street. *McArthur v. Saginaw*, 58 Mich. 357; *Fitzgerald v. Berlin*, 64 Wis. 203; see *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 383; at least in a suburban street, *Monongahela v. Fischer*, 111 Penn. St. 9, 56 Am. Rep. 241.

in consequence of defects in sidewalks.⁵⁰ "Municipal [*747] governments owe to the public the specific, clear and

The city of Augusta, Georgia, maintained a bridge across the Savannah river into South Carolina. It was held liable for a defect in the part in the latter state, though a municipality was not so liable under the laws of that state. *City Council v. Hudson*, 88 Ga. 599, 15 S. E. 678.

50—*Bloomington v. Bay*, 42 Ill. 503; *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334; *Rockford v. Hillebrand*, 61 Ill. 155; *Lacon v. Page*, 48 Ill. 499; *Alexander v. Mt. Sterling*, 71 Ill. 366; *Lovenguth v. Bloomington*, 71 Ill. 238; *Quincy v. Barker*, 81 Ill. 300, 25 Am. Rep. 278; *Chicago v. McGiven*, 78 Ill. 347; *Chicago v. McCarthy*, 75 Ill. 602; *Joliet v. Verley*, 35 Ill. 58; *Galesburg v. Higley*, 61 Ill. 287; *Chicago v. Kelly*, 69 Ill. 475; *Chicago v. Robbins*, 2 Black, 418, (from Illinois); *Wallace v. New York*, 2 Hilt. 440; *Davenport v. Ruckman*, 37 N. Y. 568; *Koester v. Ottumwa*, 34 Iowa, 41; *Rowell v. Williams*, 29 Iowa, 210; *St. Paul v. Kuby*, 8 Minn. 154; *Atlanta v. Perdue*, 53 Geo. 607; *Bohen v. Waseca*, 32 Minn. 176; *Bell v. West Point*, 51 Miss. 262; *Baltimore v. Marriott*, 9 Md. 160; *Atchison v. King*, 9 Kan. 550; *McDonough v. Virginia City*, 6 Nev. 90; *Russell v. Canastota*, 98 N. Y. 496; *Dotton v. Albion*, 50 Mich. 129; *O'Neill v. Detroit*, Id. 133; *Hanscom v. Boston*, 141 Mass. 242; *Platts-mouth v. Mitchell*, 20 Neb. 228, 29 N. W. 593; *Birmingham v. Tayloe*, 105 Ala. 170, 16 So. 576; *Denver v. Dean*, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594; Den- ver *v. Hyatt*, 28 Colo. 129, 63 Pac. 403; *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414; *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 315; *Giffen v. Lewiston*, 6 Ida. 231, 55 Pac. 545; *Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; *Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41; *Anderson v. Albion*, 64 Neb. 280, 89 N. W. 794; *Russell v. Monroe*, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823; *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. 932; *Norman v. Teel*, 12 Okl. 69, 69 Pac. 791; *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324; *Bangus v. Atlanta*, 74 Tex. 629, 12 S. W. 750. In *Chicago v. Schmidt*, 107 Ill. 187, the city was held liable where from a defective walk one was thrown on a railroad track and killed by a train. Liable for defects though a minor was using street as a playground. *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860. See *Donoho v. Vulcan Iron Works*, 75 Mo. 401; *Varney v. Manchester*, 58 N. H. 430, 42 Am. Rep. 592; *McGuire v. Spence*, 91 N. Y. 303; *Gulline v. Lowell*, 144 Mass. 491, 59 Am. Rep. 102. Standing for five minutes to watch a procession is not such a use of a street that one ceases to be a traveler and entitled to protection as such. *Varney v. Manchester*, 58 N. H. 430, 42 Am. Rep. 592, collecting many cases. Plaintiff may recover, if using the walk for any purpose for which it was designed, though not traveling at the time. *Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 315; *Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389. But where

legal duty of putting and maintaining the public highways which are in their care, or under their management, in a good, safe and secure condition, and any default in making them safe and secure, or in so maintaining them, if occurring through the negligence of the officials, upon whom a duty is devolved by law, will render the city liable. Where the unsafe condition occurs through some other agency or instrumentality, negligence is not imputable until a sufficient time has elapsed to charge the city officials with notice. Where a street is thrown open for public use, those who travel upon it have the right to assume that it is in a reasonably safe condition, and if, without fault of their own, or without knowledge of some existing obstruction, they are injured while lawfully using the street, the city is liable, unless the defect which caused the injury has existed for so short a time that the city officials, by the exercise of reasonable care and supervision could not have known of it. The city is not an insurer of the safety of those who travel upon its highways, and those who do so are bound to use their faculties and are held to the exercise of ordinary care and prudence. The duty of the city to keep its streets in a safe condition for public travel is absolute, and it is bound to exercise reasonable diligence and care to accomplish that end.⁵¹ A city may impose

a child leaves the sidewalk and make the necessary repairs it goes upon a wall and falls into an area the city is not liable. Clark *v.* Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281. Where a child was drowned while skating upon a pond partly in the street and partly in the adjoining lot, the city was held not liable, as the deceased was not a traveler. Arnold *v.* St. Louis, 152 Mo. 173, 53 S. W. 900, 75 Am. St. Rep. 447, 48 L. R. A. 291.

51—Turner *v.* Newburgh, 109 N. Y. 301, 305, 16 N. E. 344, 4 Am. St. Rep. 453. It is no defense that the city cannot raise sufficient funds to perform its duty in making repairs. If it cannot

should close the street to travel. Carney *v.* Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328. See Lord *v.* Mobile, 113 Ala. 360, 21 So. 366. Nor that it is indebted to the constitutional limit. Connor *v.* Nevada, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 267. Nor is it a defense that the injury was due in part to an accidental circumstance, or the act or neglect of a third party, concurring with the defect, if the injury would not have been done but for the defect. Board of Commissioners *v.* Mutchler, 137 Ind. 140, 36 N. E. 534; Hazzard *v.* Council Bluffs, 79 Ia. 106, 44

the duty of making and keeping the sidewalks in repair upon the adjoining owners; but doing so does not relieve the city itself from responsibility to perform the duty imposed upon it by law; and if the duty fails in performance, the city and the individual in default may be united in a suit for the injury caused by the nuisance.⁵²

N. W. 219; *Byerly v. Anamosa*, 79 Ia. 204, 44 N. W. 359; *Voglege-sang v. St. Louis*, 139 Mo. 127, 40 S. W. 653; *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. 932; *Burrell v. Uncapher*, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 664; *Gonzales v. Galveston*, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17; *McPherson v. District of Columbia*, 7 Mackey, 564; *Kansas City v. Orr*, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; *Kansas City v. Gilbert*, 65 Kan. 469, 70 Pac. 350; *Cline v. Crescent City R. R. Co.*, 41 La. Ann. 1031, 6 So. 851; *Cline v. Crescent City R. R. Co.*, 43 La. Ann. 327, 9 So. 122, 26 Am. St. Rep. 187; *Pettingill v. Yonkers*, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442.

It is not necessarily contributory negligence for the plaintiff to use a walk or street known to be defective. *Corts v. District of Columbia*, 7 Mackey, 277; *Bailey v. Centerville*, 115 Ia. 271, 88 N. W. 379; *Harris v. Clinton*, 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842; *Maus v. Springfield*, 101 Mo. 613, 14 S. W. 630; *Russell v. Monroe*, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823. Where a pedestrian on the street was killed by a timber negligently thrown from a building in process of erection, it was held that the city was not liable because it gave a permit for the erection of the building or because it did not

put up a guard about the premises. *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333.

Where a statute requires notice to the municipality before action is brought, compliance is a condition precedent. *Roberts v. Cleburne County*, 116 Ala. 378, 22 So. 545; *Biesiegel v. Seymour*, 58 Conn. 43, 19 Atl. 372; *Manning v. Woodstock*, 59 Conn. 224, 22 Atl. 42; *Mears v. Spokane*, 22 Wash. 323, 60 Pac. 1127.

52—*Davenport v. Ruckman*, 37 N. Y. 568. See *Rowell v. Williams*, 29 Iowa, 210. *Contra*, *Marquette v. Cleary*, 37 Mich. 296. If a common duty rests on the city and the owner both are liable though there is no concert of action. *Peoria v. Simpson*, 110 Ill. 204, 51 Am. Rep. 683. See *Papworth v. Milwaukee*, 64 Wis. 389.

Space will not be taken up with a specification of what constitute defects in sidewalks. How far snow and ice may constitute a defect has been so much a matter of controversy that the following references to cases are given: *Cook v. Milwaukee*, 24 Wis. 270; *Luther v. Worcester*, 97 Mass. 268; *Hutchins v. Boston*, 97 Mass. 272, note; *Collins v. Council Bluffs*, 32 Iowa, 324, 7 Am. Rep. 200; *Nason v. Boston*, 14 Allen, 508; *Stanton v. Springfield*, 12 Allen, 566; *Chicago v. McGiven*, 78 Ill. 347; *Powers v. Chicago*, 20

[*748] *Obstructions consequent on the repair of streets create no liability if there is no negligence.⁵³

Individual Liability for Defects in Streets. If an individual, whether the adjoining owner or not, and whether the fee in the public way is in himself or in the public, does any act which renders the use of the street hazardous or less secure than it was left by the proper public authorities—as by excavations made in the sidewalks, or by unsafe hatchways left therein, or by opening or leaving open area ways in the traveled way, or by undermining the street or sidewalk—he commits a nuisance, and he is liable to any person who, while exercising due care, is injured in consequence.⁵⁴ If, however, he has the consent of the

Ill. App. 178; *McLaughlin v. Sic*, 68 Ohio St. 1, Corry, 77 Pa. St. 109, 18 Am. Rep. 432; *Mauch Chunk v. Kline*, 100 Pa. St. 119, 45 Am. Rep. 364; *Hanson v. Warren*, 14 Atl. Rep. 405 (Penn.); *Shea v. Lowell*, 8 Allen, 136; *Wilson v. Charlestown*, 8 Allen, 137; *Payne v. Lowell*, 10 Allen, 147; *Hall v. Lowell*, 10 Cush. 260; *Baltimore v. Marriott*, 9 Md. 160; *Providence v. Clapp*, 17 How. 161; *Calkins v. Hartford*, 33 Conn. 57, 87 Am. Dec. 194; *Dooley v. Meriden*, 44 Conn. 117, 26 Am. Rep. 433; *Cloughessey v. Danbury*, 51 Conn. 405; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492; *Kinney v. Troy*, 108 N. Y. 567, 15 N. E. 728; *Kaveny v. Troy*, 108 N. Y. 571, 15 N. E. 726; *Grossenbach v. Milwaukee*, 65 Wis. 31, 56 Am. Rep. 614; *Smyth v. Bangor*, 72 Me. 249; *Broburg v. Des Moines*, 63 Ia. 523, 50 Am. Rep. 756; *McKellar v. Detroit*, 57 Mich. 158, 58 Am. Rep. 357; *Gaylord v. New Britain*, 58 Conn. 398, 20 Atl. 365, 8 L. R. A. 752; *Kinney v. Troy*, 108 N. Y. 567, 15 N. E. 728; *Harrington v. Buffalo*, 121 N. Y. 147, 24 N. E. 186; *Leip-*

67 N. E. 87; *Brown v. White*, 206 Pa. St. 106, 55 Atl. 848; *Scoville v. Salt Lake City*, 11 Utah, 60, 39 Pac. 481; *Garland v. Wilkes-Barre*, 212 Pa. St. 151; *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054; *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138; *Beaton v. Milwaukee*, 97 Wis. 416, 73 N. W. 53; *Dapper v. Milwaukee*, 107 Wis. 88, 82 N. W. 725.

53—*Kimball v. Bath*, 38 Me. 219. See *Robbins v. Chicago*, 4 Wall. 657; *Klatt v. Milwaukee*, 53 Wis. 196, where a barrier had been removed without notice to the city. Compare *Mayor, &c., of Baltimore v. O'Donnell*, 53 Md. 110.

54—*Robbins v. Chicago*, 2 Black, 418; S. C. 4 Wall. 657; *Bush v. Johnston*, 23 Pa. St. 209; *Beatty v. Gilmore*, 16 Pa. St. 463, 55 Am. Dec. 514; *Irvin v. Fowler*, 5 Rob. 482; *Davenport v. Ruckman*, 10 Bosw. 20; S. C. 37 N. Y. 568; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *Durant v. Palmer*, 29 N. J. 544; *Pfau v. Reynolds*, 53 Ill. 212; *Severin v. Eddy*, 52 Ill. 189; *Rowell v. Williams*, 29 Iowa, 210; *Driscoll v.*

proper *public authorities, and what he does is consistent with the customary use of the way for private purposes—as where he is making connection with a public sewer or with a gas main—and he observes a degree of care proportioned to the danger, and is consequently chargeable with no fault, he cannot be held responsible for accidental injuries, inasmuch as in such case he has failed in the observance of no duty.⁵⁵ The question in all such cases is one of due and proper care.

Carlin, 50 N. J. L. 28, 11 Atl. 482; Calder *v.* Smalley, 66 Ia. 219, 55 Am. Rep. 270. If a street car company leaves ridges of snow in cleaning its tracks and thereby a traveler is injured, it is liable. Bowen *v.* Detroit, &c., Ry. Co., 54 Mich. 496, 52 Am. Rep. 822; Wallace *v.* Detroit, &c., Ry. Co., 58 Mich. 231. If the slot for the grip in track of a cable car company is large enough to let a carriage wheel slip into it, the company is liable without notice. Keitel *v.* St. Louis Cable Ry. Co., 28 Mo. App. 657.

55—Ottumwa *v.* Parks, 43 Iowa, 119; Portland *v.* Richardson, 54 Me. 46, 89 Am. Dec. 720. See Kimball *v.* Bath, 38 Me. 219; Kirkpatrick *v.* Knapp, 28 Mo. App. 427; Crandall *v.* Loomis, 56 Vt. 664. If one chargeable with no duty as to maintaining a sidewalk, takes up and replaces a loose plank in it, he is not liable to one afterward injured by it. Davis *v.* Mich. Bell, &c., Co., 61 Mich. 307, 28 N. W. 108. One is not obliged to make his bridge as safe as a sidewalk if he is digging under the sidewalk by a city's authority. Nolan *v.* King, 97 N. Y. 565, 49 Am. Rep. 561. Lot owner not liable for fall of limbs upon traveler where a city has authority to trim shade trees. Weller *v.* McCormick, 47 N. J. L. 397, 54 Am. Rep. 175. Where an owner's duty is to repair the walk and in default thereof the city is to do it and charge the lot with the expense, if by reason of its non-repair the city has to pay damages, the owner is not liable over. Keokuk *v.* Ind. Sch. Dist., 53 Ia. 352. But see Detroit *v.* Chaffee, 70 Mich. 80, 37 N. W. 882, and cases in note p. 1315, *suptra*. The owner may be made primarily liable for the injury in Wisconsin. Henker *v.* Fond du Lac, 71 Wis. 616, 38 N. W. 187; Raymond *v.* Sheboygan, 35 Id. 540; but in Minnesota, he can be made liable only to the city. Noonan *v.* Stillwater, 33 Minn. 198, 53 Am. Rep. 23. As to liability for failure to remove snow and ice where ordinance requires it. Wenzlick *v.* McCotter, 87 N. Y. 122; Moore *v.* Gadsden, 93 N. Y. 12; Taylor *v.* Lake Shore, &c., Co., 45 Mich. 74, 40 Am. Rep. 457. See also Merritt *v.* Fitzgibbons, 102 N. Y. 362, where a man slipped under a horse's feet and was hurt by the horse and lot owner was held not liable. As to liability over in such case. Hartford *v.* Talcott, 48 Conn. 525, 40 Am. Rep. 189.

WRONGS FROM NON-PERFORMANCE OF CONVENTIONAL AND
STATUTORY DUTIES.

In this chapter will be considered certain cases in which, by virtue of some conventional relation between parties, a specific obligation is imposed upon one to observe some special course of conduct as regards the person or the property of the other. The most numerous of these are cases of bailment, but in some a special duty is undertaken or in contemplation of law promised as regards both person and property.

Bailment, what is. Bailment is a delivery of goods in trust, upon an agreement expressed or implied, that the trust shall be duly exercised, and the goods returned or delivered over when the purpose of the bailment is accomplished. There are several sorts of bailment, and for our purposes we follow the classification of Mr. Justice STORY, which is as follows:

1. Those in which the trust is for the benefit of the bailor.
2. Those in which the trust is for the benefit of the bailee.
3. Those in which the trust is for the benefit of both parties.¹

The classification is important here, because the degree of care and vigilance required of the bailee is justly held to be in some degree dependent upon the circumstance that the benefit is to accrue to one rather than the other, or to both instead of one only.

Bailments for the Benefit of the Bailor. Of the first class of bailments, or those in which one assumes a trust in goods for the benefit of the owner, it is to be said that these are usually mere matters of friendly accommodation; such as the carriage of a parcel from one town to another by one who is going on his own business, for his neighbor, who is thereby saved the

1—Story on Bailments, § 3.

necessity of a journey to carry it himself. In *this case [*751] by receiving the parcel on an understanding that he will carry it, the bailee undertakes to do so, and though there is no benefit to accrue to him from the performance of the trust, the delivery to him of the parcel is a sufficient consideration for the undertaking. Another illustration is the case of one who, at his neighbor's request, receives some article of value to be cared for during the latter's absence from his home or place of business.^{1a} Here the trust is one of safe keeping only, but the law implies a promise commensurate with the trust.

If the trust to carry and deliver in the one case, or to keep safely in the other is not performed, the bailee is guilty of a breach of duty unless he has some legal excuse for the failure. It would be a good legal excuse if the goods are injured, lost or destroyed without the bailee's fault: of this there can be no question.

What, then, would be a loss or injury without the bailee's fault? One occurring by inevitable accident would certainly be; but this term is somewhat ambiguous and uncertain, and few accidents occur that might not, by extreme care, have been avoided. It has been said in another place² that for accidents occurring without fault no action will lie; and those accidents are usually spoken of as inevitable which have occurred notwithstanding the exercise of such care as might reasonably have been expected under the circumstances.³ The utmost human vigilance is not to be anticipated or demanded under the ordinary circumstances of every-day life.

The bailee who accepts a trust for the benefit of the bailor is of course obligated to its performance, and he is not discharged from this obligation unless he has done all that can reasonably be required of him in respect to it. But he has not done all that can reasonably be required of him if he has been guilty of negli-

1a—Louisville, etc., R. R. Co. 3—See *Holmes v. Mather*, L. R. v. Gerson, 102 Ala. 409, 14 So. 10 Exch. 261; S. C. 14 Moak, 548, 873; *Wade v. Lutcher*, etc., Lum- and the editor's note thereto, for ber Co., 74 Fed. 517, 20 C. C. A. an examination of the subject of 515. accident.

2—*Ante*, pp. 138-141.

gence; for negligence implies fault, and to be in fault in discharging a legal duty to another is to place one's self under legal obligation to make good the consequent loss.⁴

Negligence, what is. The question of legal liability [*752] is therefore one of negligence, and its consideration *de-

mands, first, a determination of what negligence is. To reach this we are not to look solely at a man's acts or his failure to act: the term is relative, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose. That degree is not the same in all cases: it may vary according to the danger involved in the want of vigilance. A few simple illustrations may make this apparent. It might not be negligence in one having charge of an infant to permit it to wander in the fields where friendly people would be continually within call and no peculiar danger was to be looked for, when to allow the same liberty in a country where the people were few and ferocious beasts abundant would be highly culpable if not criminal. The degree may vary also according to the benefit, if any, that the party assuming the duty is to derive from its performance: if he is paid a large sum for undertaking it, the evident understanding is that he shall give to it an attention and vigilance in proportion, and he is justly put to a watchfulness that is not expected of one who, on request, undertakes a mere friendly commission. The degree may also vary according to the value of the thing in respect to which the trust is assumed, not only because the loss that might result from want of care would be more severe, but also because the danger of loss generally bears some proportion to the value; a jewel being unsafe where something of little worth might be exposed with impunity, and consequently requiring more care and vigilance for its protection. All these circumstances are to be taken into account when the question involved is one of negligence; for negligence in a legal sense is no more nor less than this: the failure to observe, for the pro-

4—*Burk v. Dempster*, 34 Neb. for the loss or injury of the prop-
erty bailed. *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114.

tection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.⁵ Some writers classify negligence as gross negligence, ordinary negligence and slight negligence; *but this classification only [*753] indicates this: that under the special circumstances great care and caution were required, or only ordinary care, or only slight care. If the care demanded was not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown.⁶ "There are no degrees of negligence;

5—Negligence is the absence of care which the circumstances require." Jackson Tp. *v.* Wagner, 127 Turnpike Co. &c., Railroad Co., Pa. St. 184, 195, 17 Atl. 903, 14 51 Pa. St. 345; Philadelphia, &c., Am. St. Rep. 833. See further, Railroad Co. *v.* Stinger, 78 Pa. St. 219; Texas, &c., R. R. Co. *v.* Murphy, 46 Texas, 356, 26 Am. Rep. 272; Blaine *v.* Ches. & Ohio R. R. Co., 9 W. Va. 252; Nor. Cent. R. R. Co. *v.* State, 29 Md. 420; Barber *v.* Essex, 27 Vt. 62.

"The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do." Alderson B. in *Blyth v. Birmingham Waterworks*, 11 Exch. 781, 784. "The absence of such care as a person is by law bound to take." Hyman *v.* Nye, L. R. 6 Q. B. D. 685; Lindley, L. J. "Actionable negligence consists in the neglect of the use of ordinary care or skill toward a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff without contributory negligence on his part has suffered injury to his person or property." Brett, M. R. in Heaven *v.* Pender, L. R. 11 Q. B. D. 503, 507. "Negligence is the absence of that measure of

Giles, 7 Houst. 556, 11 Atl. 189; Hinton *v.* Dibbin, 2 Q. B. 644, 661; Wilson *v.* Brett, 11 M. & W. 113, 115; Steamboat New World *v.* King, 16 How. 469, 474. A bailment for the mutual amusement and recreation of both parties, is to be considered one for the benefit of both, and the want of ordinary care in the bailee will render him liable. Carpenter *v.* Branch, 13 Vt. 161.

there are degrees of care, and the failure to exercise the proper degree of care is negligence.''⁷

Applying these principles to the case of a gratuitous bailee we perceive that that is not to be attributed to him as negligence which is only a failure to apply to this charge the highest degree of vigilance and prudence, because to require so much would not be reasonable. Neither, on the other hand, should he be excused for a loss which has occurred from an entire neglect of his charge, for this would be equally unreasonable.⁸ His undertaking must consequently be for something which falls short of the highest vigilance, but which, on the other hand, is not entire neglect.

Degrees of Negligence. Sir WILLIAM JONES has undertaken to define the degrees of care which can justly be required of bailees under the different classes of bailments. Where the bailment is for the mutual benefit of both parties, he finds it just to require that degree of care which every person of common prudence and capable of governing a family ordinarily takes of his own concerns; and this he designates ordinary diligence. If, on the other hand, the bailment is for the benefit of the bailee, it is proper to require of him the highest vigilance, or such as a very cautious and vigilant man would take of his own possessions, while if it were for the benefit of the bailor exclusively, the bailee is chargeable only with such slight care as a man of common sense, however inattentive, would give to his own affairs.⁹

[*754] *We have here the three degrees of extreme care, ordinary care and slight care demanded in different cases, according to the circumstances and the nature of the trust; the highest being demanded when the person who is to be benefited by the trust is himself the person to perform it, and the lowest when he accepts the trust as a mere favor to another. But, as has already been said, these degrees are subject to be affected

7—*Magrane v. St. Louis, etc.*, 115 Mo. 119, 128, 81 S. W. 1158. 8—See *Griffith v. Zipperwick, Ry. Co.*, 28 Ohio St. 388.

9—*Jones on Bailments*, 4-10.

by the nature of the thing in respect to which the trust is created, its value, its liability to injure, etc.¹⁰

Liability as gratuitous bailee only arises when the trust has once been assumed: the promise to accept such a trust is void for want of consideration, and probably after he has accepted the bailee may surrender it without performance if he restore the property uninjured, and without having put the bailor to any inconvenience or damage.¹¹ But any dealing with the subject of the bailment in a manner not warranted by the understanding, is in law wrongful. Therefore, if one having undertaken to carry and deliver money for another, shall hand it over to a third person to be carried, from whom it is stolen or by whom it is lost, the loss must fall upon the bailee, who alone was trusted by the owner.¹²

The question whether the proper degree of care has been observed is one of fact, not of law.¹³ A bailee is not responsible if the property is stolen from him without his fault, and this rule applies to a bank from which a special deposit is stolen by its officers.¹⁴ But where securities are placed with a bank as a

10—*Coggs v. Bernard*, 2 Ld. Raym. 909; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Chase v. Mayberry*, 3 Harr. 266.

11—*Thorne v. Deas*, 4 Johns. 84. Compare *Shillibeer v. Glyn*, 2 M. & W. 143.

12—*Colyar v. Taylor*, 1 Cold. 372. If one who undertakes to carry money, sends it by mail, he is responsible for the loss. *Stewart v. Frazier*, 5 Ala. 114. See *Bland v. Womack*, 2 Murphey, 373; *Jenkins v. Motlow*, 1 Sneed, 248, 60 Am. Dec. 154; *Graves v. Ticknor*, 6 N. H. 537.

13—*Chase v. Mayberry*, 3 Harr. 266; *Jenkins v. Motlow*, 1 Sneed, 248; *Beatty v. Gilmore*, 16 Penn. St. 463, 55 Am. Dec. 514; *Storer v. Gowen*, 18 Me. 174; *Tracy v. Wood*, 3 Mason, 132; *Doorman v. Jenkins*, 2 Ad. & E. 256.

14—*Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *DeHaven v. Kensington Bank*, 81 Pa. St. 95; *Merchants Nat. Bank v. Guilmartin*, 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322. Bank liable when bonds specially deposited are stolen if it has been grossly negligent. *Whitney v. Nat. Bank*, 55 Vt. 154. See *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582; *Nat. Bank v. Graham*, 100 U. S. 699; *Wylie v. Northampton Bank*, 119 U. S. 361; *Comp v. Carlisle, &c., Bank*, 94 Pa. St. 409. So of an individual bailee of money. *Bronnenburg v. Charman*, 80 Ind. 475; *Caldwell v. Hall*, 60 Miss. 330, 45 Am. Rep. 410. Of a bailee of a ring left to be raffled for contrary to law. *Woolf v. Bernero*, 14 Mo. App. 518. A gratuitous bailee, it is held, is only lia-

special deposit it is held liable for any loss thereof "accruing through the want of that degree of care, which good business men should exercise in keeping property of such value."¹⁵ And the Supreme Court of the United States, in a suit against a bank for a special deposit of bonds stolen by its cashier, stated the law to be that gratuitous bailees are bound to exercise such reasonable care as men of common prudence would usually bestow for the protection of their own property of similar value, and that gross negligence, as applied to such bailees, "is nothing more than a failure to bestow the care which the property in its situation demands."¹⁶ And where it is known that an officer or employe having access to special deposits is engaged in speculation, and he is retained in his position and no examination is made to see if such deposits are intact, the bank will be liable if such deposits are stolen by such officer or employe.¹⁷ A rail-

ble for gross negligence. *Patterson v. McIver*, 90 N. C. 493; *Carriington v. Ficklin*, 32 Gratt. 670. In a case where, with bailor's knowledge, the bailee had put his bonds in a locked drawer from which they were stolen it was held there was no liability and the rule was stated that a gratuitous bailee "is bound to observe such care in the custody of property committed to his keeping as persons of ordinary prudence in his situation and business usually bestow on the custody and keeping of like property belonging to themselves." *Schermer v. Neurath*, 54 Md. 491, 39 Am. Rep. 379. See *Rea v. Simmons*, 141 Mass. 561, 55 Am. Rep. 492; *Brant v. McMahon*, 56 Mich. 498. Where the plaintiff, for his own accommodation, put his money in the defendant's safe for safe keeping and the same was stolen by robbers without the defendant's fault, it was held there was no liability. *Carlyon v. Fitzhenry*, 2 Ariz. 266, 15 Pac. 273.

So where the money was stolen from the safe by the defendant's trusted clerk. *Glover v. Burbridge*, 27 S. C. 305, 3 S. E. 471.

15—*Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769.

16—*Preston v. Prather*, 137 U. S. 604, 11 S. C. Rep. 162, 34 L. Ed. 788.

17—*Rushin v. Tharpe*, 88 Ga. 779, 15 S. E. 830; *MERCHANTS NAT. BANK v. GUILMARTIN*, 93 Ga. 503, 21 S. E. 55, 44 Am. St. Rep. 182; *MERCHANTS NAT. BANK v. CARHART*, 95 Ga. 394, 22 S. E. 628, 51 Am. St. Rep. 95, 32 L. R. A. 775; *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769; *MANHATTAN BANK v. WALKER*, 130 U. S. 267, 9 S. C. Rep. 519, 32 L. Ed. 959; *Preston v. Prather*, 137 U. S. 604, 11 S. C. Rep. 162, 34 L. Ed. 788. In the last case the court says: "The business of the bailee will necessarily have some effect upon the care required of him, as, for example, in the

road company is not liable for the loss, *without fault, [*755] of property which it has received to carry gratuitously.¹⁸

Bailments for the Benefit of the Bailee. The case of a bailment for the exclusive benefit of the bailee is the opposite of that already considered, and requires of the bailee the exercise of more than the ordinary care and vigilance. A common instance is the gratuitous loan of his horse by the owner to a friend for a particular journey. If in such a transaction the party accommodated is guilty of even slight neglect, and the horse is lost or injured in consequence, this is such negligence as will render him responsible.¹⁹

case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody. Persons therefore, depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that whenever ground for suspicion arises an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor." pp. 610, 611.

Where a special deposit of bonds is used from time to time as collateral it is held to be a bailment for the mutual advantage of the parties and the bank is bound to corresponding care, even when the bonds are not pledged as col-

lateral. *Gray v. Merriam*, 46 Ill. App. 337; *Onderkirk v. Central National Bank*, 119 N. Y. 263, 23 N. E. 875; *Preston v. Prather*, 137 U. S. 604, 11 S. C. Rep. 162, 34 L. Ed. 788.

18—*Van Gilder v. Chicago, &c., R. R. Co.*, 44 Iowa, 548; *Flint, &c., R. Co. v. Weir*, 37 Mich. 111, case of gratuitous carriage of baggage. So only liable for gross negligence of baggage gratuitously stored. *Clark v. Eastern R. R. Co.*, 139 Mass. 423. But if one receives money to be carried gratuitously, and can give no account whatever of its disposition, a presumption of gross neglect arises against him. *Boyd v. Estis*, 11 La. Ann. 704. See *Fairfax v. N. Y. Cent. R. R. Co.* 67 N. Y. 11.

19—*Phillips v. Coudon*, 14 Ill. 84; *Howard v. Babcock*, 21 Ill. 259; *Watkins v. Roberts*, 28 Ind. 167.

He is responsible for even the slightest neglect, and when a loss occurs the burden is upon him to prove that it was the result of inevitable accident or of a wrongful act which, in the exercise of due diligence, could not have been foreseen or prevented. *Scranton*

Bailments for Mutual Benefit. The most common bailments are those from which each party expects, or is supposed to receive, some advantage. Some of these cases are simple, [*756] involving a *consideration only of the particular transaction, as where the livery-keeper lets a horse, to be taken by the bailee for a journey, for a consideration paid or to be paid. Others are complicated by the consideration that the bailee receives the property in the course of a certain occupation to which the law attaches exceptional duties, imposing upon those who follow it extraordinary liabilities. Among the first may be named the case of a pledge of goods in security for a debt.²⁰ Here the goods are delivered to a bailee, whose implied undertaking is that he will keep them safely and return them when the debt is paid. Another case is that of the delivery of a thing to a mechanic, in order that something may be done by him upon or in respect to it, in the line of his employment

v. Baxter, 4 Sandf. 5; *Wood v. McClure*, 7 Ind. 155. Such a bailee of a flag which is injured by a hail storm is not liable from the mere fact of injury. *Beller v. Schultz*, 44 Mich. 529, 38 Am. Rep. 280. If one furnishes a carriage gratuitously to three persons and a fourth without his knowledge gets in, he is not liable if such an one is injured by a runaway. *Siegrist v. Arndt*, 86 Mo. 200, 56 Am. Rep. 424. If the gratuitous bailor of a chattel or appliance, knows of a defect therein which renders it unsafe for the use intended and does not inform the bailee of the defect, he will be liable for any injury to the bailee by reason of such defect. *Coughlin v. Gillison*, (1899) 1 Q. B. 145. Otherwise if the bailor did not know of the defect. *Gagnon v. Dana*, 69 N. H. 264, 39 Atl. 982, 26 Am. St. Rep. 170, 41 L. R. A. 389. The bailor is under no obligation to exercise care to dis-

cover such defects, in order to warn the bailee thereof. *Ibid.* 20—A bank, as bailee of bonds deposited as security for a loan, is bound only to ordinary care. *Jenkins v. Nat. Bank of Bowdoinham*, 58 Me. 275, citing *Field v. Brackett*, 56 Me. 121. And see *Maury v. Coyle*, 34 Md. 235; *First Nat. Bank v. Graham*, 79 Pa. St. 106, 21 Am. Rep. 49; *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520, 22 So. 976; *Serry v. Knepper*, 101 Ia. 372, 70 N. W. 601; *Loomis v. Reimers*, 119 Ia. 169, 93 N. W. 95; *Schaaf v. Fries*, 90 Mo. App. 111. A warehouseman is only liable for want of ordinary care. *Mobile, &c., R. R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586. As to the liability of a national bank as gratuitous bailee, see *DeHaven v. Kensington Bank*, 81 Pa. St. 95; *Wiley v. First Nat. Bank*, 47 Vt. 546, 19 Am. Rep. 122, and cases, p. 1328, *supra*.

and for a compensation. As in each of these cases the bailment is for the benefit of both parties, the bailee is charged with the obligation of ordinary care, but no more.²¹ Another case is that of the deposit of grain in a mill or warehouse, to be returned on demand. This case is peculiar in that it is commonly expected that the grain deposited will be stored with other grain of like kind and quality, so that the return of precisely the same grain will be impossible. This circumstance, however, does not vary the rules of legal responsibility. The bailor is entitled to receive from the aggregate an amount of grain [*757] of like kind and quality equal to the deposit, and the bailee must deliver it on demand, or he must show an excuse which does not involve a want of ordinary care on his part. It would be a valid excuse if, while he was in the exercise of ordinary care, the grain was stolen, or was destroyed by an accidental or incendiary fire.²² If, however, by the custom of the business, a warehouseman is expected to buy and sell, and to

21—Articles left to be repaired. which had been left for exhibition. Dale *v.* See, 51 N. J. L. 378, 18 Atl. 306, 14 Am. St. Rep. 688, 5 L. R. A. 583; Zell *v.* Dunkle, 156 Pa. St. 353, 27 Atl. 38. Goods delivered to be made up into garments. Labowitz *v.* Frankfort, 4 Misc. 275, 23 N. Y. S. 1038. So when cotton is left to be ginned. Kelton *v.* Taylor, 11 Lea, 264, 47 Am. Rep. 284; James *v.* Orrell, 68 Ark. 284, 57 S. W. 931, 82 Am. St. Rep. 293; or to be compressed, Union Compress Co. *v.* Nunnally, 67 Ark. 284, 54 S. W. 1072; horse left with stable keeper over night, Dennis *v.* Huyck, 48 Mich. 620, 42 Am. Rep. 479; logs to be sawed left with sawyer, Gleason *v.* Beers, 59 Vt. 581, 59 Am. Rep. 757; notes left for collection, Kincheloe *v.* Priest, 89 Mo. 240; when a horse is hired, Carrier *v.* Dorrance, 19 S. C. 30. An agricultural society is liable for goods, stolen through its negligence from its fair ground,

Vigo Ag'l. Soc. *v.* Brumfiel, 102 Ind. 146, 52 Am. Rep. 657. To same effect, Prince *v.* Ala. State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716. A bailee for hire of cars to be returned in as good condition as when received, ordinary wear excepted, is not liable for loss from fire occurring without its fault. St. Paul, &c., R. R. Co. *v.* Minn., &c., Ry. Co., 26 Minn. 243. In Mass. under a like contract the bailee of a piano was held liable where the loss occurred from the blowing down of the house. Harvey *v.* Murray, 136 Mass. 377.

22—Erwin *v.* Clark, 13 Mich. 10; Perkins *v.* Dacon, 13 Mich. 81; Norton *v.* Woodruff, 2 N. Y. 152; James *v.* Plank, 48 Ohio St. 255, 26 N. E. 1107. See Nelson *v.* Brown, 44 Iowa, 455; Young *v.* Miles, 20 Wis. 615.

store what he buys with that which he receives on deposit, making his sales from the aggregate, this course of dealing negatives the supposition that the grain deposited is to remain subject to call.²³ It is, therefore, not a bailment, but it is a sale of the grain on an undertaking to pay for it on demand in grain of like kind and quality; and all risks are upon the warehouseman.²⁴

Every bailee is bound, in his use of the property, to keep

23—But these cases hold that the absolute owner of his own wheat is delivered to a share, he still stands as a bailee where warehouseman, who is engaged in buying and selling wheat, and who gives a receipt therefor and mingles it with the wheat of others and with his own, and who sells from the common mass, the transaction is a bailment and not a sale. *O'Dell v. Leyden*, 46 Ohio St. 244, 20 N. E. 472; *James v. Plank*, 48 Ohio St. 255, 26 N. E. 1107; *Tobin v. Portland Mills Co.*, 41 Ore. 269, 68 Pac. 748, 1108; *Bretz v. Diehl*, 117 Pa. St. 589, 11 Atl. 893, 2 Am. St. Rep. 706. In the last case the court says: "If the wheat is delivered in pursuance of a contract for bailment, the mere fact that it is mixed with a mass of like quality, with the knowledge of the depositor or bailor, does not convert that into a sale which was originally a bailment, and the bailee of the whole, can, of course, have no greater control of the mass than if the share of each were kept separate. If the commingled mass has been delivered on simple storage, each is entitled on demand to receive his share; if for conversion into flour, to his proper proportion of the product. It makes no difference that the bailee had, in like manner, contributed to the mass of his own wheat; for, although

to the others, and he cannot abstract more than that share from the common stock, without a breach of the bailment, which will subject him not only to a civil suit, but also to a criminal prosecution." pp. 603, 604. See *Lyon v. Lennon*, 106 Ind. 567; *Weiland v. Krejnick*, 63 Minn. 314, 65 N. W. 631; *Wieland v. Sunwell*, 63 Minn. 320, 65 N. W. 628.

24—*Nelson v. Brown*, 44 Iowa, 455; *Wilson v. Cooper*, 10 Iowa, 565; *Smith v. Clark*, 21 Wend. 83; *Carlisle v. Wallace*, 12 Ind. 252, 74 Am. Dec. 207; *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623; *Sou. Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101; *Jones v. Kemp*, 49 Mich. 9. But see *Sexton v. Graham*, 53 Ia. 181; *Ledyard v. Hibbard*, 48 Mich. 421, 42 Am. Rep. 474; *Schindler v. Westover*, 99 Ind. 395; *Dean v. Lammers*, 63 Wis. 331; *Thompson v. Jordan*, 164 Ind. 551. A warehouseman is liable for a loss by negligence. *Motley v. Warehouse Co.*, 122 N. C. 347, 30 S. E. 3. And negligence is presumed from a failure to deliver on demand or to account for the property. *Lichtenstein v. Jarvis*, 31 App. Div. 33, 52 N. Y. S. 605.

within the terms of the bailment. If he hires a horse to go to one place, but goes with it to another, he is guilty of a conversion of the horse from the moment the departure from the journey agreed upon takes place. It is immaterial that the change is not injurious to the interests of the bailor; it is enough that it is not within the contract.²⁵ Contracts are matters of agreement, and even a more beneficial contract cannot be substituted for another without the mutual assent upon which all agreements must rest.

Where a customer in a store took off her cloak and laid it on the counter in order to try on a new one which she was proposing to purchase, and, while she was occupied with the new one the old garment disappeared, and it appeared that no place was provided for the garments of customers laid off under such circumstances, and no warning given to customers that garments so laid off would be at their own risk, and no rules made for such matters and that no care whatever was exercised in the particular case or in like cases, it was held that the proprietor was liable.²⁶ In another case the plaintiff went to the defend-

25—*Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick 136, 22 Am. Dec. 414; *Duncan v. Sou. Car. R. R. Co.*, 2 Rich. 613; *Columbus v. Howard*, 6 Geo. 213; *Mullen v. Ensley*, 8 Humph. 428; *Fox v. Young*, 22 Mo. App. 386; *Welch v. Mohr*, 93 Cal. 371, 28 Pac. 1060; *Malone v. Robinson*, 77 Ga. 719. Compare *Harvey v. Epes*, 12 Grat. 153, in which it was decided that a departure from the terms of a hiring was not a conversion unless injury was occasioned thereby. And see *Doolittle v. Shaw*, 92 Ia. 348, 60 N. W. 621, 54 Am. St. Rep. 562, 26 L. R. A. 366. Defendant hired a horse to go to K. and return direct. On the way back he stopped, put the horse in a stable to be fed and while there the horse was burned without his

fault. Held not liable. *Evans v. Mason*, 64 N. H. 98, 5 Atl. 766. Where one hired a team and driver and substituted another driver, it was held a conversion. *Kellar v. Garth*, 45 Mo. App. 332. See, further, *Line v. Mills*, 12 Ind. App. 100, 39 N. E. 870; *Bass v. Cantor*, 123 Ind. 444, 24 N. E. 147.

26—*Bunnell v. Stern*, 122 N. Y. 539, 25 N. E. 910, 19 Am. St. Rep. 519, 10 L. R. A. 481. As cases on this subject are rare, we quote from the opinion of the court as follows: “The defendants kept a store and thus invited the public to come there and trade. In one of their departments they kept ready-made cloaks for sale and provided mirrors for the use of customers in trying them on, and clerks to aid in the process. They

ant's store to buy a suit of clothes. When about to try on a suit he took off his watch and chain and, at the suggestion of thus invited each lady who came there to buy a cloak, to remove the one she had on and try on the one they wished her to purchase, because the invitation to do a given act extends by implication to whatever is known to be necessary in order to do that act. It is not perceived that under the circumstances disclosed by the evidence, the obligation of the defendant would have been greater or in any respect different if one of their number had met the plaintiff on the street and had not only expressly invited her to come to the store and buy a cloak, but had also requested her to take off her wrap and try on the one that he offered to sell her. The clerk who waited upon her stood in the place of the defendants as long as she was engaged in the line of her duties and no claim is made that she at any time exceeded her authority. Therefore, when she led the way to the second mirror and stood before it holding the new garment in her hands in readiness to help the plaintiff try it on, in legal effect one of the defendants stood there inviting her to try it on, and to lay aside her wrap for that purpose. She accepted the invitation and removed her wrap, but as she could not hold it in her hand while she tried on the other, it was necessary for her to lay it down somewhere. No place was provided for that purpose. There was not even a chair in sight. She was neither notified where to put it, nor informed that she must look out for it as it would be at her own risk whatever she did with it. She put it in the only place that was available, unless she threw it on the floor, and as she did so, in contemplation of law, the defendants stood looking at her. Under these circumstances we think that it became their duty to exercise some care for the plaintiff's cloak, because she had laid it aside on their invitation and with their knowledge and, without question or notice from them, had put it in the only place that she could. The consideration for the implied contract imposing that duty resided in the situation of the plaintiff and her property for which the defendants were responsible, and in the chance of selling the garment that she had selected. It is unnecessary for us to define the degree of care required by the circumstances, because no care whatever was exercised by the defendants. While they created the situation that required care, they made no provision for it by furnishing a safe place to deposit the property of customers, or notifying plaintiff to look out for her cloak herself, or making rules for the government of their employees under such circumstances, or in any other way. Even the chairs on which customers were in the habit of leaving their garments were wholly wanting, and the floor-walker was absent without explanation as to the reason. As the defendants were bound to use ordinary care to keep their premises in a safe condition for the access of business visitors, whether expressly or impliedly invited, so we think they

the clerk, who was waiting on him, he put them in a drawer. When through with his purchase the watch and chain were gone. It was held that the defendant might be held liable on the ground of an implied contract of the defendant with his customers that no harm should come to them that could reasonably be averted and also on the ground of a bailment for mutual advantage, and that in either view the question of proper care was for the jury.²⁷ "The proprietor of a barber-shop kept for public patronage is liable to the customer for the value of his hat, which was deposited on a hat rack in the shop and which, while the customer was being shaved, disappeared from the shop and was thus lost, such proprietor being, under these facts, a bailee for hire as to the customer's hat."²⁸ The pro-

were bound to use some care for his purchases, he is invited to lay aside by the invitation to come and purchase, and, having laid it aside upon such invitation and with the knowledge of the dealer, he has committed it to his custody. And this being a necessary incident of the business upon which the customer was invited to come to the store, the care of the property would be within the authority of the salesman assigned to wait upon him; it would be part of the transaction in which he is authorized to represent his employer." Where a customer in a store left her purse on a table, when it was unnecessary to do so, and went into another part of the store and when she returned the purse was gone, it was held that the proprietor was not liable. *McAllister v. Simon*, 27 Misc. 214, 57 N. Y. S. 733.

27—*Woodruff v. Painter*, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. Rep. 786, 16 L. R. A. 451. Speaking of the implied contract between merchant and customer, the court says: "Upon principle, the contract must be held to extend to the safety of such property as the customer necessarily or habitually, in pursuance of an universal custom, carries with him. Whatever thus necessarily, or, in common with people generally, he habitually carries with him, and must necessarily lay aside in the store while making or examining

28—*Delbert v. Harris*, 95 Ga. 571, 23 S. E. 112. So of a customer's hat or coat in a restaurant. *Appleton v. Welch*, 20 Misc. 343, 45 N. Y. S. 751; *Ultzen v. Nicols*, (1894) 1 Q. B. 92.

prietor of a bathing establishment who takes charge of his patrons' clothes is a bailee for hire and liable accordingly.²⁹

When the bailor shows a failure to deliver the property on demand or a loss of or injury to the property while in the hands of the bailee, he makes out a *prima facie* case of negligence on the part of the bailee, and the burden is then on the latter to show that the loss or injury was not due to any want of ordinary care on his part.³⁰ If the bailee shows a loss by fire, accident or theft the burden will be on the bailor to show negligence.³¹

29—*Tombler v. Koelling*, 60 Ark. 62, 28 S. W. 795, 46 Am. St. Rep. 146, 27 L. R. A. 502; *Bird v. Everard*, 4 Misc. 104, 23 N. Y. S. 1008.

30—*Prince v. Ala. State Fair*, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716; *Higman v. Carmody*, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33; *Davis v. Hurt*, 114 Ala. 146, 21 So. 468; *Massillon E. & T. Co. v. Akerman*, 110 Ga. 570, 35 S. E. 635; *Geo. C. Bagley El. Co. v. Am. Express Co.*, 63 Minn. 142, 65 N. W. 264; *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295, 92 N. W. 354; *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; *Lichtenstein v. Jarvis*, 31 App. Div. 33, 52 N. Y. S. 605; *McKillop v. Reich*, 76 App. Div. 334, 78 N. Y. S. 485; *Snell v. Cornwell*, 93 App. Div. 136, 87 N. Y. S. 1. A bailee who fails to "give any such explanation of his neglect to restore the property entrusted to him as will enable the bailor to test his good faith ought to be held to proof that he has exercised ordinary diligence in the care of it." *Woodruff v. Painter*, 150 Pa. St. 91, 24 Atl. 621, 30 Am. St. Rep. 786, 16 L. R. A. 451. But see *Maconey v. Taft*, 60 Vt. 571, 15 Atl.

326, 6 Am. St. Rep. 135. Where provisions were damaged while in a cold storage warehouse it was held that there was no presumption of negligence. *Leidy v. Quaker City, etc., Co.*, 180 Pa. St. 323, 36 Atl. 851.

31—*Hunter v. Recke Bros.*, 127 Ia. 108; *Knights v. Piella*, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375; *Meridian Fair, etc., Ass. v. North Birmingham St. Ry. Co.*, 70 Miss. 808, 12 So. 555; *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; *Kaiser v. Latmer*, 40 App. Div. 149, 57 N. Y. S. 833; *Tower v. Grocers, etc., Co.*, 150 Pa. St. 106, 28 Atl. 229. Where a livery stable keeper received a hearse for storage which he kept in his livery stable for a while and then removed to his barn where it was burned, he was held not liable, both places being equally safe. The plaintiff had insured the hearse as being at the livery stable but did not notify the defendant and the defendant did not notify the plaintiff of the removal. *Bradley v. Cunningham*, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679.

The following additional cases are referred to on bailments for mutual advantage. *Tarver v.*

Safe Deposit Companies. The keeper of a safe deposit vault is a bailee for hire as to the property of his customers kept in rented boxes.³² Where the keeper of a vault permitted officers with a search warrant to break open the plaintiff's box and to take therefrom property not described in the warrant, and failed to notify the plaintiff, whose address he had and who lived near by, and made no effort to retake the property, it was held that the defendant had not exercised the care required by law and was liable for the property.³³ So where the lessee of a box was known to be sick in a hospital with brain fever and the keeper of the vault delivered the contents of the box to two men, who appeared with the key to the box and what purported to be a power of attorney from the lessee, but which was spurious, and the keeper required no identification of the man presenting the power of attorney, did not retain the power of attorney or take any precautions to verify it.³⁴ The loss of property from the lessee's box presumes negligence.³⁵

- Torrance, 81 Ga. 261, 6 S. E. 177, 32—*Cussen v. Southern Cal. Sav. Bank*, 133 Cal. 534, 65 Pac. 1099, 85 Am. St. Rep. 221; *Mayer v. Brensinger*, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196; *Mayer v. Brensinger*, 74 Ill. App. 475; *Roberts v. Stuyvesant Safe Dep. Co.*, 123 N. Y. 57, 25 N. E. 294, 20 Am. St. Rep. 718, 9 L. R. A. 428; *Lockwood v. Manhattan Storage, etc., Co.*, 28 App. Div. 68, 50 N. Y. S. 974.
- 245, 62 N. E. 1; *Johnson v. Smith*, 54 Minn. 319, 56 N. W. 37; *Minnesota Butter & Cheese Co. v. St. Paul Cold Storage Warehouse Co.*, 75 Minn. 445, 77 N. W. 977, 74 Am. St. Rep. 515; *Joslyn v. King*, 27 Neb. 38, 42 N. W. 756, 20 Am. St. Rep. 656, 4 L. R. A. 457; *Hardegg v. Willard*, 12 Misc. 17, 33 N. Y. S. 25; *Turrentine v. Wilming-ton, etc., R. R. Co.*, 100 N. C. 375, 6 S. E. 116, 6 Am. St. Rep. 602; *Walker v. McCaull*, 13 S. D. 512, 83 N. W. 578.
- 33—*Roberts v. Stuyvesant Safe Dep. Co.*, 123 N. Y. 57, 25 N. E. 294, 20 Am. St. Rep. 718, 9 L. R. A. 428.
- 34—*Mayer v. Brensinger*, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196.
- 35—*Cussen v. Southern Cal. Sav. Bank*, 133 Cal. 534, 65 Pac. 1099, 85 Am. St. Rep. 221; *Lockwood v. Manhattan, etc., Storage etc., Co.*, 28 App. Div. 68, 50 N. Y. S. 974.

Innkeepers. Among the employments to which special obligations are attached is that of an inkeeper. An inkeeper is one who holds himself out to the public as ready to accommodate all *comers with the conveniences usually supplied to travelers on their journeys.³⁶ One who keeps a European hotel in the usual way, except that another person runs the restaurant connected therewith, is an innkeeper.³⁷ "The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn and a boarding house."³⁸

An innkeeper is bound, as a matter of law, to furnish the entertainment called for; and while he may demand his hire in advance, if he doubts the traveler's ability to pay, yet if that be paid or tendered, he must receive the person offering himself as guest at any hour of the day or night.³⁹ He would be excused, however, if the inn were full, or if the traveler were infected with a contagious disease, or if he came in a disorderly manner or intoxicated. And after having received a guest he might turn him away if his conduct was disorderly, or if he refused to comply with the reasonable rules of the establishment. And a disorderly guest might be removed with force if necessary;⁴⁰ but a traveler turned away without cause, either before

36—See *Thompson v. Lacy*, 3 B. & Ald. 283. An inn is a public house of entertainment for all who choose to visit it. *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Fay v. Pacific Imp. Co.*,

38—*Fay v. Pacific Imp. Co.*, 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188.

93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188. See *Southwood v. Myers*, 2 Bush, 681; *Dickerson v. Rogers*, 4 Humph. 179, 40 Am. Dec. 642.

39—*Hawthorn v. Hammond*, 1 C. & K. 404; *Rex v. Ivens*, 7 C. & P. 213. A landlord in a large village is bound to have food enough for two persons who apply. *Atwater v. Sawyer*, 76 Me. 539.

37—*Johnson v. Chadbourn Finance Co.*, 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571.

40—*Howell v. Jackson*, 6 C. & P. 723. See *Calye's Case*, 8 Co. 32; *Markham v. Brown*, 8 N. H. 523. Mere apprehension that

or after being received, may sustain an action therefor.⁴¹ While a disorderly or intoxicated guest may be summarily removed, a sick guest may only be removed with due care, having reference to his condition. And where a guest becomes sick and delirious and wandered aimlessly about and was found half dressed in a room not his own and was turned unprotected into an alley on a cold, stormy winter day and died from the exposure, the innkeeper was held liable, although the deceased had drank some liquor.⁴² One who only furnishes occasional entertainment is not an innkeeper,⁴³ neither is a boarding-house keeper, or one who lets lodgings and furnishes their occupants with meals.⁴⁴ One may be an innkeeper as to some of his guests and a boarding-house keeper as to others.⁴⁵ Generally one who takes a room and boards at a hotel by the week or month at special rates is a boarder and not a guest.⁴⁶

guests may be disorderly will not *v. Schambacher*, 11 Atl. Rep. 779 justify their exclusion. Atwater (N. J.).

v. Sawyer, 76 Me. 539.

41—Whiting *v. Mills*, 7 Up. Can. Q. B. 450; McCarthy *v. Niskern*, 22 Minn. 90.

42—McHugh *v. Schlossen*, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574.

43—State *v. Mathews*, 2 Dev. & Bat. 424; Lyon *v. Smith*, 1 Morris, (Iowa,) 184; Carter *v. Hobbs*, 12 Mich. 52; Johnson *v. Reynolds*, 3 Kan. 257; Southwood *v. Myers*, 3 Bush, 681.

44—Parkhurst *v. Foster*, Carth. 417; S. C. 1 Salk. 387; Shoecraft *v. Bailey*, 25 Iowa, 553; Pinkerton *v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; Chamberlain *v. Masterson*, 26 Ala. 371; Wintermute *v. Clarke*, 5 Sandf. 242; Walling *v. Potter*, 35 Conn. 183. A saloon keeper is not an innkeeper. Doe *v. Laming*, 4 Camp. 73. But he is bound to protect one guest from the assault of another in his presence. Rommel

v. Schambacher, 11 Atl. Rep. 779

(N. J.).

45—As to the distinction between guests and boarders, see Chamberlain *v. Masterson*, 26 Ala. 371; Shoecraft *v. Bailey*, 25 Iowa, 553; Johnson *v. Reynolds*, 3 Kan. 257; Hancock *v. Rand*, 94 N. Y. 1, 46 Am. Rep. 112. Special rate does not necessarily make one a boarder. Beale *v. Posey*, 72 Ala. 323. Nor duration of stay. Presumption is that one coming as a guest remains such. Ross *v. Mel-lin*, 36 Minn. 421. One who engages a room at a hotel by the week but for no definite period held a guest and not a boarder. Metzger *v. Schnabel*, 23 Misc. 698, 52 N. Y. S. 105. So in Polk *v. Melenbacker*, 136 Mich. 611, 99 N. W. 867.

46—Moore *v. Long Beach Development Co.*, 87 Cal. 483, 26 Pac. 92, 22 Am. St. Rep. 265; Meacham *v. Galloway*, 102 Tenn. 415, 52 S. W. 859, 73 Am. St. Rep. 886, 46 L. R. A. 319. Compare Fay *v.*

As a bailee of the personal effects which the guest brings with him to the inn, it is generally held, that where the guest himself is not in fault, the innkeeper is responsible as insurer, except only as against losses by the act of God or of the public enemy.⁴⁷ This imposes upon the innkeeper not [*759] *only all losses attributable to his own negligence or misconduct, or those of his servants, but also such as may result from accidental fires, and the thefts or other misconduct or negligence of third persons—a degree of responsibility.

Pacific Imp. Co., 93 Cal. 253, 26 745; Woodworth *v.* Morse, 18 La. Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188. A conductor rented a room at a hotel at one end of his route by the month. Held not a guest and the hotel not liable as insurer for his property in the room. Horner *v.* Harvey, 3 N. M. 307, 5 Pac. 329. Where a club gave a banquet at a hotel the guests of the club were held not to be guests of the hotel, so as to make the latter liable for their hats stolen from the hat rack. Amey *v.* Winchester, 68 N. H. 447, 39 Atl. 487, 39 L. R. A. 760.

47—Mason *v.* Thompson, 9 Pick. 280, 20 Am. Dec. 471; Shaw *v.* Berry, 31 Me. 478, 52 Am. Dec. 628; Norcross *v.* Norcross, 53 Me. 163; Piper *v.* Manny, 21 Wend. 282; Grinnell *v.* Cook, 3 Hill, 485, 38 Am. Dec. 663; Hulett *v.* Swift, 33 N. Y. 571, 88 Am. Rep. 405; Hill *v.* Owen, 5 Blackf. 323, 35 Am. Dec. 124; Thickstun *v.* Howard, 8 Blackf. 535; Johnson *v.* Richardson, 17 Ill. 302, 63 Am. Dec. 369; Sasseen *v.* Clark, 37 Ga. 242; Manning *v.* Wells, 9 Humph. 746, 51 Am. Dec. 688; Mateer *v.* Brown, 1 Cal. 221, 52 Am. Dec. 303; Burrows *v.* Trieber, 21 Md. 320, 83 Am. Dec. 590; Sibley *v.* Aldrich, 33 N. H. 553, 66 Am. Dec.

Woodworth *v.* Morse, 18 La. Ann. 156; Howth *v.* Franklin, 20 Tex. 798, 73 Am. Dec. 218; Packard *v.* Northcraft, 2 Met. (Ky.) 439; Fay *v.* Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188; Coskery *v.* Nagle, 83 Ga. 696, 10 S. E. 491, 20 Am. St. Rep. 333, 6 L. R. A. 483; Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82; Labold *v.* Southern Hotel Co., 54 Mo. App. 567; Shultz *v.* Wall, 134 Pa. St. 262, 19 Atl. 742, 19 Am. St. Rep. 686, 8 L. R. A. 97; Turner *v.* Whitaker, 9 Pa. Supr. 83; Cunningham *v.* Bucky, 42 W. Va. 671, 26 S. E. 442, 57 Am. St. Rep. 876, 35 L. R. A. 850. Liable for goods stolen unless by guest's servant or companion. Walsh *v.* Porterfield, 87 Pa. St. 376. To be held to a stricter accountability if guest gets drunk at the hotel bar. Rubenstein *v.* Cruikshanks, 54 Mich. 199, 52 Am. Rep. 806. Liable for injury to horse left with him though owner stays elsewhere. Russell *v.* Fagan, 7 Houst. 389, 8 Atl. 258. *Contra*, Healey *v.* Gray, 68 Me. 489, 28 Am. Rep. 80. Liable to guest who has taken small-pox from person sick in hotel, if with knowledge of sickness landlord keeps house open for business without informing guests of the

ity which is certainly very severe, and the justice and policy of which have recently been called in question, both in England and in this country.⁴⁸ In Illinois, it is held that the loss of the goods of the guest only makes out a *prima facie* case of liability against the innkeeper, and that he may exonerate himself by showing that the loss was in no manner occasioned by a want of proper care and attention on his part;⁴⁹ and the like rule has been laid down in Vermont and in Michigan.⁵⁰ Also in Minnesota.⁵¹

One important difference between innkeepers and other bailees *is, that the former do not necessarily [*760] come into actual possession of the thing bailed; usually they have a constructive possession only. Their liability extends to the traveler's luggage, to the clothes upon his person, and to the money in his pocket.⁵² It has been held that the

fact. *Gilbert v. Hoffman*, 66 Ia. 205. A farmer who receives and provides for travelers as matter of accommodation, is not an innkeeper, though he receives pay therefor. *Howth v. Franklin*, 20 Tex. 798, 73 Am. Dec. 218. One who keeps a sea bathing house, separate from his inn, is not liable as innkeeper for clothes stolen from bathing house. *Minor v. Staples*, 71 Me. 316, 36 Am. Rep. 318.

48—See *Burgess v. Clements*, 4 M. & S. 306; *Dawson v. Chamney*, 5 Q. B. 164; *Merritt v. Claghorn*, 23 Vt. 177.

49—*Metcalf v. Hess*, 14 Ill. 129; *Eden v. Drey*, 75 Ill. App. 102. And see *Laird v. Eichold*, 10 Ind. 212, 71 Am. Dec. 323; *Bowell v. De Wald*, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240.

50—*Merritt v. Claghorn*, 23 Vt. 177; *Cutler v. Bonney*, 30 Mich. 259, 18 Am. Rep. 127. See *Clary v. Willey*, 49 Vt. 55. And as to

boarders in a hotel, see *Vance v. Throckmorton*, 5 Bush, 41.

51—*Johnson v. Chadbourne Finance Co.*, 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571. The plaintiff's goods were destroyed by fire which originated on the premises of another and, no negligence being imputable to the innkeeper, he was held not liable. The court says: "All losses of property incurred by guests at a public hotel or inn by fire are *prima facie* due to the negligence of the proprietor, but he may discharge or relieve himself from liability by showing the loss happened by an irresistible force or unavoidable accident, such as a fire originating on premises over which he had no control, without fault or negligence on his part." p. 318.

52—*Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655; *Magee v. Pacific Imp. Co.*, 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199;

grain in the traveler's sleigh, when brought within the enclosure, was constructively in the innkeeper's possession,⁵³ and in a very careful decision the landlord has been held responsible for a considerable sum of money taken from a trunk in a traveler's room, though the traveler appears to have left the room unguarded and the key in the door, the jury having acquitted him of the charge of negligence.⁵⁴ An innkeeper, at the common law, cannot relieve himself of this responsibility, or any part of it, by any notice posted about the inn which may or

Coskery v. Nagle, 83 Ga. 696, 10 S. 124; *Mason v. Thompson*, 9 Pick. E. 491, 20 Am. St. Rep. 333, 6 L. 280, 20 Am. Dec. 471; *Packard v. R. A.* 483; *Maloney v. Bacon*, 33 Mo. App. 501. See the extent of this liability discussed at length in *Vance v. Throckmorton*, 5 Bush, 41. The liability extends only to such things as are brought in the character of guest. *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303. Covers cattle brought by drover. *Hilton v. Adams*, 71 Me. 19. Jewelry in use. *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188. Does not cover what is brought to the inn for business, as a stallion to the hotel barn to stand for service. *Mowers v. Fethers*, 61 N. Y. 34, 19 Am. Rep. 244. See *Myers v. Cottrill*, 5 Biss. 465. Not liable at common law for goods stolen from a room used for business of selling by samples. *Fisher v. Kelsey*, 121 U. S. 383. But held liable for merchandise received and taken charge of. *Eden v. Drey*, 75 Ill. App. 102. And for the goods of a peddler. *Cohen v. Manuel*, 91 Me. 274, 39 Atl. 1030, 64 Am. St. Rep. 225, 40 L. R. A. 491.

53—*Clute v. Wiggins*, 14 Johns, 175, 7 Am. Dec. 448. See *Hill v. Owen*, 5 Blackf. 323, 35 Am. Dec.

280, 20 Am. Dec. 471; *Packard v. Northcraft*, 2 Met. (Ky.) 439. 54—*Berkshire Woolen Co. v. Proctor*, 7 Cush. 417. And, see *Burrows v. Trieber*, 21 Md. 320, 27 Md. 130; *Classen v. Leopold*, 2 Sweeney, 705; *Buddenburg v. Benner*, 1 Hilt. 84; *Spring v. Hager*, 145 Mass. 186, 13 N. E. 479. So where money taken from belt on traveler's person after forcing back the bolt to the door of his room. *Smith v. Wilson*, 36 Minn. 334. Where the plaintiff with two friends went to the defendant's hotel for lunch and handed the waiter a five hundred dollar bill to pay his lunch check of six dollars and the waiter absconded with the money, the defendant was held liable. *Grand Pacific Hotel Co. v. Rowland*, 88 Ill. App. 519. A landlord is not liable for money deposited in his office by one who is not a guest, and one whose purpose is merely so to deposit is not a guest. *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 33, 4 N. E. 398, 58 Am. Rep. 785. Nor is one who goes to a hotel with a harlot for purposes of prostitution a guest who can hold a landlord for such deposit. *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242.

may not have been brought to the notice of the guest.⁵⁵ But by statute, in England and in many of the States, he is permitted to restrict his liability within certain limits which the statute defines, by the posting of notices in his rooms. These are very reasonable and proper statutes, but they must be strictly complied with or they will constitute no protection.⁵⁶

An innkeeper is not an insurer of the personal safety of his guests and is only bound to the exercise of reasonable care in that behalf.⁵⁷ He is not bound to protect his guest from violence as a carrier of passengers is and is not liable for an assault upon a guest by a servant, unless he has been guilty of negligence in employing or retaining the guilty servant.⁵⁸ "An innkeeper is no doubt guilty of negligence if he admits to his hotel or permits to remain there, whether as guest or servant, a person of known violent and disorderly propensities who will probably assault or otherwise maltreat his guests, and for the consequence of such negligence he may be liable in damages."⁵⁹

*If the loss or injury to the goods occur through the [*761] fraud or intermeddling of the guest, or through his failure to use the ordinary care that a prudent man might be reasonably expected to have taken under the circumstances, the innkeeper is, of course, excused.⁶⁰

55—*Bodwell v. Bragg*, 29 Iowa, 232; *Maltby v. Chapman*, 25 Md. 310. See *Epps v. Hinds*, 27 Miss. 657, 61 Am. Dec. 528.

An innkeeper does not relieve himself from responsibility by telling the guest, when he receives his property, that the guest must run all risks. *Woodward v. Birch*, 4 Bush, 510.

56—*Porter v. Gilkey*, 57 Mo. 235; *Woodworth v. Morse*, 18 La. Ann. 156; *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114. See *Faucett v. Nichols*, 64 N. Y. 377; *Batterson v. Vogel*, 8 Mo. App. 24.

57—*Week v. McNulty*, 101 v. *Amidon*, 41 Vt. 15, 98 Am. Dec.

Tenn. 495, 48 S. W. 809, 70 Am. St. Rep. 693, 43 L. R. A. 185.

58—*Rahmel v. Lehndorff*, 142 Cal. 681, 76 Pac. 659, 100 Am. St. Rep. 154, 65 L. R. A. 88; *Clancy v. Barker*, 131 Fed. 161, — C. C. A. —. See *Overstreet v. Moser*, 88 Mo. App. 72.

59—*Rahmel v. Lehndorff*, 142 Cal. 681, 76 Pac. 659, 100 Am. St. Rep. 154, 65 L. R. A. 88.

60—*Cashill v. Wright*, 6 El. & Bl. 891; *Burgess v. Clements*, 1 Stark. 251; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Vance v. Throckmorton*, 5 Bush, 41; *Read*

If an innkeeper's servants take charge of the luggage of a departing guest to deliver it to a railroad company or other carrier, the responsibility of the innkeeper continues until actual delivery.⁶¹ And probably if the guest goes away without, at the time, taking his baggage with him, the innkeeper's liability as such will continue until it is removed, if this be within reasonable time.⁶² The liability for baggage begins as soon as the baggage is received, though before the owner actually presents himself at the inn.⁶³ And where a traveler delivers a check for his baggage to the porter of a hotel at the station with a view to becoming a guest of such hotel, the liability of the hotel begins upon such delivery, and if the baggage is lost between the station and the hotel the hotel keeper is liable.⁶⁴

560; *Kelsey v. Berry*, 42 Ill. 469; *Hadley v. Upshaw*, 27 Tex. 547, 86 Am. Dec. 654. The innkeeper may establish reasonable rules, which

8 L. R. A. 97. Absence of guest all night not necessarily negligence. *Turner v. Whitaker*, 9 Pa. Supr. Ct. 83.

the guest must observe. *Fuller v. Coats*, 18 Ohio St. 343. And he is relieved from liability by noncompliance with such rules, if called to guest's attention. *Burbank v. Chapin*, 140 Mass. 123. But mere notice in the register is not sufficient as calling the attention of the guest to the rule. *Murchison v. Sergent*, 69 Geo. 206.

61—*Maxwell v. Gerard*, 84 Hun, 537, 32 N. Y. S. 849; *Richards v. London, &c., R. Co.*, 7 C. B. 839.

It is negligence in a guest to carry a large sum of money in his valise, and, without notifying the innkeeper, allow it to be treated as mere luggage. *Fowler v. Dordon*, 24 Barb. 384. See also, *Elcox v. Hill*, 98 U. S. 218. Mere failure to lock one's door is not lack of such ordinary care. *Murchison v. Sergent*, 69 Geo. 206; *Watson v. Loughran*, 112 Ga. 837, 38 S. E. 82; *Cunningham v. Burcky*, 42 W. Va. 671, 26 S. E. 442, 57 Am. St. Rep. 876, 35 L. R. A. 850. *Contra*, *Shultz v. Wall*, 134 Pa. St. 262, 19 Atl. 742, 19 Am. St. Rep. 686,

62—*Adams v. Clem*, 41 Geo. 65,

5 Am. Rep. 524; *Murray v. Clarke*, 2 Daly, 102. But see *Murray v. Marshall*, 9 Colo. 482, 59 Am. Rep. 152. Not liable as innkeeper if left for guest's convenience. *Palin v. Reid*, 10 Ont. App. 63; *Miller v. Peeples*, 60 Miss. 819, 45 Am. Rep. 423; *O'Brien v. Vaill*, 22 Fla. 627, 1 So. 137; *Glenn v. Jackson*, 93 Ala. 342, 9 So. 259, 12 L. R. A. 382; *Wear v. Gleason*, 52 Ark. 364, 12 S. W. 756, 20 Am. St. Rep. 186; *Brown Hotel Co. v. Burckhart*, 13 Colo. App. 59, 56 Pac. 188. As to liability for money left behind with clerk, see *Whitemore v. Haroldson*, 2 Lea, 312.

63—*Eden v. Drey*, 75 Ill. App. 102. And see *Maloney v. Bacon*, 33 Mo. App. 501.

64—*Coskery v. Nagle*, 83 Ga. 696, 10 S. E. 491, 20 Am. St. Rep.

An innkeeper has a lien for reasonable charges on the goods brought with him by his guest,⁶⁵ but not upon the clothing on his person.⁶⁶ A boarding-house keeper, or an innkeeper as to those who merely board with him and are not guests in the proper sense, has no such lien. On the other hand, his liability to his *boarders for such of their property as [*762] may be in his care is only that of any other bailee in a bailment for mutual benefit.

Common Carriers. Closely resembling the liability of an innkeeper is that of a common carrier. A common carrier is one

333, 6 L. R. A. 483; *Carhart v. Wainman*, 114 Ga. 632, 40 S. E. 781, 88 Am. St. Rep. 45. It is no defense that the porter was not authorized to receive the check. *Ibid.* In the first case cited the court says: "When a traveler arrives at a depot and is met by one who is the porter of an inn, hotel or house kept for the purpose above stated (the accommodation of transient guests, wayfarers and travelers), who indicates to the traveler a certain conveyance by which he can go to such place or not, and the traveler delivers to him his baggage or the check therefor, the traveler is thereby a guest of such inn, hotel or house, so far as to render the proprietor thereof liable for the safe-keeping or redelivery of the same; the liability of the proprietor commences from the time of the delivery of the baggage or check to the porter. All that the traveler must do is to assure himself that the person representing himself as such porter, is in fact the porter of the house. Any private arrangement between the landlord and a carrier for the transportation of persons and baggage to his house, does not affect the trav-

eler, who has the right to assume, without any knowledge to the contrary, that such carrier is in fact authorized by the proprietor of the house to safely and securely transport himself and his baggage; and when loss occurs by the negligence of such carrier, the proprietor of the house is liable to the traveler." But where a peddler left his pack at a hotel and went away for two days, during which time it disappeared, it was held that the relation of innkeeper and guest had not been created. *Toub v. Schmidt*, 60 Hun, 409, 15 N. Y. S. 616. In order to make an innkeeper liable as such for animals they must be delivered to him or in some way put under his care. *Bradley Livery Co. v. Snook*, 66 N. J. L. 654, 50 Atl. 358, 55 L. R. A. 208.

65—*Watson v. Cross*, 2 Duv. 147; *Ewart v. Stark*, 8 Rich. 423; *Pollock v. Landis*, 36 Iowa, 651. Even though they be goods with which another has entrusted him. *Snead v. Watkins*, 1 C. B. (N. S.) 267; *Manning v. Hollenbeck*, 27 Wis. 202. *Contra*, *Domestic, &c., Co. v. Watters*, 50 Ga. 573.

66—*Sunbolf v. Alvord*, 3 M. & W. 248.

who regularly undertakes, for hire, either on land or on water, to carry goods, or goods and passengers, between different places, for such as may offer.⁶⁷ The definition includes railway corporations, express companies, stage coach proprietors, the proprietors of all ships, boats and vessels employed in carriage on regular routes, wagoners and carmen, who carry as a regular employment from town to town or from place to place within the same town, street railway companies and the proprietors of omnibus routes.⁶⁸ It does not include vessel owners who employ their vessels for particular voyages as they may make contracts, nor draymen and others who take particular jobs or commissions, but who have no regular route,⁶⁹ nor those who let horses and carriages for hire, nor tug-boatmen.⁷⁰

- 67—*Gisbourn v. Hurst*, 1 Salk. 249; *Mershon v. Hobensack*, 22 N. J. 373; *U. S. Express Co. v. Backman*, 28 Ohio St. 144; *Parsons on Cont.* 163; *Caye v. Pool's Assigner*, 108 Ky. 124, 55 S. W. 887, 94 Am. St. Rep. 348, 49 L. R. A. 251. No person is a common carrier who is not a carrier for hire. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16; *Knox v. Rives*, 14 Ala. 249, 48 Am. Dec. 97; *Fay v. Steamer New World*, 1 Cal. 348. Log driving companies are not. *Mann v. White River, &c., Co.*, 46 Mich. 38, 41 Am. Rep. 141; *Chesley v. Mississippi, &c., Boom Co.*, 39 Minn. 83, 38 N. W. 769. Railroad carrying a mail is not liable as a carrier to one who sends a letter which is lost. *Centr. R. R., &c., Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334. One who lets carriages for hire is bound to as much care to provide safe vehicles as is a stage proprietor or railway company. *Hyman v. Nye*, L. R. 6 Q. B. D. 685. A railroad company does not act as a common carrier in carrying for ex-
- press companies. *Louisville, etc., Ry. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 58 Am. St. Rep. 348, 38 L. R. A. 93.
- 68—*Merchants' Dispatch Trans. Co. v. Boch*, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; *Adams Express Co. v. Jackson*, 92 Tenn. 326, 21 S. W. 666.
- 69—One who holds himself out as a general truckman and especially for moving heavy machinery and keeps horses, trucks and appliances for the purpose, held a common carrier and liable accordingly. *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432.
- 70—But as to tug or tow-boatmen, see *White v. Tug Mary Ann*, 6 Cal. 462; *Smith v. Pierce*, 1 La. (o. s.) 354; *Davis v. Houren*, 6 Rob. La. 255; *Clapp v. Stanton*, 20 La. Ann. 495, 96 Am. Dec. 417; *Bussey v. Mississippi, &c., Co.*, 24 La. Ann. 165, 13 Am. Rep. 120. These Louisiana cases hold that tug-boatmen, such as ply between New Orleans and the Gulf of Mex.

A carrier may profess to limit his employment to some one species of goods, or may exclude one or more things from his general offer to carry. His employment is then limited by his offer, and he cannot be required to go beyond it. But within the limits of his accustomed business he must receive

*and carry for all who offer, without partiality or discrimination.⁷¹ He may, nevertheless, make special bargains for carrying for exceptional prices, or on exceptional terms;⁷² but he cannot restrict or change his common law liability by a mere notice posted at his place of business, or given to the party delivering goods for carriage, and to which the latter does not appear to have given assent.⁷³ It is thus seen that a

ico, are common carriers. The Fitchburg R. R. Co. v. Gage, 12 rule is otherwise in New York, Gray, 393; Mich. Cent. R. R. Co. v. Hale, 6 Mich. 243; Audenried v. Pennsylvania and Kentucky, Caton v. Rumney, 13 Wend. 387; Wells v. Steam Nav. Co., 2 N. Y. 204; Leonard v. Hendrickson, 18 Pa. St. 40, 55 Am. Dec. 587; Brown v. Clegg, 63 Pa. St. 51; Hays v. Millar, 77 Pa. St. 238, 18 Am. Rep. 445; Varble v. Bigley, 14 Bush, 698, 29 Am. Rep. 435. See Alkali Co. v. Johnson, L. R. 9 Exch. 338.

71—Keeney v. Grand Trunk, &c., R. Co., 47 N. Y. 525; Chicago, &c., R. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599; McDuffee v. Railroad Co., 52 N. H. 430, 13 Am. Rep. 72; Mich. Cent. R. R. Co. v. Hale, 6 Mich. 243; Houston, &c., Ry. Co. v. Smith, 63 Tex. 322; Scofield v. Lake Shore, &c., Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846. For additional cases see *ante*, p. 609. A railroad company is under no common law duty to furnish equal facilities to all express companies for doing business over its line. Express Cases, 117 U. S. 1.

72—New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455; McMillan v. Michigan, &c., R. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Brown v. Eastern R. Co., 11 Cush. 97; Buck-

73—New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455; McMillan v. Michigan, &c., R. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Brown v. Eastern R. Co., 11 Cush. 97; Buck-

common carrier cannot decline a bailment which is tendered to him within the line of his employment,⁷⁴ neither can he enforce upon the party proposing to employ him any terms to which the latter refuses assent. The obligation which is imposed upon him by the common law is that he shall deliver at its [*764] destination *the property received by him, without damage while in his hands, unless prevented by the act of God, or of the public enemy.⁷⁵ And he must deliver,

land *v.* Adams Express Co. 97 v. Conatser, 61 Ark. 560, 33 S. W. Mass. 124, 93 Am. Dec. 68; Baltimore, &c., R. R. Co. *v.* Brady, 32 Md. 333; Smith *v.* Nor. Car. R. R. Co. 64 N. C. 235; Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49; Sou. Exp. Co. *v.* Caperton, 44 Ala. 101, 4 Am. Rep. 18; Sou. Exp. Co. *v.* Armstead, 50 Ala. 350; Bennett *v.* Dutton, 10 N. H. 481; Jones *v.* Voorhees, 10 Ohio, 145; Fillebrown *v.* Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606; Baldwin *v.* Collins, 9 Rob. La. 468; Railroad Co. *v.* Manuf. Co., 16 Wall. 318. The contract for any exemption must be by clear and distinct terms, and there must be reason and justice to sustain it. McCoy *v.* Erie, &c., Co., 42 Md. 498; Sou. Exp. Co. *v.* Caperton, 44 Ala. 101.

Carriers have a right to require that those entrusting property to them for carriage shall disclose its value. See Crouch *v.* London R. Co., 14 C. B. 255; Magnin *v.* Dinsmore, 62 N. Y. 35; Oppenheimer *v.* U. S. Exp. Co., 69 Ill. 62. See further on right to limit liability, *post*, p. *825.

74—Railway Co. *v.* Cravens, 57 Ark. 112, 20 S. W. 803, 38 Am. St. Rep. 230, 18 L. R. A. 527; Mathis *v.* Southern Ry. Co., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824. See Little Rock, etc., Ry. Co.

1057. Held liable for furnishing an infected car. Railway Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878.

75—Coggs *v.* Bernard, 2 Ld. Raym. 909; Eagle *v.* White, 6 Whart. 505, 37 Am. Dec. 434; Morrison *v.* Davis, 20 Penn. St. 171, 57 Am. Dec. 695; Orange Co. Bank *v.* Brown, 9 Wend. 85; Hollister *v.* Nowlen, 19 Wend. 234, 32 Am. Dec. 455; Fish *v.* Chapman, 2 Kelly, 349, 46 Am. Dec. 393; Turney *v.* Wilson, 7 Yerg. 340; Boyle *v.* McLaughlin, 4 H. & J. 291; Friend *v.* Woods, 6 Grat. 189, 52 Am. Dec. 119; Bohannan *v.* Hammond, 42 Cal. 227; Powell *v.* Mills, 30 Miss. 231, 64 Am. Dec. 158; Swindler *v.* Hilliard, 2 Rich. 286, 45 Am. Dec. 732; McMillan *v.* Michigan, &c., R. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Fillebrown *v.* Grand Trunk, &c., Co., 55 Me. 462, 92 Am. Dec. 606; Railroad Co. *v.* Reeves, 10 Wall. 176; Railway Co. *v.* Cravens, 57 Ark. 112, 20 S. W. 803, 38 Am. St. Rep. 230, 18 L. R. A. 527; Clyde S. S. Co. *v.* Burrows, 36 Fla. 121, 18 So. 349; Cooper *v.* Raleigh, etc., R. R. Co., 110 Ga. 659, 36 S. E. 240; Willcock *v.* Pennsylvania R. R. Co., 166 Pa. St. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228; John-

stone *v. Richmond, etc., R. R. Co.*, 39 S. C. 55, 17 S. E. 512; Gulf, etc., Ry. Co. *v. Levi*, 76 Tex. 337, 13 S. W. 191, 18 Am. St. Rep. 45, 8 L. R. A. 323. Proof of delivery to a common carrier for transportation and of a failure to deliver or of injury while in his possession, makes a *prima facie* case of liability. Louisville, etc., R. R. Co. *v. Cowherd*, 120 Ala. 51, 23 So. 793; Mears *v. New York, etc., R. R. Co.*, 75 Conn. 171, 52 Atl. 610, 96 Am. St. Rep. 193, 56 L. R. A. 884.

In Gordon *v. Buchanan*, 5 Yerg. 72, 82, the act of God, it is said, "means disasters with which the agency of man has nothing to do, such as lightning, tempests, and the like." In Friend *v. Woods*, 6 Grat. 189, 196, 52 Am. Dec. 119, it is said that the act of God, which excuses the carrier must be "a direct and violent act of nature." The negligence of the carrier must not concur with it in producing the injury. New Brunswick, &c., Co., *v. Tiers*, 24 N. J. 697, 64 Am. Dec. 394. The act of God to excuse the carrier must be the sole cause of the loss or injury. Sonneborn *v. Southern Ry. Co.*, 65 S. C. 502, 44 S. E. 77. WRIGHT, J., in Michaels *v. N. Y. Cent. R. R. Co.*, 30 N. Y. 564, 571, 86 Am. Dec. 415, says: "What is precisely meant by the expression 'act of God,' as used in the case of carriers, has undergone discussion, but it is agreed that the notion of exception is those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. All the cases agree in requiring the entire exclusion of human agency from

the cause of the injury or loss. If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God; nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work to their injury, is he excused. In short, to excuse the carrier, the act of God, or *vis divina*, must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God." "The act of God," says Lord MANSFIELD, "is natural necessity, and wind and storms, which arise from natural causes, and distinct from inevitable accident." Proprietors, &c., *v. Wood*, 4 Doug. 287, 290. See, also, Chicago, &c., R. R. Co. *v. Sawyer*, 69 Ill. 285. A loss caused solely by an earthquake is by "act of God." Slater *v. So. Car. Ry Co.*, 29 S. C. 96, 6 S. E. 936. Snow and cold and violent storms are "act of God." Smith *v. Western Ry. Co.*, 91 Ala. 455, 8 So. 754, 24 Am. St. Rep. 929, 11 L. R. A. 619; Blythe *v. Denver*, etc., R. R. Co., 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615; Jones *v. Minneapolis*, etc., R. R. Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. Rep. 507; Black *v. Chicago*, etc., R. R. Co., 30 Neb. 197, 46 N. W. 428; Herring *v. Chesapeake*, etc., R. R. Co., 101 Va. 778, 45 S. E. 322. Accidental fires, the explosion of steam boilers, etc., are therefore casualties against which a common carrier is insurer. Caldwell *v. N. J. Steamboat Co.*, 47 N. Y. 282; Merchants' Despatch

[*765] or be ready to deliver, *within a reasonable time; but custom has much to do with the time, place and manner of delivery.⁷⁶

Co. v. Smith, 76 Ill. 542; *Bulkley v. Naumkeag, etc., Co.*, 24 How. 386; *Cox v. Peterson*, 30 Ala. 608, 68 Am. Dec. 145. See *Hayes v. Kennedy*, 41 Pa. St. 378, for discussion of the phrases act of God, inevitable accident, and unavoidable dangers. If the loss happens as the result of the act of God and lack of ordinary care, liability exists. *Rodgers v. Cent. Pac., &c., Co.*, 67 Cal. 607; *Packer v. Taylor*, 35 Ark. 402. See *Davis v. Wabash, &c., Co.*, 89 Mo. 340; *Hewitt v. Chicago, &c., Ry. Co.*, 63 Ia. 611; *McGraw v. Balt., &c., R. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696. The negligence, however, must be a real producing cause. *Balt., &c., R. R. Co. v. Sulphur Springs Dist.*, 96 Pa. St. 65, 42 Am. Rep. 529, 2 A. & E. R. R. Cas., 171, and note. The fidelity of the servants of a common carrier is at the risk of the employers. Therefore, it is no answer to a suit for failure to deliver goods with reasonable promptness that a strike among their employees prevented. *Blackstock v. N. Y. & Erie R. R. Co.*, 1 Bosw. 77, 20 N. Y. 48; *Galena, &c., R. R. Co. v. Rae*, 18 Ill. 488; *Gulf, etc., Ry. Co. v. Levi*, 76 Tex. 337, 13 S. W. 191, 18 Am. St. Rep. 45, 8 L. R. A. 323. But if the employees are discharged, and afterwards interfere unlawfully with the business, and cause delays, the carrier is no more chargeable with this than he would be with the lawless conduct of any other mob. *Pittsburgh, &c., R. R. Co. v. Hazen*, 84 Ill. 36. So, if without being formally discharged. *Geissmer v. Lake Shore, &c., Ry. Co.*, 102 N. Y. 563; *Pittsburgh, &c., Ry. Co. v. Hollowell*, 65 Ind. 188, 32 Am. Rep. 63; *Lake Shore, &c., Ry. Co. v. Bennett*, 89 Ind. 457. Destruction of the property by a mob held not to relieve the carrier. *Railway Co. v. Nevill*, 60 Ark. 375, 30 S. W. 425, 46 Am. St. Rep. 208, 28 L. R. A. 80. No liability if the railroad is in the hands of the government for war purposes. *Phelps v. Ill. Centr. R. R. Co.*, 94 Ill. 548; nor if goods taken up within the Confederate lines were destroyed by Confederate soldiers. *Nashville, &c., R. R. Co. v. Estes*, 10 Lea, 749. Carrier not liable if goods, while in transit, are taken by an officer under regular process. *Wells v. Maine S. S. Co.*, 4 Cliff. 228; *French v. Star Un., &c., Co.*, 134 Mass. 288; *Pingree v. Detroit, etc., R. R. Co.*, 66 Mich. 143, 33 N. W. 298, 11 Am. St. Rep. 479; *Merz v. Chicago, etc., Ry. Co.*, 86 Minn. 33, 90 N. W. 7; *Jewett v. Olsen*, 18 Ore. 419, 23 Pac. 262, 17 Am. St. Rep. 745. Carrier held liable for fish unlawfully seized by game warden. *Merriman v. Great Northern Express Co.*, 63 Minn. 543, 65 N. W. 1080.

76—If, by the local custom, the consignee is to furnish the conveniences for unloading and delivery, and he does so, and an injury occurs through defects in them, the carrier is not responsible for this injury. *Loveland v.*

The common law liability of a common carrier does not apply in all respects to railroad companies as carriers of live stock. This mode of transportation is new; it imposes great risks of a different character, demanding more labor and special arrangements for the protection of the stock, and does not come within the reasons which, at the common law, imposed upon common carriers the duty of care and custody of other property, and made them insurers. The owner is expected to accompany them and have the entire charge, care and management, and to that extent he takes upon himself the risk of loss and injury; the company being responsible for the furnishing of proper cars and motive power, and for the proper making up and running of the train.⁷⁷ The liability for live stock is the same as for other freight, except loss or injuries resulting from the nature and propensities of the animals themselves.⁷⁸

Burke, 120 Mass. 139, 21 Am. Rep. 507, citing *St. John v. Van Santvoord*, 25 Wend. 660; *Gibson v. Culver*, 17 Wend. 305; *Farmers', &c., Bank v. Transportation Co.*, 18 Vt. 131, and 28 Vt. 176. See *Forbes v. Boston, &c.*, R. R. Co., 133 Mass. 154; *Stimson v. Jackson*, 58 N. H. 138; *Turner v. Huff*, 46 Ark. 222.

77—*Michigan, &c., R. R. Co. v. McDonough*, 21 Mich. 165; *Clark v. Rochester, &c.*, R. R. Co., 14 N. Y. 570; *Penn v. Buffalo, &c.*, R. R. Co., 49 N. Y. 204; *Smith v. New Haven, &c.*, R. R. Co., 12 Allen, 531; *Squire v. N. Y. Cent. R. R. Co.*, 98 Mass. 239; *Central R. R. & B. Co. v. Smithe*, 85 Ala. 47, 4 So. 708; *Union Pac. Ry. Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986; *Dow v. Portland Steam Packet Co.*, 84 Me. 490, 24 Atl. 945; *Hiller v. Chicago, etc., Ry. Co.*, 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541.

78—*Western Ry. Co. v. Harwell*, 91 Ala. 340, 8 So. 649; *Central R.*

R. & B. Co. v. Smithe, 85 Ala. 47, 4 So. 708; *Coupland v. Housatonic R. R. Co.*, 61 Conn. 531, 23 Atl. 870; *Cooper v. Raleigh, etc.*, R. R. Co., 110 Ga. 659, 36 S. E. 240; *Boehl v. Chicago, etc.*, R. R. Co., 44 Minn. 191, 43 N. W. 333; *Louisville, etc., Ry. Co. v. Bigger*, 66 Miss. 319, 6 So. 234; *Louisville, etc., R. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Kennick v. Chicago, &c., Co.*, 69 Ia. 665; *Lindsley v. Chicago, &c., Co.*, 36 Minn. 539; *Miss. Pac. Ry. Co. v. Harris*, 67 Tex. 166. See *Bills v. New York, &c., Co.*, 84 N. Y. 5, and note 3 A. & E. R. R. Cas. 326; *Holapple v. New York, &c., Co.*, 86 N. Y. 275; *Phila., &c., Ry. Co. v. Lehman*, 56 Md. 209; *Farnham v. Camden, &c., R. R. Co.*, 55 Pa. St. 53; *Bryant v. Southw., &c., Co.*, 68 Ga. 805; *Lake Shore, &c., Co. v. Bennett*, 89 Ind. 457; *Ball v. Wabash, &c., Co.*, 83 Mo. 574; *Sprague v. Miss., &c., Co.*, 34 Kan. 347; *St. Louis, &c., Ry. Co. v. Lesser*, 46 Ark. 236. The duty of deliv-

[*766] *The liability of the common carrier, as such, does not attach in respect to goods in his hands awaiting the orders of the owner for shipment.⁷⁹ The liability begins as soon as goods are delivered to the carrier for shipment, and if they are lost or injured after such delivery is made and before the transportation of the goods begins, the carrier is liable as an insurer, the same as though they were lost or injured while in transit.⁸⁰ Thus when the goods are in the carrier's warehouse and the order is given to ship, the responsibility as carrier attaches at once.⁸¹ So when a car is loaded by the shipper on a side track and the carrier is notified that it is ready.⁸² So when live stock is received in the carrier's stock pens for shipment.⁸³ Baled hay was delivered to a railroad company for immediate shipment and placed in the company's depot. The shippers were to load the hay and were ready to do so, but shipment was delayed solely to enable the company to get cars for

ering live stock is like that as to other freight. North Penn. R. R. Co. v. Commercial Bank, 123 U. S. 727; Furman v. Union Pac., &c., Co., 106 N. Y. 579. Carrier need not furnish safest appliances, Ill., &c., R. R. Co. v. Haynes, 63 Miss. 485, but must use reasonable diligence to furnish suitable cars when asked. Ayres v. Chicago, &c., Co., 71 Wis. 372, 37 N. W. 432. As to a menagerie carried on its owner's cars and run on time to suit the owners, the railroad is not a common carrier. Coup v. Wabash, &c., Ry. Co., 56 Mich. 111.

79—Michigan, &c., R. R. Co. v. Shurtz, 7 Mich. 515; St. Louis, &c., R. R. Co. v. Montgomery, 39 Ill. 335; Little Rock, &c., Ry. Co. v. Hunter, 42 Ark. 200; Basnight v. Atlantic, etc., R. R. Co., 111 N. C. 592, 16 S. E. 323. See further, Iron Mt. Ry. Co. v. Knight, 122 U. S. 79; Miss. Pac. Ry. Co. v. Douglass, 16 A. & E. R. R. Cas.,

98, and note; Montgomery, &c., Ry. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; Ill. Centr. R. R. Co. v. Tronstine, 64 Miss. 834; Grand Tower, &c., Co. v. Ullman, 89 Ill. 244.

80—Capehart v. Granite Mills, 97 Ala. 353, 12 So. 44; Railway Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202; Berry v. Southern Ry. Co., 122 N. C. 1002, 30 S. E. 14, 65 Am. St. Rep. 743; Gulf, etc., Ry. Co. v. Travick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; Schmidt v. Chicago, etc., Ry. Co., 90 Wis. 504, 63 N. W. 1057.

81—Schmidt v. Chicago, etc., Ry. Co., 90 Wis. 504, 63 N. W. 1057.

82—Railway Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202.

83—Gulf, etc., Ry. Co. v. Travick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

the purpose. While so delayed the hay was destroyed by fire. The company was held liable as an insurer. The case is a very carefully considered one and the court says: "The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents or servants, at the place appointed or provided for their reception when they are in a fit and proper condition and ready for immediate transportation. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods. But, on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done or some further direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for his convenience and accommodation, and the receiver until some change takes place will be responsible only as a warehouseman. The party bringing the goods must do whatever is essential to enable the carrier to commence, or to make needful preparations for commencing, the service required of him, before he can be made liable, or subject to responsibility in that capacity. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former, while they are in his custody, is only liable as warehouseman, and his only responsibility as carrier is where goods are delivered to and accepted by him in the usual course of business for immediate transportation. The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other, and until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible

for them. The entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously (*eo instanti*) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put *in itinere*.⁸⁴

The time when the liability ceases depends upon circumstances. If the carrier is to transport the goods for a portion only of the whole distance, and then deliver them to another, his liability as carrier ceases when the goods arrive at the point

84—London, etc., Ins. Co. v. Rome, etc., R. R. Co., 144 N. Y. 200, 206, 207, 39 N. E. 79, 43 Am. St. Rep. 752. “Here the hay was delivered to the defendant for immediate shipment, and it was accepted by it and placed in its freight house. It was not stored for the accommodation and convenience of the shippers. They were there ready, willing and anxious to put the hay into the cars as fast as the defendant would furnish them. There was no delay whatever by the request of the shippers or on account of any act or omission on their part. Whatever delay there was in the shipment was due exclusively to the omission of the defendant to promptly furnish cars for the transportation. Although a railroad company may not be able promptly to transport freight delivered to it, and there may be considerable delay and even long storage of the freight until cars can be furnished, nevertheless it takes on the character of a common carrier the moment the property is delivered and received by it for immediate transportation. It can make no difference whether the railroad company was to place this hay in its cars or whether the shippers were to do that work. Whoever was to load the hay into the cars, it was delivered and received for immediate shipment, not for storage, not to be kept by the shippers, and not subject to their control, and it was not in their custody. It was simply left in the freight house of the railroad company until it could furnish cars for its transportation. It was there for immediate shipment, with nothing more to be done than to place it in the cars, and whether that work was to be done by the railroad company or by the shippers can make no difference in reason or principle. If, however, in such a case the delay in the shipment is caused by some fault of the shippers, if they are not ready to place the freight in the cars when they are furnished, and thus shipment is delayed until the property, without the fault of the carrier, is destroyed, the loss would then fall upon the shippers, because it was due to their fault.” pp. 207-8.

of intersection, and he then becomes a forwarder only.⁸⁵ But a carrier having possession of the goods is not discharged of his liability as insurer until he has delivered the goods to the succeeding carrier, or has done what, according to the course of business, is equivalent to such delivery.⁸⁶ If the contract covers the whole distance, the liability as carrier only ceases when the goods are actual*ly delivered, unless, [*767] by the custom of the business, the consignee is expected to receive them at the carrier's warehouse, in which case his liability changes from that of carrier to that of warehouseman when the goods are received at the warehouse, and the con-

85—*Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1; *Am. Ex. Co. v. Second National Bank*, 69 Pa. St. 394, 8 Am. Rep. 268; *Pendergast v. Adams Ex. Co.*, 101 Mass. 120; *Baltimore, &c., R. R. Co. v. Schumacher*, 29 Md. 168, 96 Am. Dec. 516; *Myrick v. Mich. Centr. R. R. Co.*, 107 U. S. 102; *Berg v. Atchison, &c., R. R. Co.*, 30 Kan. 561; *Knight v. Prov., &c., R. R. Co.*, 13 R. I. 572, 43 Am. Rep. 46; *Detroit, &c., Ry. Co. v. McKenzie*, 43 Mich. 609; *Hadd v. U. S. Exp. Co.*, 52 Vt. 335, 36 Am. Rep. 757; *Hoffman v. Cumberland Valley R. R. Co.*, 85 Md. 391, 37 Atl. 214; *Taffe v. Oregon R. R. Co.*, 41 Ore. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187; *Hunter v. Southern Pac. Ry. Co.*, 76 Tex. 195, 13 S. W. 190; *McConnell v. Norfolk, etc., R. R. Co.*, 86 Va. 248, 9 S. E. 1006. Payment of through rate does not itself make a carrier liable beyond his own line. *Piedmont, &c., Co. v. Columbia, &c., Co.*, 19 S. C. 353. See *Ortt v. Minn., &c., Co.*, 36 Minn. 396. If the carrier contracts to carry beyond its own line, the connecting carriers are its agents and it is liable for their negligence; *Pereira v. Centr. Pac.*, &c., Co., 66 Cal. 92; *Ireland v. Mobile, etc., R. R. Co.*, 105 Ky. 400, 49 S. W. 188, 453; and they are entitled to the protection of exceptions in its bill of lading. *Halliday v. St. Louis, &c., Ry. Co.*, 74 Mo. 159, 41 Am. Rep. 309; *Ala. G. S. Ry. Co. v. Mt. Vernon Co.*, 84 Ala. 173, 4 So. 356; *St. Louis, &c., Ry. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134.

In Ala. the English rule is adopted and a carrier receiving goods for transportation over and beyond its line is liable for their delivery at the end of the route unless it expressly limits its liability to its own line. *Mobile, &c., R. R. Co. v. Copeland*, 63 Ala. 219, 35 Am. Rep. 13. But the general rule is the other way. *Hoffman v. Cumberland Valley R. R. Co.*, 85 Md. 391, 37 Atl. 214; *Hunter v. Southern Pac. Ry. Co.*, 76 Tex. 195, 13 S. W. 190.

86—*Texas, etc., Ry. Co. v. Reiss*, 183 U. S. 621, 22 S. C. Rep. 253, 46 L. Ed. 358; *Texas, etc., Ry. Co. v. Callender*, 183 U. S. 632, 22 S. C. Rep. 257, 46 L. Ed. 362; *Texas, etc., Ry. Co. v. Clayton*, 173 U. S. 348, 19 S. C. Rep. 421, 43 L. Ed. 725; *Texas, etc., Ry. Co. v. Clayton*, 84

signee has had reasonable time and opportunity to remove them.⁸⁷

Fed. 305, 28 C. C. A. 142; Congdon v. Marquette, etc., R. R. Co., 55 Mich. 218, 54 Am. Rep. 367; McDonald v. Western R. R. Co., 34 N. Y. 497.

87—Morris, &c., R. R. Co. v. Ayres, 29 N. J. 393; Blumenthal v. Brainerd, 38 Vt. 402; Thomas v. Boston, &c., R. R. Co., 10 Met. 472, 43 Am. Dec. 444; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 77; Moses v. Boston, &c., R. R. Co., 32 N. H. 523, 44 Am. Dec. 381; McMillan v. Michigan, &c., R. R. Co., 16 Mich. 79; Nat. Line, &c., Co. v. Smart, 107 Pa. St. 492; Western Ry. v. Little, 86 Ala. 159, 5 So. 563; Columbus, etc., Ry. Co. v. Ludden, 89 Ala. 612, 7 So. 471; Anniston, etc., R. R. Co. v. Ledbetter, 92 Ala. 326, 9 So. 73; Collins v. Ala. Great So. R. R. Co., 104 Ala. 390, 16 So. 140; Gulf, etc., R. R. Co. v. Horton, 84 Miss. 490, 36 So. 449; Draper v. Del. & H. Canal Co., 118 N. Y. 118, 23 N. E. 131; Railroad Co. v. Hatch, 52 Ohio St. 408, 39 N. E. 1042; Berry v. W. Va., etc., R. R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781. In New York it is held that the carrier must deliver the goods or give notice of their arrival and allow a reasonable time for removal before he becomes a warehouseman. Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574. Even after such constructive delivery he is liable for ordinary care while the goods are in his hands. Tarbell v. Royal, &c., Co., 110 N. Y. 170, 17 N. E. 721. The cases are not entirely in accord as to whether mere receiving and storing without the

allowance of a reasonable time is enough to make one a warehouseman. See Gashweiler v. Wabash, &c., Co., 83 Mo. 112, 53 Am. Rep. 558; Merch. Desp., &c., Co. v. Merriam, 111 Ind. 5; Ind. Mills Co. v. Burlington, &c., Co., 72 Ia. 535, 34 N. W. 320; Kennedy v. Mobile, &c., Co., 74 Ala. 430; Louisville, &c., R. R. Co. v. McGuire, 79 Ala. 395; Wood's Brown on Carriers, p. 297 *et seq.*; Wilson v. South Pac. R. R. Co., 7 A. & E. R. R. Cas., 400 and note; Burlington, &c., Co. v. Arms, 16 A. & E. R. R. Cas., 272 and note; Texas, &c., Co. v. Capps, Id. 118, note. The authorities are collected in note to Columbus, etc., Ry. Co. v. Ludden, 3 Am. R. R. & Corp. Rep. p. 52. See Gregg v. Illinois Central R. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238; Burr v. Adams Express Co., 71 N. J. L. 263; East Tenn., etc., Ry. Co. v. Kelly, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691. An express company, which receives a package on Saturday and holds it without delivering or notifying consignee residing near by is liable when it is burnt on Tuesday night. Union Exp., &c., Co. v. Ohleman, 92 Penn. St. 323. A carrier becomes a warehouseman as to baggage carried with a passenger when a reasonable time has elapsed for delivery after putting it in the baggage room at the end of the route. Hoeger v. Chicago, &c., Ry. Co., 63 Wis. 100, 53 Am. Rep. 271. See Jacobs v. Tutt, 33 Fed. Rep. 412; Penn. Co. v. Miller, 35 Ohio St. 541. Where the goods are held at the request of the consignee

Prima facie the consignee is the person entitled to demand and receive the goods of the carrier at the place of destination, and to sue for any breach of the carrier's contract. But the presumption is not conclusive. One may have a special interest in the goods which entitles him to demand and receive possession;⁸⁸ *or he may, as vendor to one who has [*768] become insolvent, be entitled to exercise his right of stoppage *in transitu*,⁸⁹ or some other right which the carrier cannot resist.

and for the latter's accommodation, the carrier is liable only as warehouseman. Southern Express Co. v. Holland, 109 Ala. 362, 19 So. 66; Mulligan v. Northern Pac. Ry. Co., 4 Dak. 315, 29 N. W. 659; Whitney Mfg. Co. v. Richmond, etc., R. R. Co., 38 S. C. 365, 17 S. E. 147, 37 Am. St. Rep. 767.

88—Sou. Exp. Co. v. Caperton, 44 Ala. 101. The carrier must deliver according to the bill of lading. Penn. R. Co. v. Stern, 12 Atl. Rep. 756 (Penn.); North v. Merch., &c., Co., 146 Mass. 315, 15 N. E. 779. Although the bill says notify A, when B is the consignee. North Penn. R. R. Co. v. Commercial Bank, 123 U. S. 727. A delivery to another than the consignee, unless the consignor has the right to stop in transit, will not be excused by the consignor's direction. Phila., &c., Co. v. Wireman, 88 Penn. St. 264. The carrier delivers to the wrong person at his peril after failure to find the consignee upon investigation. Wernwag v. Phila., &c., Co., 117 Pa. St. 46, 11 Atl. 868; Louisville, etc., R. R. Co. v. Barkhouse, 100 Ala. 543, 13 So. 534; Hamilton v. Chicago, etc., Ry. Co., 103 Ia. 325, 72 N. W. 536; Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855; Oskamp v. Southern Express Co., 61 Ohio St. 341, 56 N. E. 13. Failure to deliver upon demand to consignee makes *prima facie* case of negligence. Canfield v. Balt., &c., Co., 93 N. Y. 532, 45 Am. Rep. 268. Delivery to person named by consignee sufficient against the consignor. Dobbin v. Mich. Cent. R. R. Co., 56 Mich. 522. See further on delivery to the wrong person. Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855; Jellett v. St. Paul, &c., Ry. Co., 30 Minn. 265; McCulloch v. McDonald, 91 Ind. 240; Guillaume v. Gen. Trans. Co., 100 N. Y. 491. If without negligence the carrier delivers the goods to the actual consignee it is not liable to the consignor, though he supposes he is shipping to another person of the name. The Drew, 15 Fed. Rep. 826; Wilson v. Adams Exp. Co., 27 Mo. App. 360. When goods are shipped f. o. b. the title thereto on arrival vests in the consignee. Capehart v. Furman Farm Imp. Co., 103 Ala. 671, 16 So. 627, 49 Am. St. Rep. 60.

89—Bohtlingk v. Inglis, 3 East, 381; Newsom v. Thornton, 6 East, 17; Virtue v. Jewell, 4 Camp. 31; James v. Griffin, 1 M. & W. 20; Buckley v. Furniss, 15 Wend. 137, and 17 Wend. 504; Mottram v. Heyer, 5 Denio, 629; Naylor v.

Carriers of Persons. Where the business of a carrier is to transport both persons and property, his obligation and his consequent liability in respect to the two are different. For the safe transportation of the property he is responsible as insurer, with the exceptions already stated; but in the case of passengers he only undertakes that he will carry them without negligence or fault. But as there are committed to his charge for the time the lives and safety of persons of all ages and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life or limb, it is reasonable to require of him the most perfect care of prudent and cautious men, and his undertaking and liability as to his passengers goes to this extent, that, as far as human foresight and care can reasonably go, he will transport them safely.⁹⁰ He is not liable if

- Dennie, 8 Pick. 198, 19 Am. Dec. 319; Atkins *v.* Colby, 20 N. H. 154; Reynolds *v.* Railroad, 43 N. H. 580; Pool *v.* Columbia, &c., R. R. Co., 23 S. C. 286; Dougherty *v.* Miss. &c., R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; Crass *v.* Memphis, etc., R. R. Co., 96 Ala. 447, 11 So. 480; Farrell *v.* Richmond, etc., R. R. Co., 102 N. C. 390, 9 S. E. 302, 11 Am. St. Rep. 760, 3 L. R. A. 647; Wheeling, etc., R. R. Co. *v.* Koontz, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. Rep. 435; Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796. When goods have been rightfully stopped *in transitu*, the possession of the carrier is that of the vendor, and an officer who seizes them as the property of the vendee with notice will be liable in trover. Wolf *v.* Shepherd, 103 Ala. 241, 15 So. 519.
- 90—Railway Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571; Nagle *v.* Cal. So. R. R. Co., 88 Cal. 86, 25 Pac. 1106; Denver, etc., R. R. Co. v. Hodgson, 18 Colo. 117, 31 Pac. 954; Atchison, etc., R. R. Co. *v.* Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; Florida So. Ry. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631; Central of Ga. Ry. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Chicago, etc., R. R. Co. *v.* Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483; Louisville, etc., Ry. Co. *v.* Taylor, 126 Ind. 126, 25 N. E. 869; Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710; Louisville, etc., R. R. Co. *v.* Ritter's Admr., 85 Ky. 368, 3 S. W. 591; Le Blanc *v.* Sweet, 107 La. 355, 31 So. 766, 90 Am. St. Rep. 303; Clerc *v.* Morgan's La., etc., Co., 107 La. 370, 31 So. 886, 90 Am. St. Rep. 319; Jackson *v.* Natchez, etc., Ry. Co., 114 La. 982, 38 So. 701; Libby *v.* Maine Cent. R. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; Philadelphia, etc., R. R. Co. *v.* Anderson, 72 Md. 519, 20 Atl. 2, 20 Am. St. Rep. 483, 8 L. R. A. 673; Howell *v.* Lansing City Elec. Ry. Co., 136 Mich. 432, 99 N. W. 406;

injuries happen from sheer accident or misfortune, where there is no negligence or *fault, and where no [*769] want of caution, foresight or judgment would prevent the injury. But he is liable for the smallest negligence in himself or his servants.¹ And this liability is applied with great

Spohn v. Missouri Pac. R. R. Co., 101 Mo. 417, 14 S. W. 880; *Furnish v. Missouri Pac. R. R. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; *Smith v. Chicago, etc., R. R. Co.*, 108 Mo. 243, 18 S. W. 971; *Sweeney v. Kansas City Cable Ry. Co.*, 150 Mo. 385, 51 S. W. 682; *Union Pac. Ry. Co. v. Sue*, 25 Neb. 772, 41 N. W. 801; *Hansen v. North Jersey St. Ry. Co.*, 64 N. J. L. 686, 46 Atl. 718; *Palmer v. Del. & H. Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 17 Am. St. Rep. 629; *Bosworth v. Union R. R. Co.*, 25 R. I. 202, 55 Atl. 490; *Ferry Cos. v. White*, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427; *Texas, etc., Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; *Richmond City Ry. Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Connell v. Chesapeake, etc., R. R. Co.*, 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792; *Sears v. Seattle Consol. St. Ry. Co.*, 6 Wash. 227, 33 Pac. 389, 1081; *Chikey v. Seattle Elec. Co.*, 27 Wash. 70, 67 Pac. 379. "The carrier is legally bound to exercise the greatest, highest, or utmost care, skill, and foresight that human experience and observation and the known laws of nature suggest as conducive to the passenger's safety, and capable of being put into practice; or such active, solicitous care, skill and foresight, as intelligent, suitably trained, and very cautious per-

sons would be expected to exercise for their own personal protection in the same business and surroundings, and with the instrumentalities required and employed." *Illinois Central R. R. Co. v. Kuhn*, 107 Tenn. 106, 131, 64 S. W. 202. "A common carrier of passengers is required to exercise the highest degree of care and skill which may reasonably be expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended." *Payne v. Spokane St. Ry. Co.*, 15 Wash. 522, 46 Pac. 1054; *Larkin v. Chicago, etc., Ry. Co.*, 118 Ia. 652, 92 N. W. 891. The carrier's duty is independent of any contract and is founded upon public policy. *Delaware, etc., R. R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435; *McNeill v. Railroad Co.*, 135 N. C. 682, 47 S. E. 765. A receiver operating a railroad is subject to the same rules of liability in his official capacity as the railroad company itself. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516.

1—*Derwort v. Loomer*, 21 Conn. 246, per ELLSWORTH, J.; *Christie v. Griggs*, 2 Camp. 79; *Farish v. Reigle*, 11 Grat. 697, 62 Am. Dec. 666; *Frink v. Potter*, 17 Ill. 406;

strictness, as well as great justice, when he undertakes to transport passengers by the powerful and dangerous agency of steam.² But the carrier is not an insurer of the safety of his passengers and is not liable for injuries which the highest practicable care cannot avoid.³ "The rule, that the carrier is bound

Simmons v. New Bedford, &c., R. A. 673; New York, etc., R. R. Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99; Knight v. Portland, &c., R. R. Co., 56 Me. 234; Maverick v. Eighth Ave. R. R. Co., 36 N. Y. 378; Johnson v. Winona, &c., R. R. Co., 11 Minn. 296, 88 Am. Dec. 83; Taylor v. Grand Trunk R. R. Co., 48 N. H. 304, 2 Am. Rep. 229; Sherlock v. Alling, 44 Ind. 184; Gallagher v. Bowie, 66 Tex. 265; Citizens' St. Ry. Co. v. Twiname, 111 Ind. 587; White v. Fitchburg R. R. Co., 136 Mass. 321; Nagle v. Cal. So. R. R. Co., 88 Cal. 86, 25 Pac. 1106; Clark v. Chicago, etc., R. R. Co., 127 Mo. 197, 29 S. W. 1013; Taillon v. Mears, 29 Mont. 161, 74 Pac. 421; St. Louis, etc., Ry. Co. v. Finley, 79 Tex. 85, 15 S. W. 266; Mitchell v. Marker, 62 Fed. 139, 10 C. C. A. 306. Not an insurer against the act of God. Gillespie v. St. Louis, &c., Ry. Co., 6 Mo. App. 554; International, &c., R. R. Co. v. Halloren, 53 Tex. 46.

2—*Caldwell v. N. J. Steamboat Co., 47 N. Y. 282; Meier v. Pennsylvania R. R. Co., 64 Pa. St. 225; Baltimore & Ohio R. R. Co. v. Miller, 29 Md. 252.* If passengers are carried on a freight train, the highest care must be used consistent with the usual operations of such trains. *Wooley v. Louisville, &c., Co., 107 Ind. 381; McGee v. Miss., &c., Co., 92 Mo. 208; Central of Ga. Ry. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202, 50 L.*

Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Cleveland, etc., Ry. Co. v. Best, 169 Ill. 301, 48 N. E. 684; Illinois Cent. R. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210; Smith v. Louisville, etc., Ry. Co., 124 Ind. 394, 24 N. E. 753; Western Md. R. R. Co. v. State, 95 Md. 637, 53 Atl. 969; Whitehead v. St. Louis, etc., Ry. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; Aufdenberg v. St. Louis, etc., Ry. Co., 132 Mo. 565, 34 S. W. 485; Baltimore, etc., Ry. Co. v. Cox, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. Rep. 583; Simmons v. Oregon R. R. Co., 41 Ore. 151, 69 Pac. 440, 1022; Radley v. Columbia Ry. Co., 44 Ore. 332, 75 Pac. 212; Railroad Co. v. Hailey, 94 Tenn. 383, 29 S. W. 367, 27 L. R. A. 549; Everett v. Oregon Short Line, etc., Co., 9 Utah, 340, 34 Pac. 289; but to stand in the aisle or sit on the arm of a seat while switching is being done is contributory negligence. Harris v. Hannibal, &c., Co., 89 Mo. 233, 58 Am. Rep. 111; Smith v. Richmond, &c., Co., 99 N. C. 241, 5 S. E. 896.

3—*Nagle v. Cal. So. R. R. Co., 88 Cal. 86, 25 Pac. 1106; Tall v. Baltimore Steam Packet Co., 90 Md. 248, 44 Atl. 1007; Western Md. R. R. Co. v. Shivers (Md.), 61 Atl. 618; Buckland v. New York, etc., R. R. Co., 181 Mass. 3, 62 N. E. 955; Bunting v. Pennsylvania R. R. Co., 118 Pa. St. 204, 12 Atl. 448.* He is not bound to exercise

to exercise the highest degree of care that is possible to human foresight and prudence does not require a construction that will make the carrier an insurer against accidents, nor the prevention of accidents by the employment of means which, if the accident could have been foretold might have been used to prevent it, nor for the wrongful acts of strangers, unless the carrier was remiss in not discovering them in time to avert the injury, nor for an impracticable character or extent of precaution which could not be observed without so ruinous a cost as to destroy the business, and in all cases the liability is only such as results from negligence."⁴

The luggage, which it is customary for carriers to permit their passengers to take with them, without charge beyond what is paid for their own conveyance, is taken under the like obligation which attends the carriage of ordinary freight.⁵ Luggage

all possible care or the greatest possible care. International, etc., Ry. Co. v. Welch, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829.

4—*Fredericks v. Northern Cent. R. R. Co.*, 157 Pa. St. 103, 117, 27 Atl. 689, 22 L. R. A. 306. In *Tri-City Ry. Co. v. Gould*, 217 Ill. 317, 75 N. E. 493, it was held error to give the following instruction with the italics omitted therefrom: “The defendant, through its servants in charge of such car, was required to do all that human care, vigilance and foresight could reasonably do, in view of the character and mode of conveyance adopted, *and consistently with the practical operation of the road*, to safely carry him as such passenger.”

5—*Hannibal R. R. Co. v. Swift*, 12 Wall. 262; *Merrill v. Grinnell*, 30 N. Y. 594; *Kansas City, etc., Ry. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; *Wood v. Maine*

Cent. R. R. Co., 98 Me. 98, 56 Atl. 457, 99 Am. St. Rep. 339; *Shaw v. Northern Pac. R. R. Co.*, 40 Minn. 144, 41 N. W. 548; *Ringwalt v. Wabash R. R. Co.*, 45 Neb. 760, 64 N. W. 219; *Oakes v. Northern Pac. R. R. Co.*, 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318. Baggage lost in the Johnstown flood was held lost by act of God. *Long v. Pennsylvania R. R. Co.*, 147 Pa. St. 343, 23 Atl. 459, 30 Am. St. Rep. 732, 14 L. R. A. 741. But if the loss would not have occurred but for a negligent delay in forwarding it, the carrier is liable. *Wald v. Pittsburg, etc., R. R. Co.*, 162 Ill. 545, 44 N. E. 888, 53 Am. St. Rep. 332, 35 L. R. A. 356. A rule forbidding the checking of baggage earlier than half an hour before the departure of the train on which it is to go is reasonable and for baggage delivered before the half hour the carrier is liable only as warehouseman. *Goldberg v. Ahna-*

or baggage includes such articles of necessity and convenience as passengers usually carry for their personal use, comfort, instruction, amusement or protection, having regard to the length and object of their journeys, including such an amount of money as it would be reasonable to take for expenses and contingencies.⁶ The liability as insurer for baggage is incidental

pee, etc., Ry. Co., 105 Wis. 1, 80 N. W. 920, 76 Am. St. Rep. 899, 47 L. R. A. 221.

6—Parmelee *v.* Fischer, 22 Ill. 212, 74 Am. Dec. 138; Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460; Doyle *v.* Kiser, 6 Ind. 243; Jordan *v.* Fall River R. R. Co., 5 Cush. 69, 51 Am. Dec. 44; Bomar *v.* Maxwell, 9 Humph. 621; Giles *v.* Fauntleroy, 13 Md. 127; Noble *v.* Milliken, 74 Me. 225, 43 Am. Rep. 581; 77 Me. 359; Ill. Centr., &c., R. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846; Hopkins *v.* Westcott, 6 Blatch. 64; Hutchings *v.* Western, &c., R. R. Co., 25 Ga. 63, 71 Am. Dec. 156; Woods *v.* Devin, 13 Ill. 746, 56 Am. Dec. 483; Torpey *v.* Williams, 3 Daly, 162; Dexter *v.* Syracuse, &c., R. R. Co., 42 N. Y. 326, 1 Am. Rep. 527; Johnson *v.* Stone, 11 Humph. 419; Hillis *v.* Chicago, &c., Co., 72 Ia. 228, 33 N. W. 643; Railway Co. *v.* Berry, 60 Ark. 433, 30 S. W. 764, 46 Am. St. Rep. 212, 28 L. R. A. 501; Kansas City, etc., Ry. Co. *v.* McGahey, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; Oakes *v.* Northern Pac. R. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318; Charlotte Trouser Co. *v.* Railroad Co., 139 N. C. 382; Battle *v.* Columbia, etc., R. R. Co., 70 S. C. 329; Railroad Co. *v.* Baldwin, 113 Tenn. 205, 81 S. W. 599. What is reasonable in a given case is for the jury. Railroad Co. *v.* Fraloff, 100 U. S. 24. A railroad company is not obliged to carry large amount of money, not for the use of the traveler where express facilities are furnished. Pfister *v.* Centr. Pac., &c., Co., 70 Cal. 169, 59 Am. Rep. 404. Ladies' jewelry carried by a man traveling alone is not. Metz *v.* Cal. So. R. R. Co., 85 Cal. 329, 24 Pac. 610, 20 Am. St. Rep. 228, 9 L. R. A. 431. A notice by a carrier that baggage must be at the risk of the owner is of no force, unless assented to. Hollister *v.* Nowlen, 19 Wend. 234, 32 Am. Dec. 455; Jones *v.* Voorhees, 10 Ohio, 146; Gott *v.* Dinsmore, 111 Mass. 45; Bennett *v.* Dutton, 10 N. H. 481. But a rule that carriers will not be responsible for baggage beyond a certain amount, unless the value is reported to them and carriage paid for, is reasonable, and obligatory when brought home to the knowledge of the passenger. Brown *v.* Eastern R. R., 11 Cush. 97; Brehme *v.* Dinsmore, 25 Md. 328. Compare Coward *v.* East Tenn., &c., Co., 16 Lea, 225, 57 Am. Rep. 227. Express companies may limit their liability in the same way. Green *v.* Southern Express Co., 45 Ga. 305; Oppenheimer *v.* U. S. Express Co., 69 Ill. 62; Newstadt *v.* Adams, 5 Duer, 43. See Nicholson *v.* Willan, 5

East, 507; Baldwin *v.* Collins, 9 Rob. La. 468. But the owner need not disclose the value unless required to do so. Phillips *v.* Earle, 8 Pick. 182; Parmelee *v.* Lowitz, 74 Ill. 116, 24 Am. Rep. 276; Railroad Co. *v.* Fraloff, 100 U. S. 24. Articles carried for sale are not properly baggage. Blumantle *v.* Fitchburg, &c., R. R. Co., 127 Mass. 322; Alling *v.* Boston, &c., Co., 126 Mass. 121, 34 Am. Rep. 376; Spooner *v.* Hannibal, &c., Co., 23 Mo. App. 403; Norfolk, &c., Co. *v.* Irvine, 84 Va. 553, 5 S. E. 532; Illinois Cent. R. R. Co. *v.* Matthews, 114 Ky. 973, 72 S. W. 302; Pennsylvania R. R. Co. *v.* Knight, 58 N. J. L. 287, 33 Atl. 845; Oakes *v.* Northern Pac. R. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318; Saunders *v.* Southern Ry. Co., 128 Fed. 15, 62 C. C. A. 523; McKibbin *v.* Great Northern Ry. Co., 78 Minn. 232, 80 N. W. 1052; Talcott *v.* Wabash R. R. Co., 66 Hun, 456, 21 N. Y. S. 318; Toledo, etc., R. R. Co. *v.* Bowler, etc., Co., 63 Ohio St. 274, 58 N. E. 813; Norfolk, etc., R. R. Co. *v.* Irvine, 85 Va. 217, 7 S. E. 233, 1 L. R. A. 110; Humphreys *v.* Perry, 148 U. S. 627, 13 S. C. Rep. 711, 37 L. Ed. 587. Unless their nature being known, it is agreed to carry them. Jacobs *v.* Tutt, 33 Fed. Rep. 12; Hoeger *v.* Chicago, &c., Ry. Co., 63 Wis. 100; Trimble *v.* New York, etc., R. R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; Railway Co. *v.* Bowler, etc., Co., 57 Ohio St. 38, 47 N. E. 1039, 63 Am. St. Rep. 702; Kansas City, etc., Ry. Co. *v.* McGahey, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; Oakes *v.*

Northern Pac. R. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318; Saunders *v.* Southern Ry. Co., 128 Fed. 15, 62 C. C. A. 523. But when a passenger states that a trunk contains merchandise without stating whose it is and the trunk is checked and the merchandise belongs to a third party, the carrier is not liable to such third party. Talcott *v.* Wabash R. R. Co., 66 Hun, 456, 21 N. Y. S. 318. Manuscript music used by a traveling company in its business and carried by them as passengers held baggage. Texas, etc., Ry. Co. *v.* Morrison Faust Co., 20 Tex. Civ. App. 144, 48 S. W. 1103. But the costumes and paraphernalia of a theatrical company were held not to be baggage. Saunders *v.* Southern Ry. Co., 128 Fed. 15, 62 C. C. A. 523. The carrier's check is *prima facie* evidence of the delivery of the baggage to the carrier. Chicago, etc., R. R. Co. *v.* Steear, 53 Neb. 95, 73 N. W. 466. As to when a carrier becomes a warehouseman as to baggage, see cases p. 1356 at end note 87.

For such baggage as a passenger keeps in his own possession a carrier is not liable as insurer, but only for negligence. Steamship Co. *v.* Bryan, 83 Penn. St. 446; Whitney *v.* Pullman, &c., Co., 143 Mass. 243; Kinsley *v.* Lake Shore, &c., Co., 125 Mass. 54; Henderson *v.* Louisville, &c., Co., 123 U. S. 61. A steamship company held liable as insurer for property of passenger lost from state room. Adams *v.* N. J. Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 56 Am. St. Rep. 616, 34 L. R. A. 682.

to the carriage of the passenger,⁷ and if one checks baggage over a line upon which he does not go or intend to go as a passenger, the carrier is only liable for loss or damage by negligence,⁸ or it may be for only wilful or wanton injury.⁹ The liability as insurer terminates after the arrival of the baggage and after the owner has had a reasonable opportunity to obtain it.¹⁰

[*770] *The responsibility of the carrier begins when the passenger presents himself for transportation; and this he may be said to do when he approaches the place of reception for the purpose.¹¹ Therefore, if the carrier is negligent in re-

7—*Pennsylvania R. R. Co. v. Knight*, 58 N. J. L. 287, 33 Atl. 845; *Talcott v. Wabash R. R. Co.*, 66 Hun, 456, 21 N. Y. S. 318.

8—*Wood v. Maine Cent. R. R. Co.*, 98 Me. 98, 56 Atl. 457, 99 Am. St. Rep. 339; *Marshall v. Pontiac, etc., R. R. Co.*, 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650.

9—*Beers v. Boston, etc., R. R. Co.*, 67 Conn. 417, 34 Atl. 541, 52 Am. St. Rep. 293, 32 L. R. A. 535.

10—*Kansas City, etc., Ry. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; *George F. Ditman B. & S. Co. v. Keokuk, etc., Ry. Co.*, 91 Ia. 416, 59 N. W. 257, 51 Am. St. Rep. 352; *Galveston, etc., Ry. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133. Where the agent of a baggage express company took the plaintiff's check on the train with order for delivery of the baggage and put the check on the trunk while on the train and marked the trunk with its label, the custom being for the railroad company to take off these checks and hold the trunk until called for by the express company, it was held that upon the attaching of the

passenger's check to the trunk and the marking of it with the express company's label, the railroad became a bailee of the trunk for the express company and that the latter company became liable as carrier. *Springer v. Wescott*, 166 N. Y. 117, 59 N. E. 693. If baggage is held for the convenience of the carrier its liability is not changed. *Shaw v. Northern Pac. R. R. Co.*, 40 Minn. 144, 41 N. W. 548.

11—As to what is necessary to constitute one a passenger see *St. Louis, etc., R. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971; *Illinois Cent. R. R. Co. v. O'Keefe*, 154 Ill. 508, 39 N. E. 606; *Illinois Cent. R. R. Co. v. Treat*, 178 Ill. 576, 54 N. E. 290; *Chicago, etc., R. R. Co. v. Jennings*, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827; *Lake St. El. R. R. Co. v. Burgess*, 200 Ill. 628, 66 N. E. 215; *Baltimore, etc., R. R. Co. v. State*, 81 Md. 371, 32 Atl. 201; *Wells v. New York Cent., etc., R. R. Co.*, 25 App. Div. 365, 49 N. Y. S. 510; *Radley v. Columbia Ry. Co.*, 44 Ore. 332, 75 Pac. 212; *Norfolk, etc., R. R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935. "If a person goes upon cars

spect to the platforms and other approaches provided for the use of passengers, and in consequence of their being in an unsafe condition, the person coming to be carried is injured, he may have his action therefor.¹² The carrier of persons, like the carrier *of goods, is under obligation to carry [*771] impartially; and, therefore, he cannot refuse to receive

provided by the railroad company for the transportation of passengers, with the purpose of carriage as a passenger with the consent, express or implied, of the railroad company, he is presumptively a passenger. Both parties must enter into and be bound by the contract. The passenger may do this by putting himself into the care of the railroad company to be transported, and the company does it by expressly or impliedly receiving him and accepting him as a passenger. The acceptance of the passenger need not be direct or express, but there must be something from which it may be fairly implied. One does not become a passenger until he has put himself in charge of the carrier and has been expressly or impliedly received as such by the carrier." Illinois Central R. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 61 Am. St. Rep. 68, 39 L. R. A. 148.

12—Smith v. London, &c., R. R. Co., L. R. 3 C. P. 326; Poucher v. N. Y. Central R. R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Tobin v. Portland, &c., R. R. Co., 59 Me. 183, 8 Am. Rep. 415; Chicago, &c., R. R. Co. v. Wilson, 63 Ill. 167; McDonald v. Chicago, &c., R. R. Co., 26 Iowa, 124, 95 Am. Dec. 114; Mich. Cent. R. R. Co. v. Coleman, 28 Mich. 440; Bueneman v. St. Paul, &c., Ry. Co., 32 Minn. 390;

Snow v. Fitchburg R. R. Co., 136 Mass. 552; Reynolds v. Texas, &c., Ry. Co., 37 La. Ann. 694; Ala., &c., R. R. Co. v. Arnold, 80 Ala. 600; Alabama Great So. R. R. Co. v. Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354; Falls v. San Francisco, etc., R. R. Co., 97 Cal. 115, 31 Pac. 901; Wilkes v. Western, etc., R. R. Co., 109 Ga. 794, 35 S. E. 165; Waterbury v. Chicago, etc., Ry. Co., 104 Ia. 32, 73 N. W. 341; Moses v. Louisville, etc., R. R. Co., 39 La. Ann. 649, 2 So. 567, 4 Am. St. Rep. 231; Collins v. Toledo, etc., Ry. Co., 80 Mich. 390, 45 N. W. 178; Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; Wood v. Met. St. Ry. Co., 181 Mo. 433, 81 S. W. 152; Union Pac. Ry. Co. v. Sue, 25 Neb. 772, 41 N. W. 801; Ayres v. Delaware, etc., R. R. Co., 158 N. Y. 254, 53 N. E. 22; Skottowe v. Oregon Short Line, 22 Ore. 430, 30 Pac. 222, 16 L. R. A. 593; Chicago, etc., R. R. Co. v. Walker, 118 Ill. App. 397; McGuire v. Interborough Rapid Transit Co., 104 App. Div. 105, 93 N. Y. S. 316. Platforms should be lighted when necessary for the safety of passengers. St. Louis, etc., Ry. Co. v. Battle, 69 Ark. 369, 63 S. W. 805; Louisville, etc., Ry. Co. v. Treadway, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794; Sargent v. St. Louis, etc., Ry. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460;

one who offers, unless he has valid excuse therefor.¹³ It will be a sufficient excuse that the person refuses to pay his fare in advance, when demanded, or to procure a ticket evidencing his right to a passage, or that he is grossly intoxicated, or for other reason unfit to be received as a passenger with others.¹⁴ But

Gerhart *v.* Wabash R. R. Co., 110 R. Co., 57 S. C. 332, 35 S. E. 583; Mo. App. 105; Owen *v.* Washington, etc., Ry. Co. 29 Wash. 207, 69 Pac. 757; Grimes *v.* Pennsylvania Co., 36 Fed. 72. See Goodlove *v.* Memphis, etc., R. R. Co., 107 Ala. 233, 18 So. 166, 54 Am. St. Rep. 67, 29 L. R. A. 729; Cross *v.* Lake Shore, &c., Co., 69 Mich. 363, 37 N. W. 361. Not bound to so high a degree of care about approaches as about the running of trains. Moreland *v.* Boston, &c., R. R. Corp., 141 Mass. 31; Kelley *v.* Manhattan Ry. Co., 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74; Holcombe *v.* Southern Ry. Co. 66 S. C. 6, 44 S. E. 68. Carrier liable where platform used is owned by another company. Wabash, &c., Ry. Co. *v.* Wolff, 13 Ill. App. 437; Herrman *v.* Great Northern Ry. Co., 27 Wash. 472, 68 Pac. 82, 57 L. R. A. 390. The obligation of care extends to those who come to welcome friends or to aid them in leaving. Gillis *v.* Penn. R. R. Co., 59 Penn. St. 129, 98 Am. Dec. 317; Doss *v.* Missouri, &c., R. R. Co., 59 Mo. 27, 21 Am. Rep. 371, a valuable case; McKone *v.* Mich. Centr. R. R. Co., 51 Mich. 601, 47 Am. Rep. 596; Hamilton *v.* Texas, &c., Ry. Co., 64 Tex. 251, 53 Am. Rep. 756; Railway Co. *v.* Lawton, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434; Johnson *v.* So. Ry. Co., 53 S. C. 203, 31 S. E. 212, 69 Am. St. Rep. 849; Izlar *v.* Manchester, etc., R. 606.

13—Nevin *v.* Pullman, &c., Co., 106 Ill. 222, 46 Am. Rep. 688; Atwater *v.* Delaware, &c., Co., 48 N. J. L. 55; Lake Erie, &c., Ry. Co. *v.* Acres, 108 Ind. 548, and cases cited.

14—See Jencks *v.* Coleman, 2 Sumn. 221; Bennett *v.* Dutton, 10 N. H. 481; Elmore *v.* Sands, 54 N. Y. 512, 13 Am. Rep. 617; Pittsburgh, &c., R. R. Co. *v.* Vandyne, 57 Ind. 576, 26 Am. Rep. 63; Johnson *v.* Louisville, etc., R. R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39; Hudson *v.* Lynn, etc., R. R. Co., 178 Mass. 64, 59 N. E. 647. A railroad company is not bound to receive as a passenger unattended a person who is unable to take care of himself but if such a person is knowingly received care must be exercised accordingly. Croom *v.* Chicago, etc., Ry. Co., 52 Minn. 296, 53 N. W.

the color of a person is no justification for refusing to carry him as others are carried.¹⁵ The carrier *is also [*772] under obligations to use the utmost care and diligence

1128, 38 Am. St. Rep. 557, 18 L. R. A. 602. A rule that no blind person would be received as a passenger unattended held unreasonable. *Zackery v. Mobile, etc., R. R. Co.*, 75 Miss. 746, 23 So. 434, 65 Am. St. Rep. 617, 41 L. R. A. 385. And see *Illinois Central R. R. Co. v. Smith*, 85 Miss. 349, 37 So. 643, 107 Am. St. Rep. 245, where a railroad company was held liable in damages for refusing to carry a blind person who was competent to look out for himself.

15—See *ante*, p. 611. A rule requiring whites to occupy one part of a car and blacks another is reasonable. *Bowie v. Birmingham Ry. & Elec. Co.*, 125 Ala. 397, 27 So. 1016, 82 Am. St. Rep. 347, 50 L. R. A. 632. One is to be deemed a passenger on a steam-boat who enters for the purpose of being carried, though he has not yet paid his fare. *Cleveland v. Steamboat Co.*, 68 N. Y. 306; see *Muehlhausen v. St. Louis, etc., Co.*, 91 Mo. 332. Presumptively one on a train is a passenger though not in a passenger car. *Creed v. Penn. R. R. Co.*, 86 Penn. St. 139, 27 Am. Rep. 693. Carrier having permitted one to travel is liable though contract of carriage is not directly with it. *Foulkes v. Metr., etc., Ry. Co.*, L. R. 5 C. P. D. 157. One traveling on a non-transferable ticket by fraudulently personating the owner is not entitled to the care due a passenger. *Toledo, etc., Ry. Co. v. Beggs*, 85 Ill. 80; *Way v. Chicago, &c., Ry. Co.*, 64 Ia. 48, 52 Am. Rep. 431; see *Chicago, etc., R. R. Co. v. Michie*, 83 Ill. 427; *Virginia, etc., Co. v. Roach*, 83 Va. 375, 5 S. E. 175. There is no doubt, however, of the right to require passengers to purchase and exhibit a ticket before going on board boat or cars. *Pittsburgh, etc., R. R. Co. v. Vandyne*, 57 Ind. 576. One having no ticket and refusing to pay fare may be ejected. *St. Louis, etc., Ry. Co. v. Brown*, 62 Ark. 254, 37 S. W. 1051; *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157; *Nye v. Marysville, etc., St. R. R. Co.*, 97 Cal. 461, 32 Pac. 530; *Pickens v. Richmond, etc., R. R. Co.*, 104 N. C. 312, 10 S. E. 556; *Moore v. Columbia, etc., R. R. Co.*, 38 S. C. 1, 16 S. E. 781; *Warfield v. Railroad Co.*, 104 Tenn. 74, 55 S. W. 304, 78 Am. St. Rep. 911. So if he presents an expired ticket. *McGhee v. Drisdale*, 111 Ala. 597, 20 So. 391; *Southern Ry. Co. v. Watson*, 110 Ga. 681, 36 S. E. 209; *Trezona v. Chicago, etc., Ry. Co.*, 107 Ia. 22, 77 N. W. 486, 43 L. R. A. 136; *Mitchell v. Southern Ry. Co.*, 77 Miss. 917, 27 So. 834; *International, etc., R. R. Co. v. Best*, 93 Tex. 344, 55 S. W. 315. But not if delayed without passenger's fault. *Watkins v. Pennsylvania R. R. Co.*, 21 D. C. Rep. 1. The conductor has a right to put one off the cars when the point indicated by his ticket is reached, and if the passenger claims that he purchased a ticket for a more distant point and re-

in providing safe, suitable and sufficient vehicles for the conveyance of his passengers,¹⁶ to carry the passenger therein to

ceived the wrong ticket by mistake, he should pay the additional fare, and have the mistake corrected afterwards. *Frederick v. Marquette, &c., R. R. Co.*, 37 Mich. 342. See further as to conclusiveness of ticket on passenger's right to travel. *Mosher v. St. Louis, &c., Ry. Co.*, 127 U. S. 390, 8 S. C. Rep. 1324; *Hufford v. Grand Rapids, &c., Ry. Co.*, 53 Mich. 118, 31 N. W. 544; *Phila., &c., Co. v. Rice*, 64 Md. 63; *Yorton v. Milwaukee, &c., Co.*, 54 Wis. 234, 41 Am. Rep. 23; *Bradshaw v. South Boston, &c., Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Morningstar v. Louisville, etc., R. R. Co.*, 135 Ala. 251, 33 So. 156; *Hot Springs R. R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913; *Baggett v. Baltimore, etc., R. R. Co.*, 3 App. D. C. 522; *Georgia R. R. Co. v. Olds*, 77 Ga. 673; *Louisville, etc., R. R. Co. v. Gaines*, 99 Ky. 411, 36 S. W. 174, 59 Am. St. Rep. 465; *Lexington, etc., Ry. Co. v. Lyons*, 104 Ky. 23, 46 S. W. 209; *Western Md. R. R. Co. v. Stocksdale*, 83 Md. 245, 34 Atl. 880; *Western Md. R. R. Co. v. Schaun*, 97 Md. 563, 55 Atl. 701; *Kansas City, etc., R. R. Co. v. Riley*, 68 Miss. 765, 9 So. 443, 24 Am. St. Rep. 309, 13 L. R. A. 38; *Alabama, etc., Ry. Co. v. Holmes*, 75 Miss. 371, 23 So. 187; *Peabody v. Oregon Ry. & N. Co.*, 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823; *Watson v. Railroad Co.*, 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454; *Railroad Co. v. Blair*, 104 Tenn. 212, 55 S. W. 154; *McKay v. Ohio Riv. R. R. Co.*, 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 913; *Trice v. Chesapeake, etc., Ry. Co.*, 40 W. Va. 271, 21 S. E. 1022; *New York, etc., R. R. Co. v. Winter*, 143 U. S. 60, 12 S. C. Rep. 356, 36 L. Ed. 71; *Northern Pac. R. R. Co. v. Panson*, 70 Fed. 585, 17 C. C. A. 287. One has no right on a train which does not stop at the station to which he has a ticket. *Chicago, &c., Ry. Co. v. Bills*, 104 Ind. 13; *Lake Shore, &c., Ry. Co. v. Pierce*, 47 Mich. 277; see *Duling v. Phila., &c., Co.*, 66 Md. 120. Compare *Richmond, &c., Co. v. Ashby*, 79 Va. 130; *Alabama, &c., Co. v. Heddleston*, 82 Ala. 218. But where a passenger having a ticket to a certain station was told by the agent of the company to take a certain train, which did not stop there, and he was put off the train, the company was held liable. *Pittsburgh, etc., Ry. Co. v. Reynolds*, 55 Ohio St. 370, 45 N. E. 712, 60 Am. St. Rep. 706. Where one went on a train without a ticket and not being called on paid no fare, he was held not to be a passenger. *Railroad Co. v. Smith*, 110 Tenn. 197, 75 S. W. 711, 100 Am. St. Rep. 799.

16—*Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412; *S. C. 4 L. R. Q. B. 379; Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229; *Caldwell v. New Jersey, &c., Co.*, 47 N. Y. 282; *Grand Rapids, &c., R. R. Co. v. Huntley*, 38 Mich. 537; *Baltimore, &c., R. R. Co. v. Miller*, 29 Md. 252; *Va. Cent. R. R. Co. v. Sanger*, 15 Grat. 230; *Kelly v. New York, &c., Ry. Co.*, 109 N. Y. 44, 15 N. E. 879; *Palmer v. Del. & H. Canal*

the end of his route,¹⁷ to protect him against assaults and other ill-treatment by those employed by or under the car-

Co., 120 N. Y. 302, 17 Am. St. Rep. 629. Duty to see that cars are properly regulated as respects heat and ventilation and where the doors were left open and the car became cold and plaintiff in shutting the doors was pitched out of the rear door, the company was held liable. Denver, etc., R. R. Co. v. Bedell, 11 Colo. App. 139, 54 Pac. 280. If an accident happens by reason of overcrowding the company is liable. Lynn v. Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; Scott v. Begen County Traction Co., 63 N. J. L. 407, 43 Atl. 1060; Graham v. McNeill, 20 Wash. 466, 55 Pac. 631, 72 Am. St. Rep. 121, 43 L. R. A. 300. A railroad company must also see that its track is reasonably safe for use. Curtis v. Rochester, &c., R. R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Baltimore, &c., R. R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578; State v. O'Brien, 32 N. J. 169; Carrico v. W. Va. Cent., etc., Ry. Co., 35 W. Va. 389, 14 S. E. 12; Carrico v. W. Va. Cent., etc., Ry. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; Gleeson v. Va. Mid. R. R. Co., 140 U. S. 435, 11 S. C. Rep. 859, 35 L. Ed. 458. Liable if car negligently left across an intersecting track is struck by car of another company on that track although the collision was not likely to have occurred. Kellow v. Centr. Ry. Co., 68 Ia. 470. Liable for injury from fall of a berth in a sleeping car of another corporation carried in its train. Penn. Co. v. Roy, 102 U. S. 451. So for the negligence of such cor-

poration's servant in the absence of notice that it will not be bound. Railroad Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433. For an accident due to snow or ice on the platform of a car during a storm of snow and sleet, the liability of the company is the same as that of cities for icy walks. Palmer v. Pennsylvania Co., 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252.

17—Porter v. Steamboat New England, 17 Mo. 290; Gilhooly v. New York, &c., Co., 1 Daly, 197; Hamilton v. Third Av. R. Co., 53 N. Y. 25. As to liability for putting a passenger off wrongfully, see Cincinnati, &c., R. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729; Lake Shore, &c., Ry. Co. v. Rosenzwig, 113 Penn. St. 519; Mabry v. City Elec. Ry. Co., 116 Ga. 624, 42 S. E. 1025, 94 Am. St. Rep. 141, 59 L. R. A. 590; Citizens' St. R. R. Co. v. Willoby, 134 Ind. 563, 33 N. E. 627; Southern Kansas Ry. Co. v. Rici, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766. Where passengers are known to be sick or helpless care must be exercised for them accordingly. Weightman v. Louisville, etc., Ry. Co., 70 Miss. 563, 12 So. 586, 35 Am. St. Rep. 660, 19 L. R. A. 671; Newark, etc., R. R. Co. v. McCann, 58 N. J. L. 642, 34 Atl. 1052, 33 L. R. A. 127; Hang v. Great Northern Ry. Co., 8 N. D. 23, 77 N. W. 97, 73 Am. St. Rep. 727, 42 L. R. A. 664. One ejected for non payment of fare cannot, by offering fare while he is being put off, or afterward, or by resisting, acquire any rights against

[*773] rier's control while on the way,¹⁸ "to exercise the utmost *vigilance and care in maintaining order and guarding the passengers against violence from whatever

the carrier. *Pease v. Del., &c., R. R. Co.*, 101 N. Y. 367, 54 Am. Rep. 699; *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Penn., &c., Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Atchison, &c., Co. v. Gants*, 38 Kan. 608, 17 Pac. 54. But see *South Car., &c., Co. v. Nix*, 68 Ga. 572; *Texas, &c., Ry. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532; *Clark v. Wilmington, &c., Co.*, 91 N. C. 506. Where a passenger rides on the engine he forfeits the right to the highest care and the company is only liable for wanton or wilful injury. *Railroad Co. v. Bogle*, 101 Tenn. 40, 46 S. W. 760.

18—*Baltimore, &c., R. R. Co. v. Blocher*, 27 Md. 277; *St. Louis, &c., R. R. Co. v. Dalby*, 19 Ill. 353; *Hanson v. European, &c., R. R. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Goddard v. Grand Trunk, &c., R. R. Co.*, 57 Me. 202; *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451; *Bass v. Chicago, &c., R. Co.*, 36 Wis. 450; *Craker v. Chicago, &c., R. Co.*, 36 Wis. 657; *Ramsden v. Boston, &c., R. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Atlantic, &c., R. R. Co. v. Dunn*, 19 Ohio St. 162; *Louisville, &c., R. R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149; *Louisville, &c., R. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. 530; *Lamplin v. Louisville, etc., R. R. Co.*, 106 Ala. 287, 17 So. 448; *Birmingham Ry. & Elec. Co. v. Ward*, 124 Ala. 409, 27 So. 471; *Birmingham Ry. & Elec. Co. v. Baird*, 130 Ala. 334,

30 So. 456, 89 Am. St. Rep. 43, 54 L. R. A. 752; *Birmingham Ry. & Elec. Co. v. Mason*, 137 Ala. 342, 34 So. 207; *Birmingham Ry. & Elec. Co. v. Mullen*, 138 Ala. 614, 35 So. 701; *Kohner v. Capital Traction Co.*, 22 App. D. C. 181; *Cole v. Atlanta, etc., R. R. Co.*, 102 Ga. 474, 31 S. E. 107; *Savannah, etc., Ry. Co. v. Quo.*, 103 Ga. 125, 29 S. E. 607, 68 Am. St. Rep. 85, 40 L. R. A. 483; *Central of Ga. Ry. Co. v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; *Atchison, etc., R. R. Co. v. Henry*, 55 Kan. 715, 41 Pac. 952, 29 L. R. A. 465; *Winnegar v. Central Pass. Ry. Co.*, 85 Ky. 547, 4 S. W. 237; *Wise v. Covington, etc., St. Ry. Co.*, 91 Ky. 537, 16 S. W. 351; *McGilvray v. West End St. Ry. Co.*, 164 Mass. 122, 41 N. E. 116; *Johnson v. Detroit, etc., Ry. Co.*, 130 Mich. 453, 90 N. W. 274; *Spohn v. Missouri Pac. R. R. Co.*, 101 Mo. 417, 14 S. W. 880; *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592; *Fohrmann v. Consolidated Traction Co.*, 63 N. J. L. 391, 43 Atl. 892; *Gillispie v. Brooklyn Heights R. R. Co.*, 178 N. Y. 347, 70 N. E. 857, 102 Am. St. Rep. 503, 66 L. R. A. 618; *McKay v. Hudson River Line*, 56 App. Div. 201, 67 N. Y. S. 651; *Daniel v. Petersburg R. R. Co.*, 117 N. C. 592, 23 S. E. 327; *Dwinelle v. New York Cent., etc., R. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Seawell v. Carolina Cent.*

source arising, which might reasonably be anticipated or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board,"¹⁹

R. R. Co., 132 N. C. 856, 44 S. E. that he may be put off at a distance from a station. Hardenbergh *v.* St. Paul, &c., Ry. Co., 610; Mahoning Valley Ry. Co. *v.* De Pascale, 70 Ohio St. 179, 71 N. E. 633, 65 L. R. A. 860; Duggan *v.* Baltimore, etc., R. R. Co., 159 Pa. St. 248, 28 Atl. 182, 39 Am. St. Rep. 672; Railroad Co. *v.* Ray, 101 Tenn. 1, 46 S. W. 554; Knoxville Traction Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549; Dillingham *v.* Russell, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; Krantz *v.* Rio Grande W. Ry. Co., 12 Utah, 104, 41 Pac. 717, 30 L. R. A. 297; New Orleans, etc., R. R. Co. *v.* Jopes, 142 U. S. 18, 12 S. C. Rep. 109, 35 L. Ed. 919; Texas, etc., Ry. Co. *v.* Williams, 62 Fed. 440, 10 C. C. A. 463; Burrow S. S Co. *v.* Kane, 88 Fed. 197, 31 C. C. A. 452. See Jardine *v.* Cornell, 50 N. J. L. 485, 14 Atl. 590. Liable for excessive force of servant in removing passenger from a part of a boat where he has no right to be. Steamboat Co. *v.* Brockett, 121 U. S. 637. For assault by sleeping car porter upon passenger who is not riding in sleeper. Williams *v.* Pullman, &c., Co., 40 La. Ann. 417, 4 So. 85. For failure to wake a passenger at his station as agreed by the conductor, the railroad company is not liable. Nunn *v.* Georgia, &c., Co., 71 Ga. 710, 51 Am. Rep. 284; Sevier *v.* Vicksburg, &c., Co., 61 Miss. 8, 48 Am. Rep. 74. As a railroad company is bound to furnish a passenger with a seat, if it does not and he refuses to pay fare, he is not so far a trespasser

19—SHIPMAN, D. J. in Flint *v.* Norwich, &c., Co., 34 Conn. 554; Pittsburgh, &c., R. R. Co. *v.* Pillow, 79 Pa. St. 510, 18 Am. Rep. 424; Britton *v.* Atlanta, &c., Ry. Co., 88 N. C. 536, 43 Am. Rep. 749; United Rys. & Elec. Co. *v.* State, 93 Md. 619, 49 Atl. 923, 86 Am. St. Rep. 453, 54 L. R. A. 942; Lucy *v.* Chicago Gt. Western Ry. Co., 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551; Illinois Cent. R. R. Co. *v.* Mirror, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627; Partridge *v.* Woodland Steamboat Co., 66 N. J. L. 290, 49 Atl. 726; Ferry Cos. *v.* White, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427; Connell *v.* Chesapeake, etc., R. R. Co., 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792; Meyer *v.* St. Louis, etc., Ry. Co., 54 Fed. 116, 4 C. C. A. 221; St. Louis, etc., Ry. Co. *v.* Greenthal, 77 Fed. 150, 23 C. C. A. 100. The carrier is not liable for the death of a passenger pushed from a flat car by drunken passengers, having no reason to anticipate such conduct. Felton *v.* Chicago, &c., Co., 69 Ia. 577. Nor for the acts of a mob which could not have been anticipated. Pittsburgh, &c., R. R. Co. *v.* Hinds, 53 Penn. St. 512, 91 Am. Dec. 224. It is for failure to use the utmost care in affording protection. Chicago, &c., Co. *v.* Pillsbury, 123 Ill. 9, 14 N. E. 22. In New York a carrier has been held

and when the journey is completed, to afford the passenger reasonable opportunity to leave the cars with safety.²⁰ It is

responsible for the moneys of which a gambler was permitted to defraud a minor while in his charge. *Smith v. Wilson*, 31 How. P. R. 272.

20—*Burrows v. Erie, &c.*, R. Co., 63 N. Y. 556; *Southern, &c., R. R. Co. v. Kendrick*, 40 Miss. 374; *Hickman v. Miss., &c., Ry. Co.*, 91 Mo. 433; *Strauss v. Kansas City, &c., Ry. Co.*, 86 Mo. 421; *Keller v. Sioux City, &c., Co.* 27 Minn. 178; *Raben v. Centr. Ia. Ry. Co.*, 72 Ia. 579, 35 N. W. 645; *Wood v. Lake Shore, &c., Co.*, 49 Mich. 370; *Centr. R. R. Co. v. Van Horn*, 38 N. J. L. 133; *Taber v. Del. &c., R. R. Co.*, 71 N. Y. 489; *Lafflin v. Buffalo, &c., Co.*, 106 N. Y. 136; *Secor v. Toledo, &c., R. R. Co.*, 10 Fed. Rep. 15; *Hemingway v. Chicago, &c., Co.*, 67 Wis. 668; *Southern Ry. Co. v. Roebuck*, 132 Ala. 412, 31 So. 611; *Railway Co. v. Tankersley*, 54 Ark. 25, 14 S. W. 1099; *Denver, etc., R. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954; *Atchison, etc., R. R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; *Brunswick, etc., R. R. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; *Baltimore, etc., R. R. Co. v. Mullen*, 217 Ill. 203, 75 N. E. 474; *Louisville, etc., Ry. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Cotant v. Boone Suburban Ry. Co.*, 125 Ia. 46, 99 N. W. 115; *Leveret v. Shreveport Belt Ry. Co.*, 110 La. 399, 34 So. 579; *Philadelphia, etc., R. R. Co. v. Anderson*, 72 Md. 519, 20 Atl. 2, 20 Am. St. Rep. 483, 8 L. R. A. 673; *Delaware, etc., R.*

R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435; *Texas, etc., Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; *St. Louis, etc., Ry. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266. “The relation of carrier does not terminate, until the passenger has alighted from the train and left the place where passengers are discharged, and the duty of the carrier to its passengers continues, until the passenger has had a reasonable time in which to leave the depot or alighting place.” *Chicago Terminal Transfer R. R. Co. v. Schmelling*, 197 Ill. 619, 64 N. E. 714. Where a passenger got off the train at his destination and stopped for fifteen minutes in the station to talk with friends and was injured in leaving the station, it was held that the relation had terminated. *Glenn v. Lake Erie, etc., R. R. Co. (Ind.)*, 75 N. E. 282. If the passenger gets out and moves about at intermediate stations, he gives up, for the time, his character of passenger. *State v. Grand Trunk R. Co.*, 58 Me. 176. A passenger has a right to safe egress from a depot. *Archer v. New York, &c., R. R. Co.*, 106 N. Y. 589; *Keefe v. Boston, &c., R. R. Co.*, 142 Mass. 251. The duty of the carrier to the passenger continues not only when he is on the train but when rightfully leaving or returning to the train at a station for lunch, telegrams or the like. *Alabama Great So. Ry. Co. v. Coggins*, 88 Fed. 455, 32 C. C. A. 1. When a passenger alights

scarcely necessary to add that a failure in the performance of any of these duties, whereby damage results, will render the carrier liable to the appropriate action.

*Carriers are permitted to adopt rules for the regulation of their business; and so far as these are not opposed to law or unreasonable in themselves, the passenger must observe them.²¹ These supplement the rules of law which require a passenger to conduct himself with decency, and not render himself an offense or an annoyance to others; for a failure to observe which he may and should be removed from the vehicle.²² A common rule, and not an unreasonable one, is that the passenger shall procure a ticket as evidence of his right to a passage; that he shall show this whenever called upon by the carrier to do so, and that this ticket shall be used only for one continuous journey, unless permission be asked for and obtained to take a part of the journey at one time and part at another.²³ *These are only instances of reasonable rules: many others might be named. But while a

from the train and starts forward to see the engineer on a matter of his own, he ceases to be a passenger. *Hendrick v. Chicago, etc., R. R. Co.*, 136 Mo. 548, 38 S. W. 297. So if one has left train and started to walk home on the track. *St. Louis, etc., Ry. Co. v. Beecher*, 65 Ark. 64, 44 S. W. 715.

21—*Florida Southern Ry. Co. v. Hirst*, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631; *Northern Central Ry. Co. v. O'Conner*, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449; *Poole v. Northern Pac. R. R. Co.*, 16 Ore. 261, 19 Pac. 107, 8 Am. St. Rep. 289. A rule that station be closed after the departure of trains and opened a half hour before held reasonable and when a passenger came at 8 p. m. to take a train at 2 a. m. and was put out of the station the company

was held not liable for damages. *Phillips v. Southern Ry. Co.*, 124 N. C. 123, 32 S. E. 388. Rule requiring gates to be shut when gong sounds for departure of train held reasonable. *Baltimore, etc., R. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052.

22—*Vinton v. Middlesex, &c., R. R. Co.*, 11 Allen, 304, 87 Am. Dec. 714; *Putnam v. Broadway, &c., R. R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190; *Marquette v. Chicago, &c., R. R. Co.*, 33 Iowa, 562; *Hanson v. European, &c., R. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Keeley v. Maine Cent. R. R. Co.*, 67 Me. 163; *Atchison, &c., Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543.

23—*Cheney v. Boston, &c., R. R. Co.*, 11 Met. 121; *Boston, &c., R. R. Co. v. Proctor*, 1 Allen, 267; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Shedd v. Troy, &c.,*

passenger may be removed from the cars for non-compliance with any reasonable rule, the carrier must see that this is not done with unnecessary force or injury.²⁴ The same rule ap-

R. R. Co., 40 Vt. 88; Jerome *v.* Smith, 48 Vt. 230, 21 Am. Rep. 125; Dietrick *v.* Penn. R. R. Co., 71 Pa. St. 432; Brooke *v.* Grand Trunk R. Co., 15 Mich. 332; Frederick *v.* Marquette, &c., R. R. Co., 37 Mich. 342, 26 Am. Rep. 531; State *v.* Overton, 24 N. J. 435, 61 Am. Dec. 671. See Pier *v.* Finch, 24 Barb. 514. These rules held reasonable and valid: That one must purchase a ticket in advance or pay twenty-five cents extra fare; McGowen *v.* Morgan's La., etc., Co., 41 La. Ann. 732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817. That a passenger having no ticket or presenting an expired or invalid ticket shall pay for the distance he has traveled as well as to destination; Manning *v.* Louisville, etc., R. R. Co., 95 Ala. 392, 11 So. 8, 36 Am. St. Rep. 225, 16 L. R. A. 55. That coupons detached will not be received in payment of fare; Norfolk, etc., R. R. Co. *v.* Wyson, 82 Va. 250. If ticket is required, office need not be open so long that one buying must get on train after it has started. State *v.* Hungerford, 39 Minn. 6, 38 N. W. 628. If the agents of the railway company inform a passenger he can purchase a ticket for a continuous journey and stop over with it, the company is bound by this. Burnham *v.* Grand Trunk R. Co., 63 Me. 298. Stop-over check may be required. Yorton *v.* Milwaukee, &c., Co., 54 Wis. 234, 41 Am. Rep. 23; Wyman *v.* North. Pac. R. R. Co., 34 Minn. 210; Hatten *v.* Railroad Co., 39 Ohio St. 375; Petrie *v.* Penn., &c., Co., 42 N. J. L. 449. While on a limited ticket a continuous trip may be required. Johnson *v.* Phila., &c., Co., 63 Md. 106, (but see Little Rock, &c., Co. *v.* Dean, 43 Ark. 529). Yet the journey need not be completed within the time. Auerbach *v.* New York Centr., &c., Co., 89 N. Y. 281, 42 Am. Rep. 290; Evans *v.* St. Louis, &c., Co., 11 Mo. App. 463; Lundy *v.* Centr. Pac., &c., Co., 66 Cal. 191, 56 Am. Rep. 100. See Georgia, &c., R. R. Co. *v.* Bigelow, 68 Ga. 219. As to rules about stopping at a given station. See Logan *v.* Hannibal, &c., Co., 77 Mo. 663; Wilson *v.* New Orleans, &c., Co., 63 Miss. 352.

If a railroad sells a through ticket over its own and connecting roads it is liable for safe carriage to the end of the route of the passenger. Little *v.* Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445; Centr., &c., R. R. Co. *v.* Combs, 70 Ga. 533, 48 Am. Rep. 582, and his baggage, in the absence of agreement to the contrary. Baltimore, &c., R. R. Co. *v.* Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Louisville, &c., Co. *v.* Weaver, 9 Lea, 38, 42 Am. Rep. 654. See Atchison, &c., Co. *v.* Roach, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199. But in Illinois the selling company is held not liable over the whole route in the absence of a contract to that effect. Penn. R. R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238.

plies here as in the case of force to remove a wrong-doer from one's premises: no more must be employed than the necessity of the case demands.²⁵

R. Co. v. Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28; Boling v. St. Louis, etc., R. R. Co., 189 Mo. 219, 88 S. W. 35; Haver v. Central R. R. Co., 64 N. J. L. 312, 45 Atl. 593; Hardenbergh v. St. Paul, etc., Ry. Co., 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610; Brunswick, etc., R. R. Co. v. Bostwick, 100 Ga. 96, 27 S. E. 725; Peavey v. Ga. B. & R. R. Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334. A passenger may resist wrongful expulsion to any extent and the carrier will be liable for all injuries caused by overcoming his resistance. Pittsburgh, etc., Ry. Co. v. Russ, 67 Fed. 162, 14 C. C. A. 612.

25—See *ante*, p. 291; Smith v. Savannah, etc., Ry. Co., 100 Ga. 96, 27 S. E. 725; Mykleby v. Chicago, etc., Ry. Co., 39 Minn. 54, 38 N. W. 763; Morrow v. Atlanta, etc., Ry. Co., 134 N. C. 92, 46 S. E. 12.

As to who are passengers the following cases are referred to: Employes riding on passes or to and from work. Louisville, etc., R. R. Co. v. Scott, 108 Ky. 392, 56 S. W. 674; Doyle v. Fitchburg R. R. Co., 166 Mass. 492, 44 N. E. 611, 55 Am. St. Rep. 417, 33 L. R. A. 844; Dickerson v. West End St. Ry. Co., 177 Mass. 365, 59 N. E. 60, 83 Am. St. Rep. 284, 52 L. R. A. 326; Noe v. Rapid Ry. Co., 133 Mich. 152, 94 N. W. 743; McDonough v. Lampher, 55 Minn. 501, 57 N. W. 152, 43 Am. St. Rep. 541; Pembroke v. Hannibal, etc., R. R. Co., 32 Mo. App. 61; McNulty v. Pennsylvania R. R. Co., 182 Pa. St. 479, 38 Atl. 524, 61 Am. St. Rep. 721, 38 L. R. A. 376; Chattanooga Rapid Transit Co. v. Venable, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886; Peterson v. Seattle Traction Co., 23 Wash. 615, 65 Pac. 543, 53 L. R. A. 586. A stevedore who stays on the boat and works at landings is not a passenger while en route but a servant and only ordinary care is due him. Lambert v. La Conner, etc., Co., 37 Wash. 113, 79 Pac. 608. Express messengers; Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597; Blank v. Illinois Cent. R. R. Co., 182 Ill. 332, 55 N. E. 332; Brown v. New York, etc., R. R. Co., 124 N. Y. 59, 26 N. E. 324, 21 Am. St. Rep. 647, 11 L. R. A. 483; Peterson v. Chicago, etc., Ry. Co., 119 Wis. 197, 96 N. W. 532, 100 Am. St. Rep. 879; Baltimore, etc., R. R. Co. v. Voight, 176 U. S. 498, 20 S. C. Rep. 385; Chamberlain v. Pierson, 87 Fed. 420, 31 C. C. A. 157; Chicago, etc., Ry. Co. v. O'Brien, 132 Fed. 593; Kelley v. Malott, 135 Fed. 74, — C. C. A. —. Mail clerks; Chesapeake, etc., Ry. Co. v. Patton, 23 App. D. C. 113; Cleveland, etc., Ry. Co. v. Ketcham, 133 Ind. 346, 33 N. E. 116, 36 Am. St. Rep. 550, 19 L. R. A. 339; Libby v. Maine Cent. R. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; Magoffin v. Missouri Pac. R. R. Co., 102 Mo. 540, 15 S. W. 76, 22 Am. St. Rep. 98; Gulf, etc., Ry. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486; Farley v.

Street Railways. Street railway companies as carriers of passengers are bound to exercise the same degree of care for their safety as other carriers.²⁶ One becomes a passenger as soon as he commences the act of entering the car, as by taking hold of the hand rail for that purpose, or putting a foot on the step, the car having stopped for the purpose of receiving passengers.²⁷ From that instant the extreme care due a passenger must be exercised. One who has merely signaled a car and is standing waiting for it or is moving towards it is not a pas-

Cincinnati, etc., R. R. Co., 108 etc., Ry. Co., 183 Mo. 119, 81 S. Fed. 14, 47 C. C. A. 156. Pullman porter; Hughson *v.* Richmond, etc., R. R. Co., 2 App. D. C. 98; Jones *v.* St. Louis S. W. Ry. Co., 125 Mo. 666, 28 S. W. 883, 46 Am. St. Rep. 514, 26 L. R. A. 718. One too late to get in car and who rides on step outside of vestibule not a passenger. Sanders *v.* Chicago, etc., Ry. Co., 10 Okl. 325, 61 Pac. 1075. So of one who goes into mail car. Bricker *v.* Philadelphia, etc., R. R. Co., 132 Pa. St. 1, 18 Atl. 983, 19 Am. St. Rep. 585. Or rides on engine. Woolsey *v.* Chicago, etc., R. R. Co., 39 Neb. 798, 58 N. W. 444, 25 L. R. A. 79. So of one riding on hand car at invitation of section boss. Gulf, etc., Ry. Co. *v.* Dawkins, 77 Tex. 228, 13 S. W. 982; Dawkins *v.* Gulf, etc., Ry. Co., 77 Tex. 232, 13 S. W. 984. But otherwise where one is being transported on a hand car by order of train master who has authority in that behalf. International, etc., Ry. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795.

26—Osgood *v.* Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; Fewings *v.* Mendenhall, 88 Minn. 336, 93 N. W. 118, 97 Am. St. Rep. 519, 60 L. R. A. 601; Magrane *v.* St. Louis,

etc., Ry. Co., 177 Mass. 106, 58 N. E. 172; Norfolk, etc., Terminal Co. v. Morris, 101 Va. 422, 44 S. E. 719. In Dallas Rapid Transit Co. *v.* Payne, 98 Tex. 211, it is held that one does not become a passenger by merely getting on the side step and standing there, when there are seats inside. A newsboy who jumps on and off the cars to sell his papers is not a passenger. Podgitt *v.* Moll, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854.

senger, and only reasonable care is owed him.²⁸ The actual payment of fare is not necessary to constitute the relation, if one enters with the intention of becoming a passenger and of paying fare.²⁹ If a passenger is injured by the premature starting of the car while he is in the act of getting off, the company is liable.³⁰ So if the place of alighting is unsafe and the danger obscured by darkness and no warning given.³¹ The contract of carriage does not end until the passenger is landed in a safe place.^{31a} If the company receives passengers after the car is full so that some are compelled to stand on the platform or side steps, it is bound to use due care to carry them

28—*Donovan v. Hartford St. Ry.* 140 Ill. 275, 29 N. E. 672; *North Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; *Duchemin v. Boston El. Ry. Co.*, 186 Mass. 353, 71 N. E. 780, 104 Am. St. Rep. 580.

29—*Birmingham Ry. L. & P. Co. v. Bynum*, 139 Ala. 389, 36 So. 736; *North Chicago St. R. R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672.

30—*Wilson v. Fourteenth Street R. R. Co.*, 90 Cal. 319, 27 Pac. 210; *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848; *Harman v. Washington, etc., R. R. Co.*, 7 Mackey, 255; *Augusta, etc., R. R. Co. v. Randall*, 79 Ga. 304, 4 S. E. 674; *Smith v. Kingston City R. R. Co.*, 55 App. Div. 143, 67 N. Y. S. 185; *Washington, etc., R. R. Co. v. Harmon*, 147 U. S. 571, 13 S. E. Rep. 557, 37 L. Ed. 284. Where a woman in the act of alighting was jostled off and injured by a passenger who rudely pushed her to get in, the company was held not liable. *Ellinger v. Wilmington, etc., R. R. Co.*, 153 Pa. St. 213, 25 Atl. 1132, 34 Am. St. Rep. 697. It is not necessarily contributory negligence to get on or off a moving car. *North Chicago St. R. R. Co. v. Williams*,

168 Ill. 613, 48 N. E. 407; *Chicago Union Traction Co. v. Olsen*, 211 Ill. 255, 71 N. E. 985; *Indianapolis St. Ry. Co. v. Hockett*, 159 Ind. 677, 66 N. E. 39; *Central Ry. Co. v. Smith*, 74 Md. 212, 21 Atl. 706;

New Jersey Traction Co. v. Gardner, 60 N. J. L. 571, 38 Atl. 669. Held contributory negligence to get on side step before car stopped. *State v. Lake Roland El. Ry. Co.*, 84 Md. 163, 34 Atl. 1130; *Baltimore Consolidated Ry. Co. v. Foreman*, 94 Md. 226, 51 Atl. 83. But not necessarily so. *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 233, 26 So. 349; *Sweeney v. Kansas City Cable Ry. Co.*, 150 Mo. 385, 51 S. W. 682.

31—*Wolf v. Third Ave. R. R. Co.*, 67 App. Div. 605, 74 N. Y. S. 336; *Richmond City Ry. Co. v. Scott*, 86 Va. 902, 11 S. E. 404. But when one was injured after having safely alighted by stepping on a rolling stone in the street the company is not liable. *Conway v. Lewiston, etc., R. R. Co.*, 90 Me. 199, 38 Atl. 110.

31a—*Senf v. St. Louis, etc., Ry. Co.*, 112 Mo. App. 74.

safely, and the fact of the passenger being in such position is not such contributory negligence as will defeat his recovery,³² though it might be if there was room inside.³³ As against acts of strangers assaulting the car only ordinary care is required.^{33a}

Passenger Elevators. The prevailing rule is that those who operate passenger elevators in buildings are common carriers of passengers and bound to exercise the same degree of care as railroad companies and other common carriers.³⁴ The correct-

32—*Hesse v. Meriden, etc.*, the company was held liable. *Tramway Co.*, 75 Conn. 571, 54 Atl. 299; *Reem v. St. Paul City Ry. Co.*, 77 Minn. 503, 80 N. W. 778; *City Ry. Co. v. Lee*, 50 N. J. L. 435, 14 Atl. 883, 7 Am. St. Rep. 798; *Cuttano v. Met. St. Ry. Co.*, 173 N. Y. 565, 66 N. E. 563; *Anderson v. City Ry. Co.*, 42 Ore. 505, 71 Pac. 659; *McCaw v. Union Traction Co.*, 205 Pa. St. 271, 54 Atl. 893.

33—*Willmott v. Corrigan Consolidated St. Ry. Co.*, 106 Mo. 535, 17 S. W. 490. See *Magrane v. St. Louis, etc., Ry. Co.*, 183 Mo. 119, 81 S. W. 1158. Held contributory

negligence for a passenger on a street car to put his head out of the car window. *Moore v. Edison Elec. Ill. Co.*, 43 La. Ann. 792, 9 So. 433.

A sick passenger whose presence is inconsistent with the reasonable rights of other passengers may be removed from the car, but this must be done with regard to the safety of the sick passenger. *Connolly v. Crescent City R. R. Co.*, 41 La. Ann. 57, 5 So. 259, 6 So. 526, 17 Am. St. Rep. 389, 3 L. R. A. 133.

Where a conductor gave the plaintiff a wrong transfer ticket which was refused by the next conductor and the plaintiff ejected,

Lawshe v. Tacoma Ry. & R. Co., 29 Wash. 681; 70 Pac. 118, 59 L. R. A. 350; *O'Rourke v. Citizens' St. Ry. Co.*, 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639, 46 L. R. A. 614. But where a transfer expired before a car passed and the plaintiff took the first car which came along and was expelled for the non payment of fare, the expulsion was justifiable. *Garrison v. United Rys. & Elec. Co.*, 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452.

33a—*Bosworth v. Union R. R. Co.*, 26 R. I. 309.

34—*Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; *Colorado M. & I. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42; *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; *Springer v. Ford*, 189 Ill. 430, 59 N. E. 953, 82 Am. St. Rep. 464, 52 L. R. A. 930; *Chicago Exchange Building Co. v. Nelson*, 197 Ill. 334, 64 N. E. 369; *Masonic Fraternity Temple Ass. v. Collins*, 210 Ill. 482, 71 N. E. 396; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010; *Russo v. Improvement Ass.*, 104 La. Ann. 426, 29 So. 46; *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700,

ness of this rule is denied in New York, where it is held that the same rule applies to elevators as to real estate generally and that is that the owner or occupant must exercise ordinary care to keep his premises safe for those who come upon it by his invitation, express or implied.³⁵ And so in Michigan.^{35a}

4 L. R. A. 673; *Lee v. Knapp*, 155 Mo. 610, 56 S. W. 458; *Becker v. Lincoln*, etc., Co., 174 Mo. 246, 73 S. W. 581; *Luckel v. Century Bldg. Co.*, 177 Mo. 608, 76 S. W. 1035; *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597, 81 S. W. 1112; *Hensler v. Stix*, 113 Mo. App. 162; *Fox v. Philadelphia*, 208 Pa. St. 127, 57 Atl. 356, 65 L. R. A. 214; *Southern B. & L. Ass. v. Lawson*, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. Rep. 804; *Edwards v. Burke*, 36 Wash. 107, 78 Pac. 610; *Obendorfer v. Pabst*, 100 Wis. 505, 76 N. W. 338. See *Oberfelder v. Doran*, 26 Neb. 118, 41 N. W. 1094, 18 Am. St. Rep. 771; *Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424; *McNee v. Coburn Trolley Track Co.*, 170 Mass. 283, 49 N. E. 437. The rule applies to freight elevators when used to carry passengers. *Beidler v. Branshaw*, 200 Ill. 425, 65 N. E. 1086.

35—*Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. Rep. 630. The court says: “If the charge of the trial court is to be sustained, we must hold that the maintenance and operation of an elevator form an exception to the general standard of care imposed by the law upon the owners and occupants of real property. We see no reason for making this exception. The operation of an elevator, no doubt, involves danger, and if accident occurs it may result in most serious consequences. It is not, however, the only dan-

gerous appliance used in modern office buildings. The boiler which furnishes steam heat, the conductors through which electric light is furnished, may at times be the cause of serious accidents. An open hatchway is equally dangerous. Yet, it has never been attempted to impose upon the owner of a building any greater responsibility as to these matters than that of exercising reasonable care. It is very probable that, in the advance of mechanical arts, many new appliances will be introduced into buildings, which will involve danger. It seems to me impracticable to distinguish as to the measure of the owner’s duty between these appliances, and that such attempt would involve great confusion in the law.

* * * There are elevators not only in great office buildings and hotels, but also in small buildings, and even in many private houses. Where there is little traffic the duty of operating the elevator is at times imposed on an employe or servant with other work to perform. To require in all these cases (and I do not see how it is possible to distinguish between them in the law), the same measure of duty that is imposed on a railroad company or common carrier would be going too far. I think sufficient security is afforded the public when owners or occupants of a building are required to use reasonable care

Sleeping Car Companies. Sleeping car and parlor car companies are not liable as common carriers or innkeepers for the property and effects of passengers occupying their coaches, but only for a failure to exercise reasonable care for the safety of such property.³⁶ In one of the cases cited, it is said: "A cor-

in the character of the appliances they provide and in its maintenance and operation. The stairways are always open to those who deem this degree of diligence inadequate for their protection," pp. 198, 199. See *McGrell v. Buffalo Office Bldg. Co.*, 153 N. Y. 265, 47 N. E. 305. In *Seaver v. Bradley*, 179 Mass. 329, 60 N. E. 795, 88 Am. St. Rep. 384, the owner and operator of a passenger elevator was held not to be a common carrier of passengers within a statute giving an action for the death of a passenger by reason of the negligence of a common carrier of passengers.

35a—*Burgess v. Stowe*, 134 Mich. 204, 96 N. W. 29.

36—*Pullman Pal. Car Co. v. Adams*, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767; *Cooney v. Pullman Pal. Car Co.*, 121 Ala. 368, 25 So. 712; *Pullman Pal. Car. Co. v. Freudenstein*, 3 Colo. App. 540, 34 Pac. 578; *Pullman Palace Car Co. v. Martin*, 92 Ga. 161, 18 S. E. 364; *Pullman Pal. Car Co. v. Martin*, 95 Ga. 314, 22 S. E. 700; *Kates v. Pullman Pal. Car Co.*, 95 Ga. 811, 23 S. E. 186; *Pullman Pal. Car Co. v. Harvey*, 101 Ga. 733, 28 S. E. 989; *Pullman Pal. Car Co. v. Hall*, 106 Ga. 765, 32 S. E. 923, 71 Am. St. Rep. 293, 44 L. R. A. 790; *Pullman Pal. Car Co. v. Smith*, 73 Ill. 360; *Woodruff Sleeping, &c., Co. v. Diebel*, 84 Ind. 474, 43 Am. Rep.

102; *Pullman Pal. Car Co. v. Gaylord*, 9 Ky. L. R. 58; *Whitney v. Pullman Pal. Car Co.*, 143 Mass. 243; *Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 267, 58 Am. Rep. 135; *Dawley v. Wagner Pal. Car Co.*, 169 Mass. 315, 47 N. E. 1024; *Whicher v. Boston, etc., R. R. Co.*, 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314; *Scaling v. Pullman Pal. Car Co.*, 24 Mo. App. 29; *Bevis v. Baltimore, etc., R. R. Co.*, 26 Mo. App. 19; *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199; *Wilson v. Baltimore, etc., R. R. Co.*, 32 Mo. App. 682; *Efron v. Wagner Pal. Car Co.*, 59 Mo. App. 641; *Carpenter v. New York, etc., Co.*, 124 N. Y. 53, 26 N. E. 227; *Tracy v. Pullman Pal. Car Co.*, 67 How Pr. 154; *Sessions v. New York, etc., R. R. Co.*, 78 Hun, 541, 29 N. Y. S. 628; *Pullman Pal. Car Co. v. Gardner*, 3 Penny. (Pa.) 78, 16 Am. & Eng. R. R. Cas. 324; *Pullman Pal. Car Co. v. Gavin*, 93 Tenn. 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 298; *Pullman Pal. Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31; *Pullman Pal. Car Co. v. Matthews*, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873; *Pullman Pal. Car Co. v. Hatch*, 30 Tex. Civ. App. 303, 70 S. W. 771; *Blum v. Southern Pullman Pal. Car Co.*, 1 Flippin, 500. See *Welch v. Pullman Pal. Car Co.*, 1 Sheldon, 457, 16 App. Pr. N. S.

poration engaged in running sleeping coaches with sections separated from the aisle only by curtains, is bound to have an employe charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers. These cars are used by both sexes, by persons of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by the carriers, and though such companies are not insurers they must exercise vigilance to protect their sleeping customers from robbery. A traveler who pays for a berth is invited and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult; and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Considering the compensation received for such services, and the hazards to which unguarded and sleeping travelers are exposed, the rule of diligence above declared is not too onerous."³⁷

352; Stearn *v.* Pullman Car Co., Co. *v.* Adams, 120 Ala. 581, 24 So. 8 Ont. 171, 21 Am. & Eng. R. R. Cas. 443; Voss *v.* Wagner Pal. Car Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010; Nashville, etc., Ry. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055. Held to the liability of an innkeeper. Pullman Pal. Car Co. *v.* Lowe, 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809. A railroad company is liable for the loss of a valise entrusted to the porter of a sleeping car owned by another company. Louisville, &c., Co. *v.* Katzenberger, 16 Lea, 380. But not for money left in a sleeper by a passenger if the porter is not negligent. Ill. Centr. R. R. Co. *v.* Handy, 63 Miss. 609, 56 Am. Rep. 846.

37—Carpenter *v.* New York, etc., R. R. Co., 124 N. Y. 53, 26 N. E. 227. Loss without fault of plaintiff held to make *prima facie* case of negligence. Pullman Pal. Car

921, 74 Am. St. Rep. 53, 45 L. R. A. 767; Cooney *v.* Pullman Pal. Car Co., 121 Ala. 368, 25 So. 712; Pullman Pal. Car Co. *v.* Freudenstein, 3 Colo. App. 540, 34 Pac. 578. *Contra*, Whicher *v.* Boston, etc., R. R. Co., 176 Mass. 275, 57 N. E. 601, 79 Am. St. Ry. 314; Pullman Pal. Car Co. *v.* Hatch, 30 Tex. Civ. App. 303, 70 S. W. 771. Held contributory negligence for a passenger to leave his watch in his berth while he went to the toilet room to wash and dress. Chamberlain *v.* Pullman Pal. Car Co., 55 Mo. App. 474. The company is liable for a theft by its servants. Pullman Pal. Car Co. *v.* Martin, 95 Ga. 314, 22 S. E. 700; Root *v.* New York, etc., Co., 28 Mo. App. 199; Pullman Pal. Car Co. *v.* Gavin, 93 Tenn. 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 298; Pullman Pal. Car Co. *v.*

Telegraph Companies. Companies for the transmission of messages by telegraph hold relations to the public and to those doing business with them much resembling those of railway companies. Their lines are constructed under legislative authority, and are either set up in the public highways, or on private lands where they appropriate an easement for the purpose under the eminent domain. The legislation which permits this recognizes them as public agencies, and requires them to accommodate the public impartially, and to transmit messages in the order in which they are received. They, therefore, to some extent, in their functions and in their responsibilities, resemble common carriers, and are sometimes so designated.³⁸ But the resemblance does not go very far; they receive nothing to carry, and the risks of theft, robbery, fire and flood which render the undertaking of the common carrier so onerous, they are not exposed to. In reason as well as on authority, they are responsible in sending, receiving and delivering messages, on the grounds only that through their negligence errors or unnecessary delays have occurred, or that they have failed to transmit and deliver messages impartially. If a message is not sent and delivered within a reasonable time under the circumstances, or

Matthews, 74 Tex. 654, 12 S. W. Pullman Palace Car Co., 40 La. 744, 15 Am. St. Rep. 873. Contra, Ann. 417, 4 So. 85, 8 Am. St. Rep. Levins *v.* New York, etc., R. R. 538.

Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. Rep. 434. To what property the liability extends. Pullman Pal. Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767; Coo-ney *v.* Pullman Pal. Car Co., 121 Ala. 368, 25 So. 712; Wilson *v.* Baltimore, etc., R. R. Co., 32 Mo. App. 682; Hampton *v.* Pullman Pal. Car Co., 42 Mo. App. 134.

As to liability for assault on passenger by porter see Campbell *v.* Pullman Pal. Car Co., 42 Fed. 484; Williams *v.* Pullman Pal. Car Co., 40 La. Ann. 87, 3 So. 631, 8 Am. St. Rep. 512; Williams *v.*

The company is liable for a failure to awake a passenger in time to get off at the proper place. Pullman Pal. Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215. And see Pullman Pal. Car Co. *v.* Fielding, 62 Ill. App. 577; McKeon *v.* Chicago, etc., Ry. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 909, 35 L. R. A. 252.

38—Telephone companies stand in this respect upon the same footing with telegraph companies. Central Un. Tel. Co. *v.* Bradbury, 106 Ind. 1; Chesapeake, &c., Co. *v.* Balt., &c., Co., 66 Md. 399. See

if errors occur in the transmission, which are attributable to their negligence, they are responsible for all consequent damages;³⁹ but *they are not insurers, and if errors [*776] occur without their fault, they are not responsible.⁴⁰ A telegraph company may be liable for negligence in not prevent-

State v. Tel. Co., 36 Ohio St. 296; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237.

39—Western U. Tel. Co. *v. Cawrew*, 15 Mich. 525; *Aiken v. Telegraph Co.*, 5 Sou. Car. 358; *Parks v. Telegraph Co.*, 13 Cal. 422; *Grinnell v. Western U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Washington, &c., Tel. Co. v. Hobson*, 15 Grat. 122; *Ferrero v. Western Union Tel. Co.*, 9 App. D. C. 455, 35 L. R. A. 548; *Cowan v. Western Union Tel. Co.*, 122 Ia. 379, 98 N. W. 281, 101 Am. St. Rep. 268; *Western Union Tel. Co. v. Watson*, 82 Miss. 101, 33 So. 76; *Wertz v. Western Union Tel. Co.*, 7 Utah, 446, 27 Pac. 172, 13 L. R. A. 510; *Wertz v. Western Union Tel. Co.*, 8 Utah, 499, 33 Pac. 136; *Harkness v. Western Union Tel. Co.*, 73 Ia. 190, 34 N. W. 811, 5 Am. St. Rep. 672; *Western Union Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461; *Brooks v. Western Union Tel. Co.*, 26 Utah, 147, 72 Pac. 499. Liable for mistake unless excused by atmospheric cause. *Western U. Tel. Co. v. Cohen*, 73 Ga. 522. Burden of disproving negligence in delaying a message is on the company. *Western U. Tel. Co. v. Scircle*, 103 Ind. 227. The receiver of the dispatch may recover damage for the negligence. *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845; *Ferrero v. Western Union Tel. Co.*, 9 App. D. C. 455, 35 L. R. A. 548; *International Ocean Tel. Co. v.*

Saunders, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; *Butner v. Western Union Tel. Co.*, 2 Okl. 234, 37 Pac. 1087; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574; *Loper v. Same*, 70 Tex. 689, 3 S. W. 600. At least where he has repaid the sender the cost of sending. *West v. Western U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807. As to damages recoverable, see *Western U. Tel. Co. v. Hall*, 124 U. S. 444, 8 S. C. Rep. 577; *Western U. Tel., etc., Co. v. Fatman*, 73 Geo. 285, 54 Am. Rep. 877; *Ayer v. Western U. Tel. Co.*, 79 Me. 493, 10 Atl. 495; *Western U. Tel. Co. v. Landis*, 12 Atl. Rep. 467 (Pa.); *Western U. Tel. Co. v. Hyer*, 22 Fla. 637, 1 So. 129; *West v. Western U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807; *Cannons v. West. U. Tel. Co.*, 100 N. C. 300, 6 S. E. 731; *Pegram v. Same*, 100 N. C. 28, 6 S. E. 770. Receiver of telegram may not sue. *Western U. Tel. Co. v. Flint River L. Co.*, 114 Ga. 576, 40 S. E. 815; *Brooke v. Western U. Tel. Co.*, 119 Ga. 694, 46 S. E. 826.

40—*Sweetland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Breese v. U. S. Telegraph Co.*, 48 N. Y. 132, 8 Am. Rep. 526. Not liable for payment to an imposter of a money order sent in re-

ing the sending of fictitious messages over its lines. The plaintiff bank at Uralda sent a message to the W. bank at San Antonio inquiring whether a draft on the latter bank by one F. would be honored. An accomplice of F. tapped the wires, intercepted the message and sent to the plaintiff an affirmative reply, upon the strength of which it cashed the draft. The plaintiff having discovered the fraud sued the telegraph company to recover its loss and obtained judgment. It was held that the company impliedly represented that the message was genuine, and the plaintiff made a *prima facie* case by showing its action upon the message, that it was false and the consequent loss. It was further held that the company did not exculpate itself by showing that it was imposed upon in the manner stated but that it should go further and show that the imposition was not made possible through the lack of proper care and precaution on its part.^{40a}

sponse to his request when there is no negligence on part of agent. Western U. Tel. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1.

40a—Western Union Tel. Co. v. Uralde National Bank, 97 Tex. 219, 77 S. W. 603. The court says: “Admitting that the agent at Uralde was without fault, the question still remains, was it not in the power of the defendant, had it exercised reasonable foresight, to have prevented the fraud by furnishing him and its other agents with means of detecting it? * * * The evidence suggests that the weakness consists in the absence of any means by which one operator may be enabled to determine whether a message comes from another office. The question at once arises, whether or not, with proper foresight, some regulation might not have been devised to remedy this and prevent, or render more difficult, the accomplishment of the designs of swindling? So far

as the evidence goes, it tends to answer this question in the affirmative. * * * The case then stands in this attitude: the defendant is engaged in the business of conveying from place to place intelligence, often of vast importance in business and other affairs; it invites the confidence of the public that its service is as reliable as the exercise of care and foresight commensurate with the importance of the interests involved can make it; at the same time it is, to its knowledge, exposed to a constant danger of being made, through the use by swindlers of its own appliances and servants, the instrument of fraudulent deceptions upon its patrons; and when such a deception has been accomplished upon one, it does not show that it had taken any precaution against it, or that none was practicable. We are unwilling to establish the first precedent that a defense going no fur-

Like common carriers telegraph companies are permitted to make rules for the regulation of their business; and these when brought home to those dealing with them, and assented to expressly or by implication, will be binding as contracts, provided they appear to be reasonable. A rule, for example, that any claim against the company for damages arising from delays or errors shall be presented within sixty days, has been sustained in Pennsylvania as a reasonable regulation of the business.⁴¹ So a rule is valid that the company sending the message will not be responsible for errors occurring on connecting lines.⁴² And if rules which are reasonable in them-

ther than this is sufficient, and to hold that the jury were not warranted in this state of the evidence in finding that defendant was guilty of negligence. If it be urged that the burden was on plaintiff to show negligence, the answer is that it did show that the company was apparently in the wrong in delivering a false telegram. The defendant, charged with the duty which, as we have seen, rested on it, should have shown, not only that it was ignorant of the falsity of the message, but that it was justifiably ignorant. It could not establish this without showing that the imposition, upon it occurred notwithstanding the use of proper care on its part." pp. 227, 227.

41—*Wolf v. West. U. Tel. Co.*, 62 Penn. St. 83, 1 Am. Rep. 387, and in Texas, *West. U. Tel. Co. v. Ed-sall*, 63 Tex. 668. See *West. U. Tel. Co. v. Scircle*, 103 Ind. 227; *West. U. Tel. Co. v. Jones*, 95 Ind. 228; *Western U. Tel. Co. v. Dougherty*, 54 Ark. 221, 15 S. W., 468, 26 Am. St. Rep. 33, 11 L. R. A. 102; *Kirby v. West. U. Tel. Co.*, 7 S. D. 623, 65 N. W. 37. The last overrules *Kirby v. West. U. Tel. Co.*, 4 S. D.

105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612. Such stipulation does not apply to action for statutory penalty. *West. U. Tel. Co. v. Cobbs*, 47 Ark. 344, 58 Am. Rep. 756, 1 S. W. 558. Nor where messages is never sent at all. *Francis v. West. U. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406. Stipulation for claim within thirty days is unreasonable where sender sues. *Johnson v. West. U. Tel. Co.*, 33 Fed. Rep. 362, citing many cases. So may make a rule as to deposit when an answer is asked. *West. U. Tel. Co. v. McGuire*, 104 Ind. 130, 54 Am. Rep. 296; *Hewlett v. West. U. Tel. Co.*, 28 Fed. Rep. 181. So reasonable rules as to keeping offices open. *West. U. Tel. Co. v. Harding*, 103 Ind. 505. See *Given v. West. U. Tel. Co.*, 24 Fed. Rep. 119; *West. U. Tel. Co. v. Steenberger*, 107 Ky. 469, 54 S. W. 829; *Western U. Tel. Co. v. Cridler*, 107 Ky. 600, 54 S. W. 963.

42—*West. U. Tel. Co. v. Carew*, 15 Mich. 525. See, further, *Redpath v. West. U. Tel. Co.*, 112 Mass. 71; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519. As to the liability independ-

[*777] selves are printed con*spicuously on the blanks of the company, they will be deemed assented to by those who make use of the blanks.⁴³

Skilled Workmen. Every man who offers his services to another and is employed, assumes the duty to exercise in the employment such skill as he possesses with reasonable care and diligence. In all those employments where peculiar skill is requisite, if one offers his services, he is understood, as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and if his pretensions are unfounded, he commits a species of fraud upon every man who employs him in reliance on his public profession. But no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully, and without fault or error; he undertakes for good faith and integrity, but not for infallibility, and he is liable to his employer for negligence, bad faith or dishonesty, but not for losses consequent upon mere errors of judgment.⁴⁴

ent of such regulation, see Leonard v. N. Y. etc., Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; Baldwin v. U. S. Telegraph Co., 45 N. Y. 744, 6 Am. St. Rep. 165.

43—Young *v.* West. U. Tel. Co., 65 N. Y. 163; Passmore *v.* West. U. Tel. Co., 78 Pa. St. 238; West. U. Tel. Co. *v.* Buchanan, 35 Ind. 430, 9 Am. Rep. 744; Clement *v.* Western U. Tel. Co., 137 Mass. 463; Cole *v.* Same, 33 Minn. 227; Heiman *v.* Same, 57 Wis. 562; Schwartz *v.* Atlantic, etc., Co., 18 Hun, 157. Even if blank is torn, if sender accustomed to use them. Keiley *v.* West. U. Tel. Co., 109 N. Y. 231, 16 N. E. 75.

44—Lincoln *v.* Gay, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; Calland *v.* Nichols, 30 Neb. 532, 46 N. W. 631; Nortwick *v.* Holbine, 62 Neb. 147, 86 N. W. 1057; Price *v.* Ga Nun, 11 Misc.

74, 32 N. Y. S. 801; Page *v.* Wells, 37 Mich. 415. Wherever an employment requires skill, a failure to exercise it is actionable negligence. The New World *v.* King 16 How. 469. Rule applied to the makers of abstracts of title. Talpey *v.* Wright, 61 Ark. 275, 32 S. W. 1072, 54 Am. St. Rep. 206; Russell *v.* Polk County Abstract Co., 87 Ia. 233, 54 N. W. 212, 43 Am. St. Rep. 381; Provident Loan Trust Co. *v.* Wolcott, 5 Kan. App. 473, 47 Pac. 8; Symms *v.* Cutler, 9 Kan. App. 210, 59 Pac. 671; Schade *v.* Gehner, 133 Mo. 252, 34 S. W. 576; Zweigardt *v.* Birdseye, 57 Mo. App. 462; Renkert *v.* Title Guaranty Trust Co., 102 Mo. App. 267, 76 S. W. 641; Western Loan & S. Co. *v.* Silver Bow Abstract Co., 31 Mont. 448; Dickle *v.* Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616; Denton *v.* Nashville

Professional Services. It is the misfortune of members of the learned professions that, in a very considerable proportion of all the cases in which their services are employed, their efforts must necessarily fall short of accomplishing the purpose desired, so that if they do not disappoint expectations, they must at least fail to fulfill hopes. For this reason they are peculiarly liable to the charge of failure in the performance of professional duty, and it is therefore important to know exactly what it is that the professional man promises when he engages his services. As the promise is not different in the case of the physician and surgeon from what it is in the case of the attorney, solicitor and proctor, one general rule may be given which will apply to all.

The English authorities are, perhaps, somewhat more indulgent *to the faults and mistakes of professional [*778] men than are those of this country. Thus Lord CAMPBELL, with the full concurrence of his associates in the House of Lords, declared that in order to maintain an action against one's legal adviser, it was necessary, "most undoubtedly, that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence or with gross ignorance. It is only upon one or the other of these grounds that the client can maintain an action against the professional adviser."⁴⁵

Title Co., 112 Tenn. 320, 79 S. W. 799. To Architects. *Corey v. Eastman*, 166 Mass. 279, 44 N. E. 217, 55 Am. St. Rep. 401; *Badgley v. Dickson*, 13 Ont. App. Rep. 494. To financial agents. *Overacre v. Blake*, 82 Cal. 77, 22 Pac. 979; *Sammonset v. Mesnager*, 108 Cal. 354, 41 Pac. 337; *Cross v. Kistler*, 14 Colo. 571, 24 Pac. 329; *Young v. Lohr*, 118 Ia. 624, 92 N. W. 684; *Coffing v. Dodge*, 167 Mass. 231, 45 N. E. 928; *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084, 38 Am. St. Rep. 766, 23 L. R. A. 90.

F. 91, 102. See, also, *Shiells v. Blackburne*, 1 H. Bl. 158; *Blaikie v. Chandless*, 3 Camp. 17; *Godefroy v. Dalton*, 6 Bing. 461; *Hart v. Frame*, 6 C. & F. 193; *Pippin v. Sheppard*, 11 Price, 400; *Slater v. Baker*, 2 Wils. 359; *Rich v. Pierpont*, 3 F. & F. 35; *Seare v. Prentice*, 8 East, 349; *Hancke v. Hooper*, 7 C. & P. 81; *Lanphier v. Phillips*, 8 C. & P. 234; *Lowry v. Guilford*, 5 C. & P. 234; *Russell v. Palmer*, 2 Wils. 325; *Chapman v. Chapman*, L. R. 9 Eq. Cas. 276; *Parker v. Rolls*, 14 C. B. 691; *Pitt v. Yalden*, 4 Burr. 2060. See Pen-

45—*Purves v. Landell*, 12 C. &

On the other hand, the rule is laid down in Pennsylvania that the professional man must bring to the practice of his profession a degree of skill and diligence such as those "thoroughly educated in his profession ordinarily employ."⁴⁶ This is a severe rule, and fixes a standard of professional skill and attainments which, in the newer portions of the country, would be quite out of the question. In New Hampshire the undertaking of the practitioner has been stated in the following language: "By our law a person who offers his services to the community generally, or to any individual, for employment in any professional capacity as a person of skill, contracts with his employer: 1. That he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community and those conversant with that employment as necessary and sufficient to qualify him to engage in such business." "2. That he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge to accomplish the purpose for which he is employed.

He does not undertake for extraordinary care or extra-
[*779] ordinary diligence any more than he does for *uncom-
mon skill." "3. In stipulating to exert his skill and
apply his diligence and care, the medical and other professional
men contract to use their best judgment."⁴⁷ This is believed
to be an accurate statement of the implied promise. The practitioner must possess at least the average degree of learning and skill in his profession in that part of the country in which his services are offered to the public; and if he exercises that learn-

nington *v.* Yell, 11 Ark. 212, 52 Am. Rep. 262.

46—McCandless *v.* McWha, 22 Pa. St. 261. In Potter *v.* Warner, 91 Pa. St. 362, 36 Am. Rep. 668, he is held to the use of reasonable diligence and skill. And the same court, in English *v.* Free, 205 Pa. St. 624, 55 Atl. 777, referring to McCandless *v.* McWha, says: "A

surgeon undertakes to possess and in the treatment of a case to employ such reasonable skill and diligence as is ordinarily expected in his profession; and in judging of the degree of skill, regard is to be had to the advanced state of the profession at the time."

47—Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Rep. 383.

ing and skill with reasonable care and fidelity, he discharges his legal duty.⁴⁸

An attorney is bound to exercise such skill, care and diligence in any matter entrusted to him, as members of the legal profession commonly possess and exercise in such matters, and will be liable for any failure in this regard.⁴⁹ He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping

48—*Landon v. Humphrey*, 9 Conn. 209, 23 Am. Dec. 233; *Howard v. Grover*, 28 Me. 97, 48 Am. Dec. 478; *Simonds v. Henry*, 39 Me. 155, 63 Am. Dec. 611; *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593; *Holmes v. Peck*, 1 R. I. 243; *Ritchev v. West*, 53 Ill. 385; *Utley v. Burns*, 70 Ill. 162; *Barnes v. Means*, 82 Ill. 379, 25 Am. Rep. 328; *Holtzman v. Hoy*, 118 Ill. 534, 59 Am. Rep. 390; *Walker v. Goodman*, 21 Ala. 647; *Branner v. Stormont*, 9 Kan. 51; *Wilmot v. Howard*, 39 Vt. 447; *Hathorn v. Richmond*, 48 Vt. 557; *Gallaher v. Thompson, Wright*, (Ohio,) 466; *Craig v. Chambers*, 17 Ohio St. 253; *Wood v. Clapp*, 4 Sneed, 65; *Smothers v. Hanks*, 34 Iowa, 286; *Hitchcock v. Burgett*, 38 Mich. 501; *Reynolds v. Graves*, 3 Wis. 416; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Gramm v. Boener*, 56 Ind. 497; *Reilly v. Cavanaugh*, 29 Ind. 435; *Foulks v. Falls*, 91 Ind. 315; *Gambert v. Hart*, 44 Cal. 542; *Heath v. Glisan*, 3 Ore. 64; *Boydston v. Giltner*, 3 Ore. 119; *Williams v. Poppleton*, 3 Ore. 139; *Hord v. Grimes*, 13 B. Mon. 188; *Bellinger v. Craigie*, 31 Barb. 531; *Carpenter v. Blake*, 60 Barb. 488; *Phillips v. Bridge*, 11 Mass. 242; *Varnum v. Martin*, 15 Pick. 440; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *O'Hara v. Wells*, 14 Neb. 403; *Vanhooser v. Berghoff*, 90 Mo. 487; *Gates v. Fleischer*, 67 Wis. 504. The question is one of reasonable skill. Evidence as to how he got his diploma is irrelevant in an action for a physician's negligence. *Bute v. Potts*, 76 Cal. 304, 18 Pac. 329. Where an attorney without his principal's knowledge takes worthless second mortgages he is liable. He must use such skill as is ordinarily possessed by those engaged in like work. *Whitney v. Martine*, 88 N. Y. 535. If a railroad company furnishes a surgeon to attend one injured, it is not liable for his negligence as to a particular patient, provided he is a surgeon reasonably fit for the duty laid on him. *Secord v. St. Paul*, etc., Ry. Co., 18 Fed. Rep. 221.

49—*Kruger's Estate*, 130 Cal. 621, 63 Pac. 31; *Humboldt Bldg. Assn. v. Ducker*, 111 Ky. 759, 64 S. W. 671. And see *Pinkston v. Aarington*, 98 Ala. 489, 13 So. 561; *Rose-*

pace with the literature of the profession.⁵⁰ "A lawyer is without excuse who is ignorant of the ordinary settled rules of pleading and practice, and of the statutes and published decisions of his own state, but he is not to be charged with negligence where he accepts as a correct exposition of the law, a decision of the supreme court of his own state, nor can he be held liable for a mistake in reference to a matter in which members of the profession, possessed of reasonable skill and knowledge, may differ as to the law until it has been settled in the courts; nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers."⁵¹

An attorney is liable only to his client for negligence and not to a third party who may be damaged thereby. Thus an intended legatee cannot maintain a suit against an attorney for negligence in the matter of drawing and executing a will whereby the plaintiff lost the legacy intended to be given for his benefit.^{51a}

bud M. & M. Co. v. Hughes, 16 Colo. App. 162, 64 Pac. 247; *Newman v. Schneck*, 66 Ill. App. 328; *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; *Jamison v. Weaver*, 81 Ia. 212, 46 N. W. 996; *Cochrane v. Little*, 71 Md. 323, 18 Atl. 698; *Watson v. Calvert Bldg. Assn.*, 91 Md. 25, 45 Atl. 879; *Byrnes v. Palmer*, 18 App. Div. 1, 45 N. Y. S. 479.

50—*Citizens' Loan Fund & S. Assn. v. Friedley*, 123 Ind. 143, 146, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L. R. A. 669

51—Ibid, pp. 147. Also *Hum-holdt Bldg. Assn. v. Ducker*, 111 Ky. 759, 64 S. W. 671.

51a—*Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L. R. A. 862. "It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his pro-

fessional duties, arising only from ignorance or want of care, to his client alone—that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties. The exceptions to this general rule, if they may be in strictness deemed such, are when the attorney has been guilty of fraud and collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the one injured; and one committing a malicious or tortious act to the injury of another is liable therefor, without reference to any question of privy between himself and the wronged one. Where, however, neither of these elements enter into the transaction, the rule is universal that for an injury arising

The physician or surgeon, undertaking the care and treatment of a patient, contracts that he possesses ordinary skill, that he will use ordinary care, and that he will exercise his best judgment in the application of his skill to the case which he undertakes.⁵² Physicians and surgeons are required to use ordinary

from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter." pp. 342, 343.

52—*Cayford v. Wilbur*, 86 Me. 414, 29 Atl. 117. And see the following cases in which the general rule is laid down, discussed or applied. *Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755; *Bailey v. Kreutzmann*, 141 Cal. 519, 75 Pac. 104; *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577; *Force v. Gregory*, 63 Conn. 167, 27 Atl. 1116, 38 Am. St. Rep. 371, 22 L. R. A. 343; *Akridge v. Noble*, 114 Ga. 949, 41 S. E. 78; *Mitchell v. Hindman*, 150 Ill. 538, 37 N. E. 916; *Sims v. Parker*, 41 Ill. App. 284; *Murdock v. Walker*, 43 Ill. App. 590; *Mitchell v. Hindman*, 47 Ill. App. 431; *Littlejohn v. Arbogast*, 95 Ill. App. 605; *Morris v. Despain*, 104 Ill. App. 452; *Lower v. Franks*, 115 Ind. 334, 17 N. E. 630; *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90; *De Hart v. Hann*, 126 Ind. 378, 26 N. E. 61; *Lane v. Boicourt*, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; *Hurley v. Eddingfield*, 156 Ind. 416, 59 N. E. 1058, 83 Am. St. Rep. 198, 53 L. R. A. 135; *Aspy v. Batkins*, 160 Ind. 170, 66 N. E. 462; *Young v. Mason*, 8 Ind. App. 264, 35 N. E. 521; *Baker v. Hancock*, 29 Ind. App. 456, 64 N. E. 38; *Thomas v. Dibblemont*, 31 Ind. App. 146, 67

N. E. 463; *Deglass v. Wight*, 114 Ia. 52, 86 N. W. 36; *Decatur v. Simpson*, 115 Ia. 348, 88 N. W. 839; *Pettigrew v. Lewis*, 46 Kan. 78, 26 Pac. 458; *Manser v. Collins*, 69 Kan. 290, 76 Pac. 851; *Stern v. Lanng*, 106 La. 738, 31 So. 303; *Lewis v. Dwinell*, 84 Me. 497, 24 Atl. 945; *Ramsdell v. Grady*, 97 Me. 319, 54 Atl. 763; *State v. Housekeeper*, 70 Md. 162, 16 Atl. 380, 14 Am. St. Rep. 340, 2 L. R. A. 587; *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094; *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992; *Mayo v. Wright*, 63 Mich. 32, 29 N. W. 832; *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813; *Martin v. Courtney*, 87 Minn. 197, 91 N. W. 487; *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N. W. 252; *Griswold v. Hutchinson*, 47 Neb. 727, 66 N. W. 819; *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295; *Du Bois v. Decker*, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429; *Pike v. Housinger*, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655; *Gerken v. Plimpton*, 62 App. Div. 35, 70 N. Y. S. 793; *Brown v. Purdy*, 54 N. Y. Supr. 109; *Wood v. Wyeth*, 106 App. Div. 21, 94 N. Y. S. 360; *Gray v. Little*, 126 N. C. 385, 35 S. E. 611; *Gillette v. Tucker*, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639; *Langford v. Jones*, 18 Ore. 307, 22 Pac. 1064, 1152; *Wohlert v. Seibert*, 23 Pa. Supr. Ct. 213; *Bigney v. Fisher*, 26 R. I. 402; *Mullin v. Flanders*, 73 Vt. 95, 50 Am. St.

skill and diligence only, the average of that possessed by the profession as a body, and not by the thoroughly educated only, having regard to the improvements and advanced state of the profession at the time of the treatment.⁵³ Locality is to be taken into account and the physician in a small and remote community is not to be judged by the standards which obtain in the great centers of population. The rule is that he must exercise that degree of care and skill ordinarily exercised by the profession in his own and in similar localities.⁵⁴ He is bound to keep abreast of the times, and a departure from approved methods, if it injures the patient, will render him liable.⁵⁵

A physician is entitled to have his treatment tested by the

Rep. 813; *Lanson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627; *Allen v. Voje*, 114 Wis. 1, 89 N. W. 924. See long note on "Degree of care and skill which a physician or surgeon must exercise," appended to *Whitesell v. Hill*, 101 Ia. 629, 70 N. W. 750, 37 L. R. A. 830. "In a case involving doubt, or when there are reasonable grounds for a difference of opinion as to the nature of the disease and the proper mode of treatment, if a physician or surgeon possessing the requisite qualifications applies his best skill and judgment, with ordinary care and diligence, to the examination and treatment of a case, he is not responsible for an honest mistake or error of judgment as to the character of the disease or the best mode of treatment." *Jackson v. Burnham*, 20 Colo. 532, 539, 39 Pac. 577.

53—*Peck v. Hutchinson*, 88 Ia. 320, 55 N. W. 511.

54—*Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577; *Thomas v. Dabblemont*, 31 Ind. App. 146, 67 N. E. 463; *Whitesell v. Hill*, 101 Ia. 629, 70 N. W. 750, 37 L. R. A.

830; *Decatur v. Simpson*, 115 Ia. 348, 88 N. W. 839; *Burk v. Foster*, 114 Ky. 20, 69 S. W. 1096; *Pelky v. Palmer*, 109 Mich. 561, 67 N. W. 561; *Bigner v. Fisher*, 26 R. I. 402; *Lanson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627. Doubtless a doctor would not in any case be excused for exercising a less degree of care and skill than the average in his own locality and he might be held to a higher degree of care and skill, if the average in his own locality was below that to be found in similar localities. *Ibid.*

55—*Pike v. Housinger*, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655. "There must be some criterion by which to test the proper mode of treatment in a given case, and when a particular mode of treatment is upheld by a consensus of opinion among the members of the profession, it should be followed by the ordinary practitioner; and if a physician sees fit to experiment with some other mode, he should do so at his peril." *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577.

rules of the school of medicine to which he belongs and whose system he professes to practice, and he is only bound to exercise such reasonable care and skill as is usually exercised by physicians of the school in good standing.⁵⁶ "To constitute a school of medicine under this rule," it is said, "it must have rules and principles of practice for the guidance of all its members, as respects principles, diagnosis and remedies, which each member is supposed to observe in a given case."⁵⁷ But every physician, no matter to what school he belongs, is bound to keep pace with the progress of professional knowledge, ideas and discoveries, to the extent that a faithful, conscientious, and competent practitioner, of whatever school, may be reasonably expected to do.⁵⁸ Any one who holds himself out as a healer of diseases and accepts employment as such, though not belonging to any recognized school of medicine, is bound to exercise reasonable skill and diligence in his vocation and the correctness of his treatment may be tested by the same standards as prevail among physicians and surgeons generally in his own or similar localities.⁵⁹

The liability of a physician is the same whether his service is gratuitous or compensated, volunteered or requested.⁶⁰ The

56—*Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813; *Force v. Gregory*, 63 Conn. 167, 27 Atl. 1116, 38 Am. St. Rep. 371, 22 L. R. A. 343. And see *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719.

57—*Nelson v. Harrington*, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719.

58—*Force v. Gregory*, 63 Conn. 167, 27 Atl. 1116, 38 Am. St. Rep. 371, 22 L. R. A. 343.

59—Applied to magnetic healers. *Longan v. Weltmer*, 180 Mo. 322, 79 S. W. 655, 103 Am. St. Rep. 573, 64 L. R. A. 969. To clairvoyant physician. *Nelson v. Harrington*, 72 Wis. 591, 40 N. W.

228, 7 Am. St. Rep. 900, 1 L. R. A. 719.

60—*Peck v. Hutchinson*, 88 Ia. 320, 55 N. W. 511; *Edwards v. Lamb*, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160; *Du Bois v. Dicker*, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429.

A physician must exercise ordinary care and skill in determining when his treatment should cease and negligence in this respect will render him liable. *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094; *Lanson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627. If a professional man turns an employment over to another, he is responsible

for his conduct. *Walker v. Stevens*, 79 Ill. 193; *Bradstreet v. Everson*, 72 Pa. St. 124, 13 Am. Rep. 665. But where a physician, about to go away, turned a case over to another physician, the former was held not liable for the negligence of the latter in the treatment of the patient. *Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755; *Myers v. Holborn*, 58 N. J. L. 193, 33 Atl. 389, 55 Am. St. Rep. 606, 30 L. R. A. 345. See *Dashiell v. Griffigh*, 84 Md. 363, 35 Atl. 1094. Partners are liable for the negligence of each other. *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90. A recovery for services is a bar to an action for malpractice. *Schopen v. Baldwin*, 83 Hun, 234, 31 N. Y. S. 581. Where a physician professed lack of sufficient skill to treat a wound, he was held not liable. *Lorenz v. Jackson*, 88 Hun, 200, 34 N. Y. S. 652.

If the injuries sued for were due to the plaintiff's own negligence in disregarding instructions or otherwise, he cannot recover. *Sims v. Parker*, 41 Ill. App. 284; *Lower v. Franks*, 115 Ind. 334, 17 N. E. 630; *Young v. Mason*, 8 Ind. App. 264, 35 N. E. 521; *Decatur v. Simpson*, 115 Ia. 348, 88 N. W. 839; *Richards v. Willard*, 176 Pa. St. 181, 35 Atl. 114; *Lanson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627. In a suit for malpractice in setting a dislocated hip and in which the evidence was conflicting as to whether the defendant required it and the plaintiff refused, the court says: "If the plaintiff in error was prevented from reducing the dislocation by the refusal of the defendant in

error to submit to an operation, he could not be held liable for damages resulting therefrom. It is the duty of a patient to submit to the necessary treatment prescribed by his physician or surgeon. If the patient is delirious and cannot be made to understand the necessity of the treatment proposed, the physician or surgeon may co-operate with the patient's immediate family and resort to reasonable force. If the patient is in that condition and the members of the family having him in charge refuse to allow the proposed treatment, then the physician or surgeon would not be required to use force." *Littlejohn v. Arbogast*, 95 Ill. App. 605, 608.

A physician using X-rays to locate a foreign substance in the lungs, is bound to the same degree of skill and diligence as in any other matter of practice. *Henslin v. Wheaton*, 91 Minn. 219, 97 N. W. 882, 103 Am. St. Rep. 504, 64 L. R. A. 126.

As to the liability of railroad companies and other corporations, who maintain hospitals for the treatment of their employees, for the malpractice of the physicians and surgeons employed therein, see *Wabash R. R. Co. v. Kelly*, 153 Ind. 119, 52 N. E. 152, 54 N. E. 752; *Haggerty v. St. Louis, etc., R. R. Co.*, 100 Mo. App. 424, 74 S. W. 456; *Quinn v. Railroad Co.*, 94 Tenn. 713, 30 S. W. 1036, 45 Am. St. Rep. 767, 28 L. R. A. 552; *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95; *Sawdey v. Spokane Falls, etc., Ry. Co.*, 30 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880; *Union*

same rules of liability are applied to dentists,⁶¹ and to veterinary surgeons⁶² as to other professions.

No action lies against a physician for a refusal to treat a patient, though he has no reason for his refusal and though there is no other physician to be had.⁶³

Voluntary Services. Where friends and acquaintances are accustomed to give, and do give, to each other voluntary services without expectation of reward, either because other assistance cannot be procured, or because the means of parties needing help will not enable them to engage such as may be within reach, the law will not imply an undertaking for *skill, even when the services are such as professional [*780] men alone are usually expected to render. And where there is no undertaking for skill, the want of it can create no liability.⁶⁴ So the "street opinion" of an attorney, given in answer to a casual inquiry by one to whom he holds no professional relation, cannot, however erroneous, render him liable.⁶⁵ But when one holds himself out to the public as having professional skill, and offers his services to those who accept them on that supposition, he is responsible for want of the skill he pretends to, even when his services are rendered gratuitously.⁶⁶

STATUTORY DUTIES.

Liability for Neglect. Where duties are imposed by statute upon individuals or corporations, questions of liability for neglect corresponding to the questions which arise when official duty

Pac. Ry. Co. v. Artist, 60 Fed. 365, suit was for causing the death.

9 C. C. A. 75.

64—Shiells v. Blackburne, 1 H.

61—Mernin v. Cory, 145 Cal. 573, 79 Pac. 174; McCracken v. Smathers, 122 N. C. 799, 29 S. E. 354.

62—Barney v. Pinkham, 29 Neb. 350, 45 N. W. 694, 26 Am. St. Rep. 340.

63—Hurley v. Eddingsfield, 156 Ind. 416, 59 N. E. 1058, 83 Am. St. Rep. 198, 53 L. R. A. 135. Here it was alleged that the patient died for lack of treatment, and the

Bl. 158; Beardslee v. Richardson, 11 Wend. 25, 25 Am. Dec. 596.

65—Fish v. Kelly, 17 C. B. (N. S.) 194. But when an employment actually exists, it is immaterial whether the injured party was the employer or not; the liability is the same. Pippin v. Sheppard, 11 Price, 400; Gladwell v. Steggall, 5 Bing. (N. C.) 733.

66—McNevins v. Lowe, 40 Ill.

fails in performance, are of frequent occurrence and often of difficulty. The regulations which include the requirement of such duties are usually in the nature of regulations of police, and the duties may be imposed for the purpose of giving to the general public some new protection which the common law did not provide, or in order to give to individuals liable to injury a remedy where none existed before, or more complete remedy than before existed. Often all these purposes are had in view, though none of them may be expressly declared. When the latter is the case the question of civil liability to parties who may be damned by the neglect can only be determined on a careful consideration of the statute and of the end it was manifestly intended to accomplish.

There are certain rules for the construction of such statutes which will afford some aid in the endeavor to arrive at the real intent. It must be admitted, however, that they are not very certain or very conclusive guides, and that the exceptions to ^{*781]} them are numerous. The rules, as we shall give them below, relate not only to the cases where new duties are imposed, but also to those where a new remedy is given for the breach of a pre-existing duty, and they are brought together because the cases that illustrate one rule will often throw light upon the others also.

I. Where a remedy existed at the common law, and a new remedy is given by statute, and there are no negative words in the statute indicating that the new remedy is to be exclusive, the presumption is it was meant to be cumulative, and the party injured may pursue at his option either the common law remedy, or the remedy given by the statute.⁶⁷ For example, the common

209; *Hord v. Grimes*, 13 B. Mon. 188. See *Conner v. Winton*, 8 Ind. 315, 65 Am. Dec. 761; *Musser's Executor v. Chase*, 29 Ohio St. 577. *Richardson*, 68 N. Y. 617; *Ward v. Severance*, 7 Cal. 126; *Gooch v. Stevenson*, 13 Me. 371; *Hayes v. Porter*, 22 Me. 371; *Cumberland, &c., Corp. v. Hitchings*, 59 Me. 206; *Washington, &c., Road v. State*, 19 Md. 239; *Candee v. Hayward*, 37 N. Y. 653; *Lane v. Salter*, 51 N. Y. 1; *Mayor, &c., of Lichfield v. Morris*, 7 Hill, 575; *Tremain v. Simpson*, 8 Q. B. 65; *Williams v.*

67—*Farmer's Turnpike Road v. Coventry*, 10 Johns. 389; *Critten-den v. Wilson*, 5 Cow. 165, 15 Am. Dec. 462; *Livingston v. Van Ingen*, 9 Johns. 507; *Renwick v. Morris*, 7 Hill, 575; *Tremain v.*

law gives to one whose property is seized on an attachment sued out maliciously and without probable cause an action on the case for the injury, and it has often been held that a statute requiring the attachment creditor to give bond to pay all damages suffered by the suing out of his writ, provided for a cumulative remedy only, and the remedy at the common law might still be resorted to.⁶⁸ So a statute giving a summary remedy for the assessment of damages done by trespassing cattle is cumulative.⁶⁹ So the statute authorizing highway commissioners to order the removal of fences encroaching upon highways does not take away the common law remedy by abatement.⁷⁰ So the statutory authority to forfeit stock in corporations for non-payment of calls lawfully made upon the subscriptions thereto does not take away the remedy by suit upon the promise to [*782] pay *contained in the subscription.⁷¹ So if a highway surveyor obstructs the passage from one's dwelling to the road by cutting a ditch along the side of the road, it is no answer to a common law action against him that a statute in such case

Golding, L. R. 1 C. P. 69; 48 Am. Dec. 59; Sanders v. Gibbes v. Town Council, 20 S. C. 213; Jarrett v. Apple, 31 Kan. 693; Ryalls v. Mechanics Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; Mackin v. Haven, 187 Ill. 480, 58 N. E. 448; Mackin v. Haven, 88 Ill. App. 434; Harper v. Mangel, 98 Ill. App. 526; Barry v. Lancy, 179 Mass. 112, 60 N. E. 395; Clark v. Lancy, 178 Mass. 460, 59 N. E. 1034; State v. Edwards, 162 Mo. 660, 63 S. W. 388; Walsh v. Ass. of Master Plumbers, 97 Mo. App. 280; May v. Anaconda, 26 Mont. 140, 66 Pac. 759; Van Tassell v. Derrensbacher, 56 Hun, 477, 10 N. Y. S. 145; Danville State Hospital v. Belleforte, 163 Pa. St. 175, 29 Atl. 901.

68—Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Donnell v. Jones, 13 Ala. 490,

69—Colden v. Eldred, 15 Johns. 220; Stafford v. Ingersoll, 3 Hill, 38; Moore v. White, 45 Mo. 206.

70—Wetmore v. Tracy, 14 Wend. 250, 28 Am. Dec. 525. See, for the same principle, Renwick v. Morris, 7 Hill, 575.

71—Goshen Turnpike Co. v. Hurtin, 9 Johns. 217, 6 Am. Dec. 273; Small v. Herkimer Manuf. Co., 2 N. Y. 330; Nor. R. R. Co. v. Miller, 10 Barb. 260; Troy, &c., R. R. Co. v. Tibbits, 18 Barb. 297; Carson v. Mining Co., 5 Mich. 288; Inglis v. Great Nor. R. Co., 1

gives a remedy against the town.⁷² Neither is it an answer to an action against a ferry keeper for an injury occasioned by his negligence that under the statute he has been compelled to give bond, on which an action will lie for the same injury.⁷³

II. But the common law remedy may be excluded by implication as well as by express negative words; and where that which constitutes the actionable wrong is permitted on public grounds, but on condition that compensation be made, and the statute provides an adequate remedy, whereby the party injured may obtain redress, the inference that this was intended to be the sole remedy must generally be conclusive. It has been so held in many cases where land or other property has been taken for public use under the eminent domain.⁷⁴

Macq. H. L. Cas. 112; Great Nor. R. Co. v. Kennedy, 4 Exch. 417; Giles v. Hutt, 3 Exch. 18.

72—Adams v. Richardson, 43 N. H. 212.

73—Wells v. Steele, 31 Ark. 219. Making the supervisor of roads liable for defects in the highways does not relieve the county commissioners who were liable before. County Commissioners v. Gibson, 36 Md. 229.

74—Fuller v. Edings, 11 Rich. 239; Conwell v. Hagerstown Canal Co., 2 Ind. 588; Crawfordsville, &c., R. R. Co. v. Wright, 5 Ind. 252; People v. Mich. Sou. R. R. Co., 3 Mich. 496; Smith v. McAdam, 3 Mich. 506; McCormick v. Terre Haute, &c., R. R. Co., 9 Ind. 283; Sudbury Meadows v. Middlesex Canal Co., 23 Pick. 36; Stevens v. Middlesex, 12 Mass. 466; Soulard v. St. Louis, 36 Mo. 546; Baker v. Hannibal, &c., R. R. Co., 36 Mo. 543; Calking v. Baldwin, 4 Wend. 667, 21 Am. Dec. 168; McKinney v. Monon. Nav. Co., 14 Penn. St. 65; Cole v. Muscatine, 14 Iowa, 296; Stowell v. Flagg,

11 Mass. 364; Dodge v. Commissioners, &c., 3 Met. 380; Null v. Whitewater, &c., Co., 4 Ind. 431; Kimble v. Whitewater, &c., Co., 1 Ind. 285; Lebanon v. Olcott, 1 N. H. 339; Troy v. Cheshire R. R. Co., 23 N. H. 83, 55 Am. Dec. 177; Henniker v. Contoocook Valley R. R. Co., 29 N. H. 146; Renwick v. Morris, 7 Hill, 575; Babb v. Mackey, 10 Wis. 371. In some cases it has been held that the common law remedy still remained and might be resorted to; as where a water course was diverted by statutory authority. Proprietors, &c., v. Frye, 5 Me. 38. *Contra*, Calking v. Baldwin, 4 Wend. 667; McKinney v. Monon. Nav. Co., 14 Pa. St. 65. And where land and building were injured by flooding, or by the percolation of water, caused by the enlargement of a canal under statutory authority. Selden v. Canal Co., 24 Barb. 362. *Contra*, Stowell v. Flagg, 11 Mass. 364; Hazen v. Essex Co., 12 Cush. 475. If a privilege is given by statute which is exceeded, the statutory remedy

*III. Where the statute imposes a new duty, where [*783] none existed before, and gives a specific remedy for its violation, the presumption is that this remedy was meant to be exclusive, and the party complaining of a breach is confined to it.⁷⁵ It is upon this ground that it has been many times held that when the right to exact tolls has been conferred upon a corporation, and a summary remedy given for their collection, the corporation must find in this summary remedy its sole redress when an attempt is made to evade payment.⁷⁶ So if performance of the duty is enjoined under penalty, the recovery of this

will not exclude a suit for the excess. *Renwick v. Morris*, 7 Hill, 575.

75—*Almy v. Harris*, 5 Johns. 175; *Edwards v. Davis*, 16 Johns. 281; *Smith v. Lockwood*, 13 Barb. 209; *Dudley v. Mahew*, 3 N. Y. 9; *Thurston v. Prentiss*, 1 Mich. 193; *Reddick v. Governor*, 1 Mo. 147; *Lang v. Scott*, 1 Blackf. 405; *Johnston v. Louisville*, 11 Bush, 527; *Smith v. Drew*, 5 Mass. 514; *Green v. Bailey*, 3 N. H. 33; *Com'r's v. Bank*, 32 Ohio St. 194; *Beckford v. Hood*, 7 T. R. 620; *Doe v. Bridges*, 1 B. & Ad. 847; *Vestry of St. Pancras v. Battenbury*, 2 C. B. (N. S.) 477; *Stevens v. Jeacocke*, 11 Q. B. 731; *Marshall v. Nicholls*, 18 Q. B. 882. See *Vallance v. Falle*, L. R. 13 Q. B. D. 109; *Couchman v. Prather*, 162 Ind. 250, 70 N. E. 240; *Abel v. Minneapolis*, 68 Minn. 89, 70 N. W. 851; *McGinnis v. Missouri Con., etc.*, Co., 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553; *Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937, 20 Am. St. Rep. 760, 10 L. R. A. 393; *Baltimore, etc., R. R. Co. v. Campbell*, 109 Ill. App. 25; *Cole v. Muscatine*, 14 Ia. 296; *Hodges v. Tama County*, 91 Ia. 578, 60 N. W. 185; *Harrington v.*

Glidden, 179 Mass. 486, 61 N. E. 54; *Clinton v. Henry County*, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415; *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401; *Multnomah County v. Kelly*, 37 Ore. 1, 60 Pac. 202; *Madden v. Lancaster County*, 65 Fed. 188, 12 C. C. A. 566. Where under a statute as to fire escapes a public remedy is given and also a remedy by injunction, available by individuals, an action on the case after an injury based on non-compliance with the statute will not lie. *Grant v. Slater, &c., Co.*, 14 R. I. 380. When a statute gives a new right but provides no remedy, the common law will supply a remedy. *Rackliff v. Greenbush*, 93 Me. 99, 44 Atl. 375; *McArthur v. St. Louis Piano Co.*, 85 Mo. App. 525; *Illinois Central R. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041. 76—*Turnpike Co. v. Martin*, 12 Pa. St. 361; *Beeler v. Turnpike Co.*, 14 Pa. St. 162; *Kidder v. Boom Co.*, 24 Pa. St. 193; *Turnpike Co. v. Van Dusen*, 10 Vt. 197; *Russell v. Turnpike Co.*, 13 Bush. 307. This is the rule generally applied in the case of taxes; if the statute imposing them prescribes a remedy, no

penalty is in general the sole remedy, even when it is not made payable to the party injured.⁷⁷ But the rule is not [*784] without its *exceptions; for if a plain duty is imposed for the benefit of individuals, and the penalty is obviously inadequate to compel performance, the implication will be strong, if not conclusive, that the penalty was meant to be cumulative to such remedy as the common law gives when a duty owing to an individual is neglected.⁷⁸ And if the duty

other can be implied. See cases collected in Cooley on Taxation, 13. But if the statute gives a corporation the right to "demand and recover" tolls for the passage of logs, and to detain the logs until the tolls are paid, this, by implication, authorizes suits. *Bear Camp River Co. v. Woodman*, 2 Me. 404.

77—*Turnpike Co. v. Brown*, 2 Penn. & Watts, 462; *Almy v. Harris*, 5 Johns. 175. Failure to remove snow as required by ordinance is a breach of duty to the public from which an individual action does not arise. *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603; *Kirby v. Market Ass'n*, 14 Gray, 249; *Taylor v. Lake Shore, &c., Co.*, 45 Mich. 74, 40 Am. Rep. 457; *Moore v. Gadsden*, 93 N. Y. 12; *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502. Compare *Collinson v. Newcastle, &c., R. Co.*, 1 C. & K. 545. So allowing unmuzzled dogs to run at large. *State v. Donohue*, 10 Atl. Rep. 150 (N. J.). So violation of police regulation as to licensing steam engines. *Burbank v. Bethel, &c., Co.*, 75 Me. 373, 46 Am. Rep. 400. In Phila., &c., Co. v. *Ervin*, 89 Penn St. 71; *Phila., &c., Co. v. Boyer*, 97 Pa. St. 91, and *Heeney*

v. Sprague, 11 R. I. 456, 23 Am. Rep. 502, it is held that an ordinance cannot create a civil duty enforceable in a common law action. *Contra, Penn., &c., Co. v. Hensil*, 70 Ind. 569. In *Cook v. Johnston*, 58 Mich. 437, where ashes kept in a wooden barrel contrary to an ordinance, caused a fire, it is held that primarily the object of ordinances is public and that whether in a given case the damaging act, contrary to an ordinance, is negligent is a question of fact. So the violation of an ordinance as to leaving horses unhitched in the street is held evidence of negligence. *Siemers v. Eisen*, 54 Cal. 418; but not necessarily negligent. *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488. But where such an ordinance appears intended for the benefit of individuals using the street, the breach of it is a ground of action. *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47, and cases cited.

78—*Salem Turnpike, &c., Co. v. Hayes*, 5 Cush. 458. See *Aldrich v. Howard*, 7 R. I. 199; *Ryan v. Gallatin Co.*, 14 Ill. 78; *Dunlap v. Gallatin Co.*, 15 Ill. 7; *Johnston v. Louisville*, 11 Bush, 527; *Curry v. Chicago, &c., R. R. Co.*, 43 Wis. 665. See, also, *Shepherd v. Hills*, 11 Exch. 55; *Mayor of Litchfield v. Simpson*, 8 Q. B. 65. This rule

imposed is obviously meant to be a duty to the public, and also to individuals, and the penalty is made payable to the State or to an informer, the right of an individual injured to maintain an action on the case for a breach of the duty owing to him will be unquestionable.

There are always questions of difficulty respecting the remedy when a statute imposes a duty as a regulation of police, without in terms pointing out what shall be the rights on the one side and the liabilities on the other, if the duty is neglected. Is the duty imposed on public grounds exclusively, and if not, what persons or classes of persons are within its intended protection? These are the problems which such statutes usually present. Some idea of the difficulties attending their construction may be had from a brief consideration of one class of them.

Statutes for Fencing Railroads. At the common law, rail*road companies, as owners of the land over [*785] which their tracks run, are under no obligation to fence them in order to protect their tracks against cattle straying upon them, and it is the duty of the owners of cattle to prevent their thus straying.⁷⁹ If the owners fail in this duty, they would not only be without remedy for any injury their cattle might receive while trespassing on the track, but they might even be

applied to a statute for the protection of elevator shafts. *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450, and to one for the furnishing of fire escapes in tenement houses by the owner, where no penalty was imposed till after he had been notified by the authorities. *Willy v. Mulledy*, 78 N. Y. 310.

79—*Manchester, &c., R. v. Wallis*, 14 C. B. 213; *S. C. 25 E. L. & Eq.* 373; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239; *S. C. 4 N. Y.* 349; *Williams v. Mich. Cent. R. R. Co.*, 2 Mich. 259, 55 Am. Dec. 59; *Vandergrift v. Rediker*, 22 N. J. 185; *Price v. N. J. R. R. Co.*, 31 N. J.

229; *Brown v. Hannibal, &c., R. R. Co.*, 33 Mo. 309; *Richmond v. Railroad Co.*, 18 Cal. 351; *Railroad Co. v. Skinner*, 19 Pa. St. 298; *Nor. Penn. R. R. Co. v. Rehman*, 49 Pa. St. 101; *Vandergrift v. Delaware, &c., R. R. Co.*, 2 Houst. 287; *Louisville, &c., R. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *Hurd v. Rutland, &c., R. R. Co.*, 25 Vt. 116. Compare *Jackson v. Rutland, &c., R. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246; *Housatonic R. R. Co. v. Knowles*, 30 Conn. 313; *Locke v. First Div., &c., R. R. Co.*, 15 Minn. 350; *Fritz v. First Div., &c., R. R. Co.*, 22 Minn. 404; *Towns v. Cheshire R. R. Co.*, 21 N. H. 363; *Michigan, &c., R. R.*

liable themselves if cars or engines were injured by the cattle being encountered, provided the owners were negligent in suffering them to stray there.⁸⁰

It is now very generally required by statute that railroad companies shall fence their tracks. The statutes differ greatly in their provisions, and in the remedies they prescribe for a breach of the duty. It is conceded that one of the chief purposes of such statutes is to protect the lives and limbs of the traveling public, who, as they pass over railroads, are exposed to great and constant hazards when cattle are not effectually excluded from the tracks.⁸¹ But another purpose is to protect the cattle themselves, and this is commonly done by making railroad [*786] companies *responsible for the cattle killed or injured by their engines or otherwise upon the unfenced tracks.⁸²

Co. v. Fisher, 27 Ind. 96; *Nor. East R. Co. v. Sineath*, 8 Rich. 185.

80—*Railroad Co. v. Skinner*, 19 Pa. St. 298; *Williams v. New Albany, &c.*, R. R. Co., 5 Ind. 111. The question in such a case will of course be one of negligence. If cattle are straying upon a railroad track they must not be willfully or recklessly run over; if they are, the company may be responsible. See *Laws v. Nor. Car. R. R. Co.*, 7 Jones, (N. C.) 468; *Hurd v. Rutland, &c.*, R. R. Co., 25 Vt. 116; *Holden v. Same*, 30 Vt. 297; *New Orleans, &c.*, R. R. Co. v. *Field*, 46 Miss. 573; *Fritz v. First Div., &c.*, R. R. Co., 22 Minn. 404; *Trout v. Virginia, &c.*, R. R. Co., 23 Grat. 619; *Baltimore, &c.*, R. R. Co. v. *Mulligan*, 45 Md. 486; *Darling v. Boston, &c.*, R. R. Co., 121 Mass. 118; *Rockford, &c.*, R. R. Co. v. *Rafferty*, 73 Ill. 58.

81—*Atchison, etc., R. R. Co. v. Elder*, 149 Ill. 173, 36 N. E. 565. Also for protection of employees,

Terre Haute, etc., Ry. Co. v. Williams, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44; *Dickson v. Omaha, etc., R. R. Co.*, 124 Mo. 140, 27 S. W. 476.

82—Failure to fence as required by statute affords a ground of action, if a child thereby gets upon the track and is injured. *Keyser v. Chicago, &c., Co.*, 56 Mich. 559, 33 N. W. 867, 56 Am. Rep. 403; *Rosse v. St. Paul, etc., Ry. Co.*, 68 Minn. 216, 71 N. W. 20, 64 Am. St. Rep. 472, 37 L. R. A. 591; *Chicago, etc., R. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522. So if fence is required by a city ordinance. *Hayes v. Mich. Cent. R. R. Co.*, 111 U. S. 228. But not if child crosses the track and is injured by falling into a trench on land beyond. *Moressey v. Prov., &c., R. R. Co.*, 15 R. I. 271, 3 Atl. 10. And see *Lake Shore, etc., Ry. Co. v. Liidtke*, 69 Ohio St. 384, 69 N. E. 653. Where contributory negligence as a defense is excluded by the statute, as against "per-

Where a liability for injury to cattle is imposed in general terms, a question is certain to arise, whether, in fact, the remedy is intended to be as broad as the general terms would indicate, or whether, on the other hand, its benefits were not intended exclusively for those whose cattle were lawfully on the adjacent lands; that is to say, the cattle of the owners of such adjacent lands, and such other cattle as might be kept there, or have a right for any reason to be there. In many cases this question has arisen, and the decisions are not uniform. In some States it has been held that if cattle stray upon the adjoining lands, and from thence pass upon the track through insufficient fences, and are injured, the owners, being themselves in fault for suffering them to stray, have no remedy whatever.⁸³ But in other States the conclusion is, that it was intended that *all [*787] persons should have the benefit of the statutory protection.⁸⁴ Differences in the phraseology of statutes will account

sons injured," an employee of the railroad, injured in the service, after knowing of the lack of a fence may recover. *Quackenbush v. Wisconsin, &c., Co.*, 62 Wis. 411. If a railroad is leased, the lessor is liable under such a statute. *Nelson v. Vermont, &c., R. R. Co.*, 26 Vt. 717, 62 Am. Dec. 614; *Clement v. Canfield*, 28 Vt. 302. So is the lessee. *Ill. Cent. R. R. Co. v. Kanouse*, 39 Ill. 272; *Toledo, &c., R. R. Co. v. Rumbold*, 40 Ill. 143. The contractor is liable under some statutes while building the road. *Gardner v. Smith*, 7 Mich. 410. See *St. Louis, &c., R. R. Co. v. Gerber*, 82 Ill. 632. In Indiana, Illinois and Nebraska the injury must be by actual contact of the train with the animal. *Louisville, &c., Ry. Co. v. Thomas*, 106 Ind. 10; *Schertz v. Ind., &c., Ry. Co.*, 107 Ill. 577; *Burlington, &c., R. R. Co. v. Shoemaker*, 18 Neb. 369. In New York the railroad must produce

the injury by mechanical or other agency. Not liable if the animal falls through a bridge. *Knight v. New York, &c., R. R. Co.*, 99 N. Y. 25.

83—See *Bemis v. Connecticut, &c., R. R. Co.*, 42 Vt. 375; *Eames v. Salem, &c., R. R. Co.*, 98 Mass. 560, 96 Am. Dec. 676; *McDonald v. Pittsfield, &c., R. R. Co.*, 115 Mass. 564. See *Berry v. St. Louis, &c., R. R. Co.*, 65 Mo. 172; *Peddicord v. Miss., &c., Ry. Co.*, 85 Mo. 160. No liability, except for recklessness, for injuring trespassing animals running at large in violation of an ordinance. *Vanhorn v. Burlington, &c., Ry. Co.*, 63 Ia. 67; *Kansas City, &c., R. R. Co. v. McHenry*, 24 Kan. 501.

84—*Indianapolis, &c., R. R. Co. v. McKinney*, 24 Ind. 283; *Isbell v. New York, &c., R. R. Co.*, 27 Conn. 393, 71 Am. Dec. 78; *McCall v. Chamberlain*, 13 Wis. 637; *Curry v. Chicago, &c., R. R. Co.*, 43 Wis. 665; *Corwin v. New York, &c., R.*

in part for the differences in conclusions, but not entirely.⁸⁵

[*788] ***Other Neglects of Statutory Duty.** The following are also cases of neglect of statutory duty for which individuals injured have been allowed to recover in actions on the

R. Co., 13 N. Y. 42; Bradley *v.* Buffalo, &c., R. R. Co., 34 N. Y. 427; Shepard *v.* Buffalo, &c., R. R. Co., 35 N. Y. 641; Tracy *v.* Troy, &c., R. R. Co., 38 N. Y. 433; Ewing *v.* Chicago, &c., R. R. Co., 72 Ill. 25; Cairo, &c., R. R. Co. *v.* Murray, 82 Ill. 76. See Fawcett *v.* York, &c., R. R. Co., 16 Q. B. 610.

These statutes do not impose on railroad companies the obligation to fence their stations and such grounds as would be inconveniently used if fenced, and the question of liability for cattle injured in such places is purely one of negligence. Swearingen *v.* Missouri, &c., R. R. Co., 64 Mo. 73; Smith *v.* Chicago, &c., R. R. Co., 34 Iowa, 506; Robertson *v.* Railroad Co., 64 Mo. 412; Toledo, &c., R. R. Co. *v.* Spangler, 71 Ill. 568. Liable for not fencing land erroneously supposed by it to be in the highway. Coleman *v.* Flint, &c., Co., 64 Mich. 160, 31 N. W. 47. Where they are required to fence, an agreement with the adjoining owner that they need not do so will not relieve them from any obligation to other persons. Gilman *v.* European, &c., R. R. Co., 60 Me. 235. And the fact that they exercise the highest care in running their trains will not excuse them. Gorman *v.* Railroad Co., 26 Mo. 441. See Union Pacific R. R. Co. *v.* Rollins, 5 Kan. 167.

85—Following are cases in which the liability of railroad companies for injury to cattle on

unfenced or imperfectly fenced tracts have been considered: Dawson *v.* Midland R. Co., L. R. 8 Exch. 8; Williams *v.* Great Western R. Co., L. R. 9 Exch. 157; Wanless *v.* N. E. R. Co., L. R. 6 Q. B. 481; Stapley *v.* London, &c., R. Co., L. R. 1 Exch. 20; Hurd *v.* Rutland, &c., R. R. Co., 25 Vt. 116; Nelson *v.* Vt. Cent. R. R. Co., 26 Vt. 717, 62 Am. Dec. 614; Thorpe *v.* Rutland, &c., R. R. Co., 27 Vt. 140, 7 Am. Rep. 91; Clark *v.* Vt. & Can. R. R. Co., 28 Vt. 103; Clement *v.* Canfield, 28 Vt. 302; Holden *v.* Rutland, &c., R. R. Co., 30 Vt. 297; Bemis *v.* Can., &c., R. R. Co., 42 Vt. 375; White *v.* Concord R. R. Co., 30 N. H. 188; Horn *v.* Atlantic, &c., R. R. Co., 35 N. H. 169; Smith *v.* Eastern R. R. Co., 35 N. H. 356; Widner *v.* Maine Cent. R. R. Co., 65 Me. 332, 20 Am. Rep. 698; McCall *v.* Chamberlin, 13 Wis. 637; Brown *v.* Milwaukee, &c., R. R. Co., 21 Wis. 39; Blair *v.* Milwaukee, &c., R. R. Co., 20 Wis. 254; Schmidt *v.* Milwaukee, &c., R. R. Co., 23 Wis. 186, 99 Am. Dec. 158; Antisdell *v.* Chicago, &c., R. R. Co., 26 Wis. 145, 7 Am. Rep. 44; Laude *v.* Chicago, &c., R. R. Co., 33 Wis. 640; Bay City, &c., R. R. Co. *v.* Austin, 21 Mich. 390; Flint, &c., R. R. Co. *v.* Lull, 28 Mich. 510; Grand Rapids, &c., R. R. Co. *v.* Southwick, 30 Mich. 445; Ill. Cent. R. R. Co. *v.* Williams, 27 Ill. 48; Chicago, &c., R. R. Co. *v.* Utley, 38 Ill. 410; Chicago, &c., R. R. Co. *v.* Cauffman, 38 Ill. 424; Ill. Cent. R.

case for negligence. Neglect of railway companies to ring bells or sound the whistle on approaching a highway crossing, or to put up a sign to warn travelers;⁸⁶ neglect to guard

R. Co. v. Kanouse, 39 Ill. 272; Toledo, &c., R. R. Co. v. Rumbold, 40 Ill. 143; Toledo, &c., R. R. Co. v. Arnold, 43 Ill. 418; Peoria, &c., R. R. Co. v. Barton, 80 Ill. 72; McCoy v. California, &c., R. R. Co., 40 Cal. 532; Jeffersonville R. R. Co. v. Martin, 10 Ind. 416; Gabbert v. Jeffersonville R. R. Co., 11 Ind. 365, 71 Am. Dec. 358; Indianapolis, &c., R. R. Co. v. Taffe, 11 Ind. 458; Indianapolis R. R. Co. v. Fisher, 15 Ind. 203; Indianapolis, &c., R. R. Co. v. McKinney, 24 Ind. 283; Ohio, &c., R. R. Co. v. Miller, 46 Ind. 215; Ohio, &c., R. R. Co. v. McClure, 47 Ind. 317; Indianapolis, &c., R. R. Co. v. Lyon, 48 Ind. 119. There are many others. Liable for failure to fence against a "crazy" horse as against any other. Liston v. Centr. Ia. Ry. Co., 70 Ia. 714. See for cases under such statutes, notes to Dunkirk, &c., R. R. Co. v. Mead, 1 A. & E. R. R. Cas. 171; Brentner v. Chicago, &c., Ry. Co., 7 Id. 577, and cases and notes *passim*, 19 Id. 529-674. If a fence is out of repair, the company is not responsible for injury resulting therefrom, provided there is no negligence in proceeding to put it in repair. Robinson v. Grand Trunk R. Co., 32 Mich. 322; Toledo, &c., R. R. Co. v. Daniels, 21 Ind. 256; Indianapolis, &c., R. R. Co. v. Truitt, 24 Ind. 162; Pittsburgh, &c., R. R. Co. v. Smith, 26 Ohio St. 124; Russell v. Hanley, 20 Iowa, 219, 89 Am. Dec. 535; Aylesworth v. Chicago, &c., R. R. Co., 30 Iowa, 459. Compare Ohio, &c., R.

R. Co. v. Clutter, 82 Ill. 123. See Crosby v. Detroit, &c., Ry. Co., 58 Mich. 458; Railway Co. v. Smith, 38 Ohio St. 410, and as to care in keeping gate shut, Wait v. Burlington, &c., Ry. Co., 74 Ia. 207, 37 N. W. 159. As to what is a sufficient fence, see Lyons v. Merrick, 105 Mass. 71; Chambers v. Matthews, 18 N. J. 368. Whether the doctrine of contributory negligence is to be allowed any force when an injury occurs through the neglect of a statutory requirement, see Caswell v. Worth, 5 El. & Bl. 849; Steves v. Oswego, &c., R. R. Co., 18 N. Y. 422; Nashville, &c., R. R. Co. v. Smith, 6 Heisk. 174; Quackenbush v. Wisconsin, &c., R. R. Co., 62 Wis. 411. Not liable for animals getting upon track through a farm gate unless it was left open through company's fault. Lemon v. Chicago, &c., Co., 59 Mich. 618. Farmer's duty to keep the gate shut. Louisville, &c., Ry. Co. v. Goodbar, 102 Ind. 596. But if the cattle of third persons are injured by coming through his open gate, his negligence is not a defense. Wabash, &c., Ry. Co. v. Williamson, 104 Ind. 154.

86—Wilson v. Rochester, &c., R. R. Co., 16 Barb. 167; Ernst v. Hud. Riv. R. R. Co., 35 N. Y. 9; Richardson v. N. Y., &c., R. R. Co., 45 N. Y. 846; Renwick v. New York, &c., R. R. Co., 36 N. Y. 132; Chicago, &c., R. R. Co. v. Triplett, 38 Ill. 482; Toledo, &c., R. R. Co. v. Jones, 76 Ill. 311; Toledo, &c., R. R. Co. v. Durkin, 76

[*789] their cross*ings with a gate or with watchmen when required;⁸⁷ moving trains at unlawful speed;⁸⁸ neglecting

Ill. 395; Indianapolis, &c., R. R. Co. v. Smith, 78 Ill. 112; Dimick v. Chicago, &c., R. R. Co., 80 Ill. 338; Langhoff v. Milwaukee, &c., R. R. Co., 19 Wis. 489; Horn v. Chicago, &c., R. R. Co., 38 Wis. 463; Linfield v. Old Colony, &c., R. R. Co., 10 Cush. 562, 57 Am. Dec. 124; Kimball v. Western R. R. Co., 6 Gray, 542; Norton v. Eastern R. R. Co., 113 Mass. 366; State v. Vermont, &c., R. R. Co., 28 Vt. 583; Wakefield v. Connecticut, &c., R. R. Co., 37 Vt. 330, 86 Am. Dec. 711; Dodge v. Burlington, &c., R. R. Co., 34 Iowa, 276; Correll v. Burlington, &c., R. R. Co., 38 Iowa, 120, 18 Am. Rep. 22; Augusta, &c., R. R. Co. v. McElmurry, 24 Ga. 75; Nashville, &c., R. R. Co. v. Smith, 6 Heisk. 174; Chicago, &c., R. R. Co. v. Boggs, 101 Ind. 522, and cases; Johnson v. Chicago, &c., Ry. Co., 77 Mo. 546; Chicago, etc., R. R. Co. v. Crisman, 19 Colo. 30, 34 Pac. 286; Green v. Eastern Ry. Co., 52 Minn. 79, 53 N. W. 808; Petrie v. Columbia, etc., R. R. Co., 29 S. C. 303, 7 S. E. 515; Bitner v. Utah Central Ry. Co., 4 Utah, 502, 11 Pac. 620. Such a statute in Rhode Island held not to be designed for the benefit of others than those intending to cross on the highway, and therefore one who is injured in walking along the track can have no action because of the omission. O'Donnell v. Providence, &c., R. R. Co., 6 R. I. 211. But, see Hill v. Portland, &c., R. R. Co., 55 Me. 438, 92 Am. Dec. 601; Norton v. Eastern R. R. Co., 113 Mass. 366; Wilson v. Rochester, &c., R. R. Co., 16 Barb. 167; Wakefield v. Connecticut, &c., R. R. Co., 37 Vt. 330, 86 Am. Dec. 711. Failure is actionable if thereby one driving parallel to the track near crossing, though not intending to cross, is injured from fright of horse. Ransom v. Chicago, &c., Ry. Co., 62 Wis. 178, 51 Am. Rep. 718. Compare, however, East Tenn., &c., Co. v. Feathers, 10 Lea, 103, where the person was some distance from the crossing. Failure to give signals is actionable if cattle are thereby injured. Palmer v. St. Paul, &c., R. R. Co., 38 Minn. 415, 38 N. W. 100. It was not presumptively negligent not to sound a signal in approaching a crossing before these statutes were passed. See Galena, &c., R. R. Co. v. Dill, 22 Ill. 246; Galena, &c., R. R. Co. v. Loomis, 13 Ill. 548; Ill. Cent. R. R. Co. v. Phelps, 29 Ill. 447.

87—Lunt v. London, &c., R. R. Co., L. R. 1 Q. B. 277; Bilbee v. London, &c., R. R. Co., 18 C. B. (N. S.) 583; St. Louis, &c., R. R. Co. v. Dunn, 78 Ill. 197; Johnson v. St. Paul, &c., R. R. Co., 31 Minn. 283. Failure to obey a statute as to obstructing highways with cars gives an action. Patterson v. Detroit, &c., R. R. Co., 56 Mich. 172. See Cumming v. Brooklyn, &c., Co., 38 Hun, 362.

88—Houston, &c., R. R. Co. v. Terry, 42 Tex. 451; Aycock v. Wilmington, &c., R. R. Co., 6 Jones (N. C.), 231; Bowman v. Chicago, &c., R. R. Co., 85 Mo. 533; Keim v. Union, &c., Co., 90 Mo. 314; Crowley v. Burlington, &c., Ry. Co., 65 Ia. 658; Phila.,

to fence or otherwise protect dangerous machinery,⁸⁹ or the shaft of a mine;⁹⁰ neglecting to keep a bridge in repair;⁹¹ neglecting to sink telegraph wire in crossing a stream;⁹² disregarding a statute which forbids selling naphtha as a burning fluid;⁹³ neglect of the *master of a vessel to take a [*790] proper supply of medicines for the benefit of his crew and passengers when going upon a voyage,⁹⁴ and neglect of a toll-bridge company to keep the bridge in repair, as required by its charter.⁹⁵ But without going further into particulars, it is

- &c., R. R. Co. v. Stebbing, 62 Md. Fawcett v. York, &c., R. R. Co., 504; South., &c., R. R. Co. v. Don- 16 Q. B. 610; Reynolds v. Hind-
ovan, 84 Ala. 141, 4 So. 142; Lit- man, 32 Iowa, 146.
tle v. Southern Ry. Co., 120 Ga. 90—Bartlett, &c., Co. v. Roach,
347, 47 S. E. 953, 102 Am. St. Rep. 68 Ill. 174.
104, 66 L. R. A. 509; Lake Shore, 91—Titecomb v. Fitchburg R. R.
etc., Ry. Co. v. Parker, 131 Ill. Co., 12 Allen, 254.
557, 23 N. E. 237; Chicago, etc., 92—Blanchard v. West. Un. Tel.
R. R. Co. v. Crose, 214 Ill. 602, 73 Co., 60 N. Y. 510.
N. E. 865, 105 Am. St. Rep. 135; 93—Hourigan v. Nowell, 110
Reidel v. Philadelphia, etc., R. R. Mass. 470; Wellington v. Oil Co.,
Co., 87 Md. 153, 39 Atl. 507, 67 104 Mass. 64. So disregarding a
Am. St. Rep. 328; Schlereth v. statute forbidding a person to keep
Missouri Pac. R. R. Co., 96 Mo. more than fifty pounds of dyna-
509, 10 S. W. 66; Beck v. Vancou- mite or gunpowder at any place
ver Ry. Co., 25 Ore. 32, 34 Pac. within the corporate limits. Kin-
753; Memphis St. Ry. Co. v. ney v. Koopman, 116 Ala. 310, 22
Haynes, 112 Tenn. 712, 81 S. W. So. 593, 67 Am. St. Rep. 119, 37
374; Grand Trunk Ry. Co. v. Ives, L. R. A. 497; Rudder v. Koopman,
144 U. S. 408, 12 S. C. Rep. 679, 36 116 Ala. 332, 22 So. 601, 37 L. R.
L. Ed. 485; Walsh v. Missouri Pac. A. 489.
A. 489.
R. R. Co., 102 Mo. 582, 14 S. W. Where a statutory requirement
873, 15 S. W. 757; Louisville, etc., cannot be fully complied with,
R. R. Co. v. Martin, 113 Tenn. 266, whatever is possible under the
87 S. W. 418. So where a building circumstances to prevent injury
was struck and person hurt should be done. Mobile, &c., R.
by car going off track. Mahan v. R. R. Co. v. Malone, 46 Ala. 391, cit-
Union Depot, &c., Co., 34 Minn. ing Gr. West. R. R. Co. v. Geddis,
29. But such speed is not con- 32 Ill. 304; Nashville, &c., R. R.
clusive of negligence. Hanlon v. Co. v. Comans, 45 Ala. 437.
South Boston, &c., Co., 129 Mass. 94—Couch v. Steel, 3 El. & Bl.
310. 402.
89—Coe v. Platt, 6 Exch. 752; 95—Grigsby v. Chappell, 5 Rich.
Holmes v. Clarke, 6 H. & N. 348; 443. See Orcutt v. Bridge Co.,
Clarke v. Holmes, 7 H. & N. 937; 53 Me. 500.
Caswell v. Worth, 5 El. & Bl. 849;

sufficient to say of the authorities that they recognize the rule as a general one, that when the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none.⁹⁶

96—*Commissioners v. Duckett*, 20 Md. 468. See *Caswell v. Worth*, 5 El. & Bl. 849; *Holmes v. Clarke*, 6 H. & N. 348; *S. C. in Ex. Ch.*, 7 H. & N. 937; *Fawcett v. York*, &c., R. Co., 16 Q. B. 610; *Britton v. Gt. West. Cotton Co.*, L. R. 7 Exch. 130; *Atkinson v. Newcastle*, &c., Co., L. R. 6 Exch. 402; *Kitchens v. Elliott*, 114 Ala. 290, 21 So. 965; *Kansas City*, etc., R. R. Co. v. *Flippo*, 138 Ala. 487, 35 So. 457; *Briscoe v. Alfrey*, 61 Ark. 196, 32 S. W. 505, 54 Am. St. Rep. 203, 30 L. R. A. 607; *McKune v. Santa Clara*, etc., Co., 110 Cal. 480, 42 Pac. 980; *Platte*, etc., Co. v. *Dowell*, 17 Colo. 376, 30 Pac. 68; *Rudd v. Meriden Elec. R. R. Co.*, 69 Conn. 272, 37 Atl. 683; *Chicago*, etc., R. R. Co. v. *Goyette*, 133 Ill. 21, 24 N. E. 549; *Landgraff v. Kuh*, 188 Ill. 484, 59 N. E. 501; *H. Channon Co. v. Hahn*, 189 Ill. 28, 59 N. E. 522; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 71 N. E. 1081; *Davis Coal Co. v. Polland*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; *Meier v. Shrunk*, 79 Ia. 17, 44 N. W. 209; *Ives v. Welde*, 114 Ia. 476, 87 N. W. 408, 89 Am. St. Rep. 379, 54 L. R. A. 854; *Illinois Central R. R. Co. v. La- loge*, 113 Ky. 896, 69 S. W. 795, 62 L. R. A. 405; *Henderson v. Clay-ton*, 22 Ky. L. R. 283, 57 S. W. 1; *Henderson v. O'Halaran*, 114 Ky. 186, 70 S. W. 662; *Clements v. La. Elec. Lt. Co.*, 44 La. Ann. 692, 11 So. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; *Carrigan v. Still-well*, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163; *Ashman v. Flint*, etc., R. R. Co., 90 Mich. 567, 51 N. W. 645; *Baxter v. Coughlin*, 70 Minn. 1, 72 N. W. 797; *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; *Hanlon v. Missouri Pac.* R. R. Co., 104 Mo. 381, 16 S. W. 233; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Pauley v. Steam Gauge*, etc., Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; *Johnson v. Steam Guage & L. Co.*, 146 N. Y. 152, 40 N. E. 773; *Brown v. Wittner*, 43 App. Div. 135, 59 N. Y. S. 385; *Pitcher v. Lennon*, 16 Misc. 609, 38 N. Y. S. 1007; *Harden v. N. C. R. R. Co.*, 129 N. C. 354, 40 S. E. 184, 85 Am. St. Rep. 747, 55 L. R. A. 784; *Fleming v. Southern Ry. Co.*, 131 N. C. 426, 42 S. E. 905; *Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725; *Riden v. Grimm Bros.*, 97 Tenn. 220, 36 S. W. 1097, 35 L. R. A. 587; *Wise v. Morgan*, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548; *San Antonio*, etc., Ry. Co. v. *Bowers*, 88 Tex. 634, 32 S. W. 880; *Texas*, etc., Ry. Co. v. *Brown*, 11 Tex. Civ. App. 503, 33 S. W. 146; *Decker v. Mc-Sorley*, 111 Wis. 91, 86 N. W. 554; *Horton v. Wylie*, 115 Wis. 505, 92 N. W. 245, 95 Am. St. Rep. 953; *Pittsburgh*, etc., Ry. Co. v. *Light-heiser*, 163 Ind. 247, 71 N. E. 660; *Nickey v. Steuder*, 164 Ind. 189; *Hailey v. Texas*, etc., Ry. Co., 113

La. 533, 37 So. 137. Failure to guard machinery as required by statute for protection of servant is negligence *per se*. Davis *v.* Mercer Lumber Co., 164 Ind. 413. See Monteith *v.* Kokomo Wood Enamelling Co., 159 Ind. 149, 58 L. R. A. 944. So is the failure to label poisons as required by statute. Burk *v.* Creamery Package Mfg. Co., 126 Ia. 730, 102 N. W. 793, 106 Am. St. Rep. 377; Sutton *v.* Wood, 27 Ky. L. R. 412, 85 S. W. 201.

THE GENERAL PRINCIPLES GOVERNING REDRESS FOR NEGLIGENCE.

In the last chapter some attention was given to wrongs resulting from the non-performance of conventional and statutory duties, and it was shown that where negligence in the performance of a legal duty is brought home to any one, and another has suffered damages therefrom, an action will lie therefor. The endeavor was also made to point out in what negligence consisted: to show that the term was rather negative than positive, and implied only the absence of such care, prudence and forethought as under the circumstances duty required should be given or exercised: that although the terms slight negligence, ordinary negligence and gross negligence are frequently employed to characterize particular conduct, yet the terms themselves have no distinctive meaning or importance in the law, and only imply that there has been culpable neglect under circumstances calling for different degrees of care; any injurious neglect of duty being actionable. It was also shown that the law imposes on those who follow certain callings in life exceptional obligations, requiring in some cases a care and caution far beyond what is required generally: also that in the case of official and other statutory duties, an individual may bring suit for failure in performance wherever it appears that they were imposed for his advantage or protection. But, as in every relation of life, and in every position in which one may possibly be placed, some duty is imposed for the benefit of others, it becomes now of importance that we consider the general principles which must govern when in any of these cases complaint is made that one has been injured by the neglect of another to observe due care.

1. The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been per-

formed. There can be no negligence unless there is a duty which has been violated.¹ "In every instance before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which duty would have averted or avoided the injury."²

- 1—*Martin v. Railway Co.*, 55 Ark. 510, 19 S. W. 314; *Railway Co. v. Ferguson*, 57 Ark. 16, 20 S. W. 545, 38 Am. St. Rep. 217, 18 L. R. A. 110; *Southwestern Tel. & Tel. Co. v. Beatty*, 63 Ark. 65, 37 S. W. 570; *Martinovitch v. Wooley*, 128 Cal. 141, 60 Pac. 760; *Farmer's High Line Canal, etc., Co. v. Westlake*, 23 Colo. 26, 46 Pac. 134; *Messenger v. Gordon*, 15 Colo. App. 429, 62 Pac. 959; *Jackson v. Standard Oil Co.*, 98 Ga. 749, 26 S. E. 60; *Smith v. Clark Hardware Co.*, 100 Ga. 163, 28 S. E. 73, 39 L. R. A. 607; *Allen v. Hixon*, 111 Ga. 460, 36 S. E. 810; *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443; *Williams v. Chicago, etc., R. R. Co.*, 135 Ill. 491, 26 N. E. 661, 25 Am. St. Rep. 397, 11 L. R. A. 352; *Illinois Central R. R. Co. v. O'Connor*, 189 Ill. 559, 59 N. E. 1098; *Angus v. Lee*, 40 Ill. App. 304; *Woodruff v. Bowen*, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 57 Am. St. Rep. 204, 32 L. R. A. 837; *Thiele v. McManus*, 3 Ind. App. 132; *Pittsburgh, etc., Ry. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 660; *Eakins v. Chicago, etc., Ry. Co.*, 126 Ia. 324, 102 N. W. 104; *Smith v. Trimble*, 111 Ky. 861, 64 S. W. 915; *Boardman v. Creighton*, 95 Me. 154, 49 Atl. 663; *State v. Consolidated Gas Co.*, 85 Md. 637, 37 Atl. 263; *Murphy v. Greeley*, 146 Mass. 196, 15 N. E. 654; *Kelly v. Mich. Cent. R. R.* Co., 65 Mich. 186, 31 N. W. 904, 8 Am. St. Rep. 876; *Wencker v. Missouri, etc., Ry. Co.*, 169 Mo. 592, 70 S. W. 145; *Buch v. Amory Mfg. Co.*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163; *Cochran v. Sess.*, 168 N. Y. 372, 61 N. E. 639; *Ramsbottom v. Railroad Co.*, 138 N. C. 38; *Baltimore, etc., Ry. Co. v. Cox*, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. Rep. 583; *Panolino v. McKendall*, 24 R. I. 432, 53 Atl. 268, 96 Am. St. Rep. 736, 60 L. R. A. 133; *San Antonio, etc., Ry. Co. v. Morgan*, 92 Tex. 98, 46 S. W. 28; *St. Louis S. W. Ry. Co. v. Pope*, 98 Tex. 535; *Mexican Nat. Ry. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. 1126; *Uthermohlen v. Boggs Run Co.*, 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 911.
- 2—*West Virginia Cent., etc., R. R. Co. v. State*, 96 Md. 652, 666, 54 Atl. 669, 61 L. R. A. 574. "Actionable negligence is the breach of a duty owed by the defendant to the plaintiff. Where there is no duty there is no negligence." *Hughes v. Boston, etc., R. R. Co.*, 71 N. H. 279, 284, 51 Atl. 1070, 93 Am. St. Rep. 518. "In every case involving actionable negligence, there are necessarily three elements necessary to its existence: 1. The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; 2. A failure by the defendant to perform that duty; 3. An injury to the plain-

A duty may be general, and owing to every*body, or [*792] it may be particular, and owing to a single person only, by reason of his peculiar position.³ An instance of the latter sort is the duty the owner of land owes to furnish by it lateral support to the land of the adjoining owner. But a duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him particular occasion to insist upon its performance: it then becomes a duty to him personally. The general duty of a railway company to run its trains with care becomes a particular duty to no one until he is in position to have a right to complain of the neglect; the tramp who steals a ride cannot insist that it is a duty to him; neither can he when he makes a highway of the railway track and is injured by the train.⁴ A man may be careless to the degree of criminality who leaves poisoned

tiff from such failure of the defendant. When these elements are brought together, they united-

ly constitute actionable negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient." Faris *v.* Hoberg, 134 Ind. 269, 274, 275, 33 N. E. 1028, 39 Am. St. Rep. 261. To same effect, State *v.* Consolidated Gas Co., 85 Md. 637, 37 Atl. 263; Erie R. R. Co. *v.* McCormick, 69 Ohio St. 45, 68 N. E. 571. A bare allegation of duty amounts to nothing. In pleading facts should be set forth which disclose the existence of the duty relied upon. Southern Ind. Ry. Co. *v.* Fine, 163 Ind. 617, 72 N. E. 589.

3—The defendant who controlled a vehicle negligently sent it full of coal in a defective condition to the buyers of the coal. A servant of the buyer in unloading the truck was injured by the defect. Held the defendant owed a duty to the injured man. Elliott *v.*

Hall, L. R. 15 Q. B. D. 315. See Heaven *v.* Pender, L. R. 11 Q. B. D. 503.

4—Ill. Cent. R. R. *v.* Hall, 72 Ill. 222; Bresnahan *v.* Mich. Centr. R. R. Co., 49 Mich. 410. See Mobile, &c., R. R. Co. *v.* Stroud, 64 Miss. 784; Railroad Co. *v.* Depew, 40 Ohio St. 121; Pittsburgh, &c., Ry. Co. *v.* Collins, 87 Pa. St. 405, 33 Am. Rep. 371; State *v.* Balt., &c., R. R. Co., 58 Md. 482; Chicago, &c., Ry. Co. *v.* Eininger, 114 Ill. 79. It makes no difference that one was at a point on the track where a highway crosses it. Kelley *v.* Mich. Centr. R. R. Co., 65 Mich. 186, 31 N. W. 904. In Pennsylvania it is held that the railroad company is entitled to a clear track, and whoever puts himself upon it, except as he has occasion to cross, must take upon himself the consequences. Mulherrin *v.* Delaware, &c., R. R. Co., 81 Pa. St. 366; Penn. R. R. Co. *v.* Lewis, 79 Pa. St. 33. But, if the track is laid in the street, one is not a

food about where others will be likely to pick it up and be injured by it; but he owes in this regard no duty to the burglar who breaks into his house to despoil it. So it may not be wise or prudent for one to have upon his premises an uncovered pit, but he is under no obligation to cover it for the protection of trespassers.⁵ On the other hand if one shall make an excavation *so near the line of the highway that one [*793] lawfully making use of the highway might accidentally fall into it, his duty to erect guards as a protection against such accidents is manifest, and he will be responsible for injuries occasioned by his neglect to do so.⁶ These are illustrations; but

trespasser in walking upon it. *Yards Co. v. Bourke*, 10 Ill. App. Louisville, &c., Ry. Co. v. Phillips, 112 Ind. 59, 13 N. E. 132.

That there must be a breach of some duty owing to plaintiff to constitute actionable negligence, see *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293; *Galveston City, &c., Co. v. Hewitt*, 67 Tex. 473. In any suit for negligence the particular duty neglected must be counted upon: a recovery cannot be had for one breach on a declaration counting on another. *Flint, &c., R. Co. v. Stark*, 38 Mich. 714.

5—*Aldred's Case*, 9 Co. 58 b.; *Blithe v. Topham*, Cro. Jac. 158; *Stone v. Jackson*, 16 C. B. 199; S. C. 32 E. L. & Eq. 349; *Hounsell v. Smyth*, 7 C. B. (N. s.) 731; *Humphries v. Brogden*, 12 Q. B. 739; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Parker v. Foote*, 19 Wend. 309; *Steuart v. Maryland*, 20 Md. 97; *Hargreaves v. Deacon*, 25 Mich. 1; *Zoebisch v. Tarbell*, 10 Allen, 385, 87 Am. Dec. 660; *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478; *Morgan v. Penn., &c., Co.*, 19 Blatchf. 239; *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365; *Union Stock* 474; *ante*, p. 1258. Nor to guard a pool of water against trespassing children. *Schmidt v. Kansas City, &c., Co.*, 90 Mo. 284, 59 Am. Rep. 16; *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74; *Klix v. Nieman*, 68 Wis. 271, 32 N. W. 223. One who leaves syrup exposed on his premises, which a trespassing cow drinks and is damaged is under no liability to the owner of the cow for this injury. *Bush v. Brainard*, 1 Cow. 78, 13 Am. Dec. 513. Compare *Fisher v. Clark*, 41 Barb. 329, case of injury by diseased sheep. A loiterer about a railway station has no claim upon the railway company for an injury caused by negligence in the construction or maintenance of the station house. *Pittsburgh, &c., R. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751.

6—*Barnes v. Ward*, 2 C. & K. 661; S. C. 9 C. B. 392; *Wettor v. Dunk*, 4 F. & F. 298; *Hardcastle v. South Yorkshire, &c., R. Co.*, 4 H. & N. 67; *Vale v. Bliss*, 50 Barb. 358; *Davis v. Hill*, 41 N. H. 329; *Baltimore & Ohio R. R. Co. v. Boteler*, 38 Md. 568; *Stratton v. Staples*, 59 Me. 94; *Beck v. Carter*,

in every instance the complaining party must point out how the duty arose which is supposed to have been neglected. And this is the real reason why one cannot complain of an injury to which his own negligence has contributed: When it appears

that but for his own fault the injury would not have [*794] occurred, it also appears that the duty to protect him

did not rest upon others; for no one is under obligation to protect another against the consequences of his own misconduct or neglect.

2. The duty being pointed out, the failure to observe it is to be shown; in other words, the existence of negligence. This is an affirmative fact; the presumption always being, until the contrary appears, that every man will perform his duty. But the quantum of evidence necessary to make out a *prima facie* case of negligence is very slight in some cases, while in others a more strict showing is required. A bailee who returns in an injured condition an article which has been loaned to him is, by this very condition, called upon for an explanation; for a presumption of fault must arise therefrom against him. If a child is sent into the streets of a city in charge of a spirited team which apparently he is too young and weak to manage, the negligence seems manifest, while there might be no appearance of want of due care had the team been broken down by labor and years. Often

68 N. Y. 283, 23 Am. Rep. 175; pair, fail to guard properly against Buesching *v.* St. Louis, &c., Co., passengers falling into dangers 73 Mo. 219, 39 Am. Rep. 503; immediately outside the line. Haughey *v.* Hart, 62 Ia. 96; State *v.* Society, 42 N. J. L. 504. See Crogan *v.* Schiele, 53 Conn. 186, 55 Am. Rep. 88; Cross *v.* Lake Shore, &c., Co., 69 Mich. 363, 37 N. W. 361. Not if the excavation is so far from the street line that one falling into it, must be a trespasser. Gramlich *v.* Wurst, 86 Pa. St. 74, 27 Am. Rep. 684; Early *v.* Lake Shore, &c., Co., 66 Mich. 349, 33 N. W. 813.

This principle has been applied to towns, which, being under obligation to keep highways in re-

pair, fail to guard properly against passengers falling into dangers immediately outside the line. Coggsell *v.* Lexington, 4 Cush. 307; Alger *v.* Lowell, 3 Allen, 402; Norris *v.* Litchfield, 35 N. H. 271, 69 Am. Dec. 546; Indianapolis *v.* Emmelman, 108 Ind. 530, 58 Am. Rep. 65; Seymer *v.* Lake, 66 Wis. 651. The rule does not cover the case of an embankment outside of a sidewalk down which a frightened horse plunges. Hubbard *v.* Yonkers, 104 N. Y. 434, 58 Am. Rep. 522. See, also, Monk *v.* New Utrecht, 104 N. Y. 522; Clarke *v.* Richmond, 83 Va. 355, 5 S. E. 369.

the injury itself affords sufficient *prima facie* evidence of negligence. Thus if the buildings of individuals are destroyed by fire originating in sparks from a locomotive, the fire itself is held to be evidence of negligence, which requires to be overcome by some showing that the railway company provides suitable precautions against such an occurrence.⁷ Every lawful business is supposed capable of being carried on in a manner that will be consistent with safety to the business and property of others: all police rules, whether constituting a part of the common law or imposed by statute, must assume that this is practicable.⁸ The construction of railroads could not be permitted if their trains must necessarily run across the country, scattering fire and destruction along their way. But experience shows that this may be avoided by the exercise of reasonable care. Reasonable care in such a case is unquestionably a high degree of care, because the risk of injury when care is not observed is very great, not to one person merely, but to whole communities of persons all along the line of the road. There is, consequently, nothing unreasonable in presuming negligence from the *occurrence of an injury, and calling [*795] upon the railway authorities to rebut the *prima facie* case by showing that they take reasonable care, in the selection and management of their machines, to prevent such injury occurring.⁹

In the case of a railway company as carriers of passengers,

7—*Piggot v. Eastern Counties R. Co.*, 3 C. B. 229, and cases page 1225, note 19, *ante*.

8—When damage occurs from an act which when properly done does not cause damage, a presumption of negligence arises. *Mulcairns v. Janesville*, 67 Wis. 24.

9—*Louisville, etc., R. R. Co. v. Reese*, 85 Ala. 497, 5 So. 283, 7 Am. St. Rep. 66; *Louisville, etc., R. R. Co. v. Malone*, 109 Ala. 509, 20 So. 33; *Louisville, etc., R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; *Railway Co. v. Jones*, 59 Ark. 105, 26 S. W. 595; *Kelsey v. Chicago, etc., Ry. Co.*, 1 S. D. 80, 45 N. W. 204; *Missouri Pac. R. R. Co. v. Bartlett*, 69 Tex. 79, 6 S. W. 549; *Gulf, etc., R. R. Co. v. Benson*, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; *Gulf, etc., Ry. Co. v. Johnson*, 92 Tex. 591, 50 S. W. 563; *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207. See *Bell v. Ala. Midland Ry. Co.*, 108 Ala. 286, 19 So. 316; *Tinney v. Central of Ga. Ry. Co.*, 129 Ala. 523, 30 So. 623.

the reasons which charge the company with presumptive negligence in case of an injury seem to be still stronger. Suppose a railway train thrown from the track from some cause not at first apparent, and a large number of persons injured; would it be reasonable to put an injured person to the necessity of discovering and pointing out the cause, and tracing to the railway company the fault, before he could recover? Must he show that it did not occur through a defect in the machinery which vigilance would not have discovered, or through a felonious tearing up of the rails by robbers, or by the act of God or inevitable accident, and thus make out negligence in the company by negativing the existence of any other cause? Or may he who has entrusted his person and his life to the control of the company, to be carried by them in vehicles of their own selection and management, rely upon the injury itself as entitling him to redress, and leave to the defense the task of presenting exculpatory evidence?

Perhaps this question may be answered by a consideration of the nature of railway carriage of persons, and the means usually employed to render it safe. When properly managed it is supposed to be at least as safe as any other method of travel, and when crime or negligence or inevitable accident do not intervene, the risk of injury is so small as to awaken little concern. A flood may tear up the track, a felon may place obstructions upon it; but even as against these due caution will usually give complete protection. If, therefore, such caution is observed, the probability that any particular passenger will be injured is only as one to many millions. When, therefore, an injury occurs, it seems perfectly logical to assume that the cause must be found in a failure at some point to observe the caution the business required.

Presumptions accept the ordinary and probable as true until it is shown not to be true. Thus we presume a man innocent of crime; that a house standing yesterday is standing to-day;

[*796] that a man in peaceful possession of a tenement has a rightful *possession; that a man and woman living together as husband and wife, recognizing each other and being recognized by the community as such, are lawfully mar-

ried: these presumptions are made because in the great majority of cases the fact accords with the presumption, and therefore any different presumption in the great majority of cases would be a false one. It is equally reasonable when an injury to a railway passenger is shown, the cause of which is not at once apparent, to assume that it is chargeable to some want of care in the company or in some of its agents or servants. As is well said in a Pennsylvania case: "*Prima facie* where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the *onus* of disproving it." This is the rule where the injury is caused by a defect in the road, cars or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control, as a part of its duty to carry the passengers safely. Thus there is a presumption of negligence when a passenger is injured by the derailing of his train,¹⁰ or by a collision or other accident to the car in which he is riding.¹¹ But this rule of evidence is not conclusive. The carrier may rebut the presumption and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight and diligence

10—*Railway Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883; *Mitchell v. Southern Pac. R. R. Co.*, 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; *Cronk v. Wabash Ry. Co.*, 123 Ia. 349, 98 N. W. 884; *Furnish v. Missouri Pac. R. R. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316; *Chicago, etc., Ry. Co. v. Young*, 58 Neb. 678, 79 N. W. 556; *Bergen County Traction Co. v. Demarest*, 62 N. J. L. 755, 42 Atl. 729, 72 Am. St. Rep. 683; *Gulf, etc., Ry. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104.

11—*Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; *North Chicago St. Ry. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Elgin, etc., Traction Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436; *Louisville, etc., Ry. Co. v. Taylor*, 126 Ind. 126, 25 N. E. 869; *Louisville, etc., R. R. Co. v. Ritter*, 85 Ky. 368, 3 S. W. 591; *Western Md. R. R. Co. v. State*, 95 Md. 637, 53 Atl. 969; *Clark v. Chicago, etc., R. R. Co.*, 127 Mo. 197, 29 S. W. 1013; *Reynolds v. St. Louis Traction Co.*, 189 Mo. 408, 88 S. W. 50, 107 Am. St. Rep. 310; *Miller v. Ocean S. S. Co.*, 118 N. Y. 199, 23 N. E. 462; *Kinney v. North Carolina R. R. Co.*, 122 N. C. 961, 30 S. E. 313; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 58 S. W. 861, 51 L. R.

could not prevent.¹² The same rule is applied as against [*797] the proprietors of *stage coaches, and on like reasons. The presumption of negligence is raised by the injury,

A. 886; Gleeson *v.* Va. Mid. R. R. Co., 140 U. S. 435, 11 S. C. Rep. 859, 35 L. Ed. 458.

12—Carpue *v.* London, etc., R. Co., 5 Q. B. 747; Laing *v.* Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Sullivan *v.* Philadelphia, etc., R. R. Co., 30 Pa. St. 234; Meier *v.* Pennsylvania R. R. Co., 64 Pa. St. 225, 230, 3 Am. Rep. 581; Louisville, &c., Ry. Co. *v.* Jones, 108 Ind. 551; Lennon *v.* Rawitzer, 57 Conn. 583, 19 Atl. 334. But where a passenger was injured by the derailing of a street car the presumption of negligence is not overcome by showing that the track was examined the day before and the day after and found in good condition. Spellman *v.* Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316. See further on presumption of negligence from injury to a passenger. Seybolt *v.* New York, &c., R. R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Hill *v.* Ninth Ave., &c., Co., 109 N. Y. 239, 16 N. E. 61; White *v.* Boston, &c., R. R. Co., 144 Mass. 404; Eagle Packet Co. *v.* Defries, 94 Ill. 598, 34 Am. Rep. 245; Smith *v.* St. Paul, &c., Co., 32 Minn. 1, 50 Am. Rep. 550; Memphis, &c., Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71; Moore *v.* Des Moines, &c., Co., 69 Ia. 491; Coudy *v.* St. Louis, &c., Co., 85 Mo. 79; Pres., &c., Balt., &c., Road *v.* Leonhardt, 66 Md. 70; Louisville, etc., R. R. Co. *v.* Jones, 83 Ala. 376, 3 So. 902; Georgia Pac. Ry. Co. *v.* Love, 91 Ala. 432, 8 So. 714, 24 Am. St. Rep. 927; Bosquio *v.* Sutro R. R. Co., 131 Cal. 390, 63 Pac. 682; Le Blanc *v.* Sweet, 107 La. Ann. 355, 31 So. 766, 90 Am. St. Rep. 303; Hite *v.* Met. St. Ry. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555; Whalin *v.* Consolidated Traction Co., 61 N. J. L. 606, 40 Atl. 645, 68 Am. St. Rep. 723, 41 L. R. A. 836; Herstine *v.* Lehigh Val. R. R. Co., 151 Pa. St. 244, 25 Atl. 104; Crary *v.* Lehigh Val. R. R. Co., 203 Pa. St. 525, 53 Atl. 363, 93 Am. St. Rep. 778, 59 L. R. A. 815; Allen *v.* Northern Pac. Ry. Co., 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; Carroll *v.* Chicago, etc., R. R. Co., 99 Wis. 399, 75 N. W. 176, 67 Am. St. Rep. 872. That if the evidence rebuts the presumption, there is no *prima facie* case from the injury, see Terre Haute, &c., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168. See, also, Spear *v.* Phila., &c., Co., 119 Pa. St. 61, 12 Atl. 824. If a collision occurs between the vehicles of two carriers and the passenger of one is injured, there is no presumption of negligence against the other. Phila., &c., R. R. Co. *v.* Boyer, 97 Pa. St. 91; but there is as to the carrying company. Iron, &c., R. R. Co. *v.* Mowery, 36 Ohio St. 418. See Centr. Pass., &c., Co. *v.* Kuhn, 86 Ky. 571, 6 S. W. 441. No Presumption of negligence where injury occurs in pushing a swing door in a passage in going to a boat. Hayman *v.* Penn., &c., Co., 118 Pa. St. 508, 11 Atl. 815. Nor where just after getting on a platform of a horse car one is

but it may be overcome by showing a cause consistent with due care.¹³

Where a passenger sitting by a car window was injured by a missile, it was held that there was no presumption of negligence. To raise such presumption and throw the burden of proof on the

thrown off by a jerk. *Stager v. Ridgeton Co.*, 119 Pa. St. 70, 12 Atl. 821. See also *Brown v. Congress, &c., Ry. Co.*, 49 Mich. 153; *Delaware, &c., R. R. Co. v. Naphneys*, 90 Pa. St. 135. There is no presumption of negligence from fact of death in transit of a horse carried as freight, where there was no collision or accident to the train. *Penn. R. R. Co. v. Riordon*, 119 Pa. St. 577, 13 Atl. 324; *St. Louis, &c., v. Weakly*, 50 Ark. 397, 8 S. W. 134. From an injury to a passenger there is no presumption that he was in the exercise of due care. *Bonce v. Dubuque St. Ry. Co.*, 53 Ia. 278. Negligence may be presumed from a fact but not from a presumption from that fact. From the fact that other drivers are overworked it cannot be presumed that a given driver is overworked, and that an injury occurred because of his inattention caused by over-work. *Phila., &c., Ry. Co. v. Henrice*, 92 Pa. St. 431, 37 Am. Rep. 699.

13—*Christie v. Griggs*, 2 Camp. 79; *Crofts v. Waterhouse*, 11 Moore, 133; S. C. 3 Bing. 319; *Boyce v. California Stage Co.*, 25 Cal. 460; *Lawrence v. Green*, 70 Cal. 417, 59 Am. Rep. 428; *McKinney v. Neil*, 1 McLean, 540; *Stokes v. Saltonstall*, 13 Pet. 181; *Wall v. Livezay*, 6 Col. 465; *Sanderson v. Frazier*, 8 Id. 79, 54 Am. Rep. 544; *Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125; *Bush v.*

Barnett, 96 Cal. 202, 31 Pac. 2; *Budd v. United Carriage Co.*, 25 Ore. 314, 35 Pac. 660, 27 L. R. A. 279; *Louisville, etc., Co. v. Nolan*, 135 Ind. 60, 34 N. E. 710. The fall of a passenger elevator presumes negligence. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; *Hartford Deposit Co. v. Solitt*, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; *Springer v. Ford*, 189 Ill. 430, 59 N. E. 953, 82 Am. St. Rep. 464, 52 L. R. A. 930; *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. Rep. 630; *Womble v. Merchants Grocery Co.*, 135 N. C. 474, 47 S. E. 493. An injury caused by a gun going off while held in one's hand *prima facie* charges him with negligence. *Underwood v. Hewson*, 1 Strange, 596; *Morgan v. Cox*, 22 Mo. 373; *Chataigne v. Bergeron*, 10 La. Ann. 699. So where it occurs in shooting at a mark. *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55.

It has been said that it is competent in connection with all the facts and circumstances of the case, to infer the absence of fault on the part of the injured party from the known disposition of men to avoid injury to themselves. *Northern Cent. R. Co. v. State*, 31 Md. 357, and see cases p. *809, notes; but as this would generally, in the case of railway accidents, operate strongly with both parties, it cannot often aid much in reaching a just conclusion.

carrier, the court holds that "it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business, or in the appliances of transportation."¹⁴

In the case of an injury by a railway train to one who is not a passenger, the rule of presumption would seem to be quite different. Common observation does not teach that in the great majority of cases where one is run over at a railway crossing the managers of the train are in fault. The probabilities are that with the exercise of due caution one will protect himself against injury at such places; and if he receives an injury and complains of it, he may justly be called upon for an explanation. Thoughtlessness, pre-occupation, intoxication, a reckless pushing forward to cross in advance of the train—any of these would be at least as likely to lead to such an injury as carelessness in the managers of the train; and it would be unre-

14—*Thomas v. Philadelphia, etc., R. R. Co.*, 148 Pa. St. 180, 23 Atl. 989, 15 L. R. A. 416. "The presumption arises not from the fact of injury, but from its cause, or the circumstances attending it. Evidence simply that a passenger on a moving train fell against the stove, and was injured, would not raise a presumption of negligence against the company. On such evidence the jury would not be allowed to presume the cause of the falling, and upon such a presumption build another of negligence. The cause, or at least the nature of the accident resulting in the injury, must be shown before a presumption of negligence attaches." *Saunders v. Chicago, etc., Ry. Co.*, 6 S. D. 40, 60 N. W. 148. To same effect: *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142; *Breen v. New York Central, etc., R. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450; *Hawkins v. Front St. Cable Ry. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16 Am. St. Rep. 808. See *Herstine v. Lehigh Val. R. R. Co.*, 151 Pa. St. 244, 25 Atl. 104; *Crary v. Lehigh Valley R. R. Co.*, 203 Pa. St. 525, 53 Atl. 363, 93 Am. St. Rep. 778, 59 L. R. A. 815. Where a rock came down upon a train while passing through a cut and killed a passenger, it was held that there was no presumption of negligence. *Fleming v. Pittsburgh, etc., Ry. Co.*, 158 Pa. St. 130, 27 Atl. 858, 38 Am. St. Rep. 835, 22 L. R. A. 351. But where a passenger was injured by the train running into a landslide it was held that negligence would be presumed. *Gleeson v. Va. Mid. R. R. Co.*, 140 U. S. 435, 11 S. C. Rep. 859; 35 L. Ed. 458.

sonable to call upon the railway company to disprove negligence when to the common mind there could be no presumption *that negligence existed.¹⁵ Unlike the case of [*798] the passenger, who submits himself to the control of the carrier, and is not called upon to do more than to quietly remain in his place, this case is one calling for vigilance on both sides, and in which the want of care by either, would be equally liable to result in injury.

But while the plaintiff's case would require some showing of negligence, it might, perhaps, be easily made out, if the statute required a warning to be sounded as the train approached, and it could be shown that this was neglected. Trace the injury to this neglect and the *prima facie* case is made out; and while the fact of neglect does not conclusively determine that the injury is attributable to it,¹⁶ yet as the party approaching a

15—*Skelton v. London, &c., R. timore, &c., Co. v. Neal*, 65 Md. Co., L. R. 2 C. P. 631; *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258. So there is no presumption of negligence from striking an animal upon a crossing. *McKissock v. St. Louis, &c., Ry. Co.*, 73 Mo. 456; nor from the explosion of giant powder in a car in a railroad yard, whereby adjacent property is injured. *Walker v. Chicago, &c., Ry. Co.*, 71 Ia. 658, 33 N. W. 224. Nor that a freight car door falls on one standing near the track. *Case v. Chicago, &c., Co.*, 69 Ia. 449. Nor that a cow is found dead in an agister's field. *Wood v. Rennick*, 143 Mass. 453. Nor from fact that when one's horse is running away his carriage damages another. *Button v. Frink*, 51 Conn. 342, 50 Am. Rep. 24. So there is in general no presumption of the master's negligence from fact of servant's injury. *Kuhns v. Wisconsin, &c., Ry. Co.*, 70 Ia. 561; *Baldwin v. St. Louis, &c., Co.*, 68 Ia. 37; *Baltimore, &c., Co. v. Denver, &c., Co.*, 438; *Murray v. Denver, &c., Co.*, 11 Colo. 124, 17 Pac. 484; *Phila., &c., Co. v. Hughes*, 119 Pa. St. 301, 13 Atl. 286; *Sorenson v. Menasha, &c., Co.*, 56 Wis. 338. But circumstances may be such as to raise such presumption. *Cummings v. Nat. Furn. Co.*, 60 Wis. 603.

16—The failure to ring a bell or sound a whistle does not alone make out a case of liability. *Quincy, &c., R. R. Co. v. Wellhoefer*, 72 Ill. 60; *Chicago, &c., R. R. Co. v. Bell*, 70 Ill. 102; *Kidder v. Dunstable*, 11 Gray, 342; *Cleveland, &c., R. R. Co. v. Elliott*, 28 Ohio St. 340; *Pakalinsky v. New York, &c., R. R. Co.*, 82 N. Y. 424; *Railroad Co. v. Houston*, 95 U. S. 697; *Zimmerman v. Hannibal, &c., R. R. Co.*, 71 Mo. 76. See *International, &c., Ry. Co. v. Gray*, 65 Tex. 32; *Baltimore, &c., R. R. Co. v. Miller*, 29 Md. 252. Especially if sounding the alarm could not have prevented the injury. Ill.

crossing has reason to expect that the statute will be complied with, he is not put to that degree of vigilance and watchfulness that otherwise would be required of him, and he goes into

the evidence with less necessity for full and satisfactory [*799] *explanation of his own movements than would otherwise be demanded. He has shown fault in the railway company when he has shown the failure to sound the alarm; and as the injury is precisely such an one as the alarm was intended to prevent, some presumption that the injury resulted from the neglect may well be indulged unless his own fault was manifest.

The rule applied to carriers of passengers is not a special rule, to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose upon one party alone the obligation of special care. The case may be instanced of a householder on a prominent street of a city repairing his roof. While thus engaged a slate falls from the roof and injures a person passing along the street below. Here, manifestly, it was the duty of the householder to take such precautions as would reasonably guard against such an injury; all the obligation of special care was upon him, and the passer-by had a right to assume that no work being done over the walk was to subject him to danger.¹⁷ True, the act of God, or some excusable acci-

Cent. R. R. Co. v. Phelps, 29 Ill. injured by a brick falling from 447; Toledo, &c., R. R. Co. v. Jones, 76 Ill. 311; Toledo, &c., R. R. Co. v. Durkin, 76 Ill. 395. Compare Beisiegel v. N. Y. Cent. R. R. Co., 34 N. Y. 622; Steves v. Oswego, &c., R. R. Co., 18 N. Y. 422; Hoffman v. Union Ferry Co., 68 N. Y. 385.

17—*Byrne v. Boadle*, 2 H. & C. 722. So if piece of zinc falls from a completed roof. *Khron v. Brock*, 144 Mass. 516. See *Hunt v. Hoyt*, 20 Ill. 544. A building was in process of construction and nineteen independent contractors were at work on the building with an aggregate of two hundred and fifty men. A passer in the street was

Wolf v. Am. Tract Society, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241. Negligence was presumed where plaintiff on the sidewalk was injured by a chisel falling from a scaffold. *Dixon v. Plums*, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698. So where a sign fell into the street. *Reynolds v. Van Buren*, 10 Misc. 703,

dent may have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection.

It is thus perceived that though the onus of showing negligence is on the party complaining of it, there are some cases in which it is made out by showing the injury and connecting the defendant with it. Some other cases may not be quite so plain, and yet in these a similar presumption may go far to support the plaintiff's case. The case of collisions in the use of the highway is in point. The custom of this country, in some States enacted into statute law, requires that where teams approach and are about to pass in the highway, each shall keep to the right of the center of the traveled portion of the road. This is a regulation to avoid collisions, and if one neglects it he is justly required to take upon himself unusual *care to [*800] avoid mischief,¹⁸ and, if an accident follow, an explanation of the occurrence must begin with some presumption against him. Still, the other party, though he has obeyed the statute and kept to the proper side of the road, is not at liberty to neglect all further precautions, and if he can prevent injury by the exercise of ordinary care, he will have no ground for complaint if he is injured through a failure to exercise it.¹⁹ The being on the wrong side of the road is a fault, but it is not one from which a collision necessarily results, and if the col-

31 N. Y. S. 827. Also, cases of injury by throwing snow from roofs. Corrigan *v.* Union Sugar Refinery, 98 Mass. 577, 96 Am. Dec. 685; Jewell *v.* Grand Trunk R. Co., 55 N. H. 84.

18—Pluckwell *v.* Wilson, 5 C. & P. 375; Chapin *v.* Hawes, 3 C. & P. 554; Wilson *v.* Rockland, &c., Co., 2 Harr. 67; McLane *v.* Sharpe, 2 Harr. 481; Daniels *v.* Clegg, 28 Mich. 32; Brooks *v.* Hart, 14 N. H. 307.

19—See *ante*, p. 274, and cases cited; also, Clay *v.* Wood, 5 Esp. 44; Wayde *v.* Carr, 2 D. & R. 255; Turley *v.* Thomas, 8 C. & P. 103;

Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249; Bigelow *v.* Reed, 51 Me. 325; McLane *v.* Sharpe, 2 Harr. 481. If an obstruction forces one over on the wrong side of the road and he runs against another without fault, the case is to be treated as one of inevitable accident, and he is not liable. Strouse *v.* Whittlesey, 41 Conn. 559. The fact that one is on the wrong side of the road is no evidence of negligence in an action brought by one who was injured while crossing the road on foot. Lloyd *v.* Ogleby, 5 C. B. (n. s.) 667.

lision only followed the concurrence of this fault with others equally blameworthy, the apparent case which the first fault went far to establish is met and overcome by the further showing.²⁰

Res ipsa loquitur. Further Illustrations. The rule known as *res ipsa loquitur* may be thus stated: When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care.²¹ In speaking of the maxim *res ipsa loquitur* the Supreme Court of Pennsylvania says: "The maxim *res ipsa loquitur* is itself the expression of an exception to the general rule that negligence is not to be inferred but to be affirmatively proved. The ordinary application of the maxim is limited to cases of an absolute duty, or an obligation practically amounting to that of an insurer. Cases not coming under one or both of these heads must be those in which the circumstances are free from dispute and show, not only that they were under the exclusive control of the defendant, but that in the ordinary course

20—The party on the wrong side of the road should be held responsible for an injury, unless it appear clearly that the other had ample means and opportunity to prevent it. *Chapin v. Hawes*, 3 C. & P. 554. See the subject discussed in *Hoffman v. Union Ferry Co.*, 68 N. Y. 385. And, see further, *Sheridan v. Brooklyn, &c., R. R. Co.*, 36 N. Y. 39, 93 Am. Dec. 490; *Lane v. Atlantic Works*, 107 Mass. 104.

21—*Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718; *Arkansas Tel. Co. v. Ratteree*, 57 Ark. 429, 21 S. W. 1059; *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443. "*Res ipsa loquitur* is

a maxim of evidentiary potency and consequence, and serves to imply or raise a presumption of negligence as a fact, where from the physical facts attending the accident or injury there is a reasonable probability that it would not have happened if the party having control, management or supervision, or with whom rests the responsibility for the sound and safe condition of the thing, property or appliance which is the immediate cause of the accident or injury, had exercised usual or proper care and precaution with reference to it." *Boyd v. Portland Elec. Co.*, 41 Ore. 336, 342, 68 Pac. 810.

of experience no such result follows as that complained of. It is sometimes said that the mere happening of an accident in this class of cases raises a presumption of negligence, but this is hardly accurate. Negligence is never presumed. If it were, it would be the duty of the court, in the absence of exculpatory evidence by the defendant, to direct a verdict for the plaintiff, whereas in these cases the question is for the jury. The accurate statement of the law is not that negligence is presumed but that the circumstances amount to evidence from which it may be inferred by the jury. In cases where the duty is not absolute, like that of the common carrier to exercise the highest care and skill in regard to the safety of a passenger who has committed himself to its charge, but arises in the ordinary course of business, it is essential that it shall appear that the transaction in which the accident occurred was in the exclusive management of the defendant, and all the elements of the occurrence within his control, and that the result was so far out of the usual course that there is no fair inference that it could have been produced by any other cause than negligence. If there is any other cause apparent to which the injury may with equal fairness be attributed, the inference of negligence cannot be drawn.²²

Negligence is presumed where a person outside the right of way of a railroad company is hit by a derailed car or by something falling from a passing car.²³ So where a bar of iron falls from the structure of an elevated railroad upon a traveler in the street.²⁴ So where one crossing a street, steps on the rail

22—*Zahniser v. Penn. Torpedo Co.*, 190 Pa. St. 350, 42 Atl. 707. 454, 103 Am. St. Rep. 243. So where a person at work in the

23—*West Virginia Cent., etc., R. R. Co. v. State*, 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574; *Howser v. Cumberland, etc., R. R. Co.*, 80 Md. 146, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L. R. A. 154. But where a person was standing by a crossing and was hit by a projecting piece of lumber there is no presumption of negligence in the company. *Chicago, etc., R. R. Co. v. Reilly*, 212 Ill. 506, 72 N. E. 24—*Hogan v. Manhattan Ry. Co.*, 149 N. Y. 23, 43 N. E. 403; *Hogan v. Manhattan Ry. Co.*, 6 Misc. 295, 26 N. Y. S. 792; *Morseman v. Manhattan Ry. Co.*, 16 Daly, 249, 10 N. Y. S. 105. Where one walking on the street is burnt by a cin-

of an electric railway and receives a shock.²⁵ Or if a horse is frightened from the same cause and, running away, injures the plaintiff.²⁶ When a traveler in a public street is injured by contact with a live wire broken down or incumbering the street, negligence is presumed on the part of the owner of the wire.²⁷ And where a man received an electric shock while handling an incandescent lamp in his house and it appeared that the current in the house was of higher voltage than it should have been,

der falling from an elevated railroad, there is a presumption of negligence. *Wiedmer v. New York El. R. R. Co.*, 41 Hun, 284. But where a block of wood fell from the defendant's structure upon its own servant working below it was held there was no presumption of negligence. *Nolan v. Brooklyn Heights R. R. Co.*, 68 App. Div. 219, 74 N. Y. S. 120. So where some wood, shavings and saw dust fell from the structure and the dust was blown into the eyes of a traveler. *Wadsworth v. Boston El. Ry. Co.*, 182 Mass. 572, 66 N. E. 421.

25—*Braham v. Nassau Elec. R. R. Co.*, 72 App. Div. 456, 76 N. Y. S. 578.

26—*Trenton Pass. Ry. Co. v. Cooper*, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637.

27—*Arkansas Tel. Co. v. Rateree*, 57 Ark. 429, 21 S. W. 1059; *Central Union Tel. Co. v. Sokola*, 34 Ind. App. 429, 73 N. E. 143; *Newark Elec. Lt. Co. v. Ruddy*, 62 N. J. L. 505, 41 Atl. 712, 57 L. R. A. 624; *Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. S. 321; *Clancy v. New York, etc., Ry. Co.*, 82 App. Div. 563, 81 N. Y. S. 875; *O'Leary v. Glens Falls Gas, etc., Co.*, 107 App. Div. 505; *Boyd v. Portland Elec. Co.*, 37 Ore. 567, 62 Pac. 378, 52 L. R. A. 509; *Boyd v. Portland Elec. Co.*, 40 Ore. 126, 66 Pac. 576, 57 L. R. A. 619; *Chaperon v. Portland Elec. Co.*, 41 Ore. 39, 67 Pac. 929; *Boyd v. Portland Elec. Co.*, 41 Ore. 336, 68 Pac. 810; *Herbert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 35 So. 731, 100 Am. St. Rep. 505, 64 L. R. A. 101; *Geisman v. Mo.-Edison Elec. Co.*, 173 Mo. 654, 73 S. W. 654; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810; *Ahern v. Ore. Tel. Co.*, 24 Ore. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Norfolk Ry. & Lt. Co. v. Spratley*, 103 Va. 379, 49 S. E. 502; *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499. “It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town shall be required to exercise the utmost degree of care in the construction, inspection and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate to it.” *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 211, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810. And see *Winkelman v.*

negligence was presumed as against the company which wired the house and furnished the lamp and the current.²⁸ Negligence was presumed in the following cases: Where the plaintiff's buildings were destroyed by the explosion of the defendant's dynamite factory.²⁹ Where a new gas tank, on being filled with water, burst and injured the plaintiff on adjoining

Kansas City Elec. Lt. Co., 110 Mo. Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39.

v. Electrical Co., 54 W. Va. 395, 46 S. E. 217. Where an electric lamp suspended over a street falls upon a traveler, negligence is presumed. Excelsior Elec. Co. v. Sweet, 57 N. J. L. 224, 30 Atl. 553.

28—Alexander *v.* Nanticoke Lt. Co., 209 Pa. St. 571, 58 Atl. 1068, 67 L. R. A. 475; Crowe *v.* Nanticoke Lt. Co., 209 Pa. St. 580, 58 Atl. 1071. The accidents in these cases happened in the same neighborhood and on the same night. In the latter case the person using the lamp was killed. In the former case the court says: "To say that one injured as the appellant was cannot recover unless he affirmatively proves, in the first instance, the specific act of negligence of the company which caused the injury, would, in many cases, be a denial of a right to recover at all, no matter how negligent the company might be. * * * The user of electricity, though having knowledge of its dangerous character, has no knowledge of how that danger can be controlled. He relies upon the company to control it, and, when this appellant took the lamp in his hand, he had a right to do so without a thought that it had not been controlled." p. 575. See a similar case, with same holding:

29—Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718. "Appellant was engaged in the manufacture of dynamite. In the ordinary course of things an explosion does not occur in such manufacture if proper care is exercised. An explosion did occur; *ergo*, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care. The logic is unassailable, and the principle of law of presumptions of fact erected thereon is as sound as the logic upon which it is based." p. 562. A judgment for over \$40,000 was affirmed in this case. Plaintiff's vessel was set on fire by an explosion of oil in the defendant's refinery. Held no presumption of negligence. Consulich *v.* Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475. So in case of the explosion of a boiler. Huff *v.* Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613. See *ante*, p. 1234. So in case of an explosion of gas upon the premises of a gas company whereby one lawfully on the premises of the company was injured. Washington Gas Lt. Co. *v.* Eckloff, 4 App. D. C. 174; Washington Gas Lt. Co. *v.* Eckloff, 7 App. D. C. 372.

property.³⁰ Where sparks escaped from a fire pot used in repairing a roof, which set fire to the building.³¹ Where a chimney fell on the plaintiff's property in an ordinary wind.³² Where caustic soda was used in the defendant's mill and was found in a mud hole in one of the approaches to the mill and the plaintiff's horse, going through the hole, received burns from which he died.³³ Some additional illustrations are given in the margin.³⁴

Whether Negligence is a Question of Law. A point of very high importance is, whether the question of negligence is one which, under any circumstances, can be disposed of as a question of law, and if so, what those circumstances are. It is of high importance because in a great proportion of cases where injuries are supposed to have resulted from negligence the case of the injured party is one which appeals strongly to sympathy and this sympathy is in danger of influencing improperly—perhaps insensibly—the minds of those who are called upon to consider the question of redress. If a jury is summoned, the influence upon their minds is likely to be more than upon

30—Duerr *v.* Consolidated Gas Co., 86 App. Div. 14, 83 N. Y. S. 714.

31—Shafer *v.* Lacock, 168 Pa. St. 497, 32 Atl. 44, 29 L. R. A. 254.

32—Cork *v.* Blossom, 162 Mass. 330, 38 N. E. 495, 44 Am. St. Rep. 362, 26 L. R. A. 256; Travers *v.* Murray, 87 App. Div. 552, 84 N. Y. S. 558. So where a brick arch fell and injured the plaintiff. Chenall *v.* Palmer Brick Co., 117 Ga. 106, 43 S. E. 443; Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329.

33—Atlanta Cotton Seed Oil Mills *v.* Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244.

34—Armbright *v.* Zion, 108 Ia. 338, 79 N. W. 72; Vincent *v.* Norton, etc., St. Ry. Co., 180 Mass. 104, 61 N. E. 822; Sheridan *v.* Foley, 58 N. J. L. 230, 33 Atl. 484;

Cole *v.* N. Y. Bottling Co., 23 App. Div. 177, 48 N. Y. S. 893; Horn *v.* N. J. Steamboat Co., 23 App. Div. 302, 48 N. Y. S. 348; Washington *v.* Missouri, etc., Ry. Co., 90 Tex. 314, 38 S. W. 764; Marcom *v.* Raleigh, etc., R. R. Co., 126 N. C. 200, 35 S. E. 423; Richmond Ry. & Elec. Co. *v.* Hudgins, 100 Va. 409, 41 S. E. 736; Klitzke *v.* Webb, 120 Wis. 254, 97 N. W. 901. Where a person is injured by a runaway team, there is no presumption that the runaway was due to negligence. Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760; O'Brien *v.* Miller, 60 Conn. 214, 22 Atl. 544, 25 Atl. 320. So where one, watching an exhibition of fire works, is hit by the stick of a spent rocket. Crowley *v.* Rochester Fireworks Co., 95 App. Div. 13, 88 N. Y. S. 483.

the mind of the judge. The judge is the representative of order and stability in the State; his training [*801] has impressed upon his mind the necessity of fixed laws, and has taught him how destructive of these is the yielding to sympathy. He knows that "hard cases are apt to make bad law." Moreover, when corporations are defendants in suits for negligence, the popular prejudice is apt to run strongly against them, and this may effect the jury when it might not affect the judge. Defendants are, therefore, likely to prefer that the judge himself shall dispose of the question of negligence, in the belief that in his rulings they will be safer than in the uncertain conclusions of the popular tribunal.

Questions of law the judge can conclusively pass upon; questions of fact are solved by the jury. If negligence is a question of law the judge may say that there is or is not negligence under a given state of facts, and the jury must accept this conclusion as they must his ruling on any other question of law. But if it is not a question of law he will not be likely to venture an opinion upon it, and if he does the jury may disregard it.

On the general question whether the law can draw the conclusion of negligence, the following considerations are presented: The question broadly stated must be, whether, in the infinite variety of human transactions, the law can say that, as to certain of them, the party charged with a duty was negligent, and as to all others he was not negligent. Manifestly this is impossible. There is no clear line of either moral or legal right by which the infinite diversity of cases where injury has resulted may be classified. Seldom, indeed, is one case in its facts exactly like one which has preceded it, and the decision upon the fault of one can consequently throw little light upon the next. Rules of law must be certain so as to constitute guides; but the rule of one case can never constitute a guide in the next if the facts and the conclusions flowing from them are of that indeterminate character and quality that the question whether the one runs parallel to the other is one upon which different minds and different judges would be likely to disagree.

There are some cases as to which there should be and could be no real doubt in the minds of fair men. Thus, if the engineer

of a train of cars were to run it at a maximum rate of speed through a city, across its principal streets, at an hour of [*802] the day when many persons would be likely to be *passing, and a person should be run over at one of the crossings, the case would seem to be so clearly one of reckless conduct that the judge might well say to the jury that it was a case of negligence and that the law so pronounced it. If, on the other hand, the engineer were in the night time, when moving at customary speed, to run over a drunken man lying upon the track at a point distant from crossings and where danger was not to be anticipated, it would seem equally plain that a conclusion exonerating the engineer should be drawn.³⁵ It is not to be supposed that two men equally fair could differ concerning such cases.

But in a very large proportion of the cases in which negligence is counted upon, the facts are of that ambiguous quality, or the proper conclusion so doubtful, that different minds would be unable to agree concerning the existence of fault, or the responsibility for it. The question will often be, does the defendant appear to have exercised the degree of care which a reasonable man would be expected to exercise under like circumstances? To such a question a man of exceeding cautious temperament might respond that he did not; another more sanguine and bold might say he did; and by the side of one or the other of these would the rest of the community range themselves, each person largely affected by temperament and perhaps by his own experience, but firmly maintaining that rule to be a proper one which now, on a retrospective examination of the facts, seems to him to be such.

If the judge, in such a case, were to pass upon negligence as a question of law, he must, in doing so, be endeavoring to enforce a rule of a variable nature, which must take its final coloring from the experience, training and temperament of the judge himself; a rule which his predecessor might not have accepted,

35—*Toledo, &c., R. R. Co. v.* 61 Md. 154. Same case 65 Md. *Miller*, 76 Ill. 278; *Grows v. Maine* 394; *Houston, &c., Ry. Co. v. Cent. R. R. Co.*, 67 Me. 100; *Wil- Sympkins*, 54 Tex. 615, 38 Am. *liams v. South. Pac. R. Co.*, 72 Cal. Rep. 632; *McClelland v. Louisville*, 120. See *Kean v. Balt., &c., Co., &c., Co.*, 94 Ind. 276.

and which his successor may reject, and upon which a court of review may reverse his action, not because the facts are differently regarded, but because judges are men and men are different. As has been said in one case, it must be a very clear case, indeed, which would justify the *court in [*803] taking upon itself this responsibility. For when the judge decides that a want of due care is or is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and measuring the conduct of the party by that, turns the case out of court or otherwise disposes of it upon his opinion of what a reasonably prudent man ought to have done under the circumstances.³⁶ But this is only one of many difficulties when the court takes into its own hand the decision upon questions of negligence. It often happens that fault in some one is unquestionable, and yet that the deduction of negligence is in dispute, because the duty to guard against it is disputable and is disputed. Thus, a passenger by railway allows his arm to project somewhat out of the window, and he is injured by its striking some object which is being passed. Some one, manifestly, is chargeable with want of due care: either the passenger in allowing his arm to project at all, or the railway company in not taking care that nothing shall be so near to the cars as that so natural an act as the putting the hand outside shall

36—Detroit, &c., R. R. Co. *v.* out of the duties and relations of Van Steinburg, 17 Mich. 99. See the parties concerned, and is as Leavitt *v.* Chicago, &c., Ry. Co., much a fact to be found by the 64 Wis. 228; Cumberland, &c., R. jury as the alleged facts to which R. Co. *v.* State, 37 Md. 156; Lewis it attaches, by virtue of such v Baltimore & Ohio R. R. Co., 38 Md. 588, 17 Am. Rep. 521; McMahon *v.* Nor. Cent. R. R. Co., 39 Md. 438; Healey *v.* City R. R. Co., 28 Ohio St. 23; Eppendorf *v.* Railroad Co., 69 N. Y. 195, 25 Am. Rep. 171; Lake *v.* Milliken, 62 Me. 240; Estes *v.* Atlantic, &c., R. R. Co., 63 Me. 308; Garlick *v.* Dorsey, 48 Ala. 220. “Negligence in one sense is a quality, attaching to acts dependent upon and arising

peril a limb. In some cases it has been said the passenger [*804] is guilty of negligence in law;³⁷ but other *courts, with certainly some good reason, hold that the question of responsibility in such a case must be one of fact, and might be different according as the circumstances varied.³⁸

The proper conclusion seems to be this: If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary, he should say to them, "In the judgment of the law this conduct was negligent," or, as the case might be, "There is nothing in the evidence here which tends to show a want of due care." In either case he draws the conclusion of negligence or the want of it as one of law.³⁹

37—*Todd v. Old Colony R. R. Co.*, 3 Allen, 18; *Pittsburgh, &c., R. R. Co. v. McClurg*, 56 Pa. St. 294, overruling *New Jersey R. R. Co. v. Kennard*, 21 Pa. St. 203; *Indianapolis, &c., R. R. Co. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336; *Louisville, &c., R. R. Co. v. Sickings*, 5 Bush, 1, 96 Am. Dec. 320; *Pittsburgh, &c., R. R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568; *Dun v. Seaboard, &c., R. R. Co.*, 78 Va. 645, 49 Am. Rep. 388.

38—*Spencer v. Milwaukee, &c., R. R. Co.*, 17 Wis. 487, 84 Am. Dec. 758; *Holbrook v. Utica, &c., R. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Dahlberg v. Minn. St. Ry. Co.*, 32 Minn. 404; *Summers v. Crescent City R. R. Co.*, 34 La. Ann. 139, 44 Am. Rep. 419. See *Chicago, &c., R. R. Co. v. Pondrom*, 51 Ill. 333; *Farlow v. Kelly*, 108 U. S. 288. If the injury occurs

from upsetting of coach it is not negligence that one's arm is outside of the rail. *Sanderson v. Frazier*, 8 Col. 79, 54 Am. Rep. 544.

39—This paragraph approved in *Farrell v. Waterbury Horse R. R. Co.*, 60 Conn. 239, 21 Atl. 675, wherein the court says: "In cases involving the question of negligence, where the general rule of conduct is alone applicable, where the facts found are of such a nature that the trier must, as it were, put himself in the place of the parties, and must exercise a sound discretion based upon his experience, not only upon the question what did the parties do or omit under the circumstances, but upon the further question, what would a prudent, reasonable man have done under those circumstances, and especially where the facts and circumstances are of

Negligence may consist in a failure to conform to a specific rule of law or in a failure to act as a man of ordinary prudence would act under the same circumstances. When the act or omission violates a specific rule of law, it is negligence as matter of law. In the other case it may be a question of law or fact according to the circumstances as developed by the evidence.⁴⁰ The definition of negligence and the determination of a standard of duty is always a matter of law for the court.⁴¹ "Generally, negligence is a mixed question of law and fact; and it is for the consideration of the jury, when the evidence is conflicting, or only tends to prove the facts, or if different minds may reasonably draw different inferences, though the facts are uncontested. The court should not take the question from the jury, unless the facts are undisputed, or conclusively proved, and the inferences indisputable; or, unless the rule of duty is clearly defined, and is invariable, whatever may be the circumstances; or, unless the court could properly sustain a demurrer to the evidence."⁴² If the facts are undisputed and if only one inference can reasonably be drawn therefrom, the question of negligence is one of law for the court.⁴³ Where the evidence is so decidedly in favor of one of

such a nature that honest, fair-minded, capable men might come to different conclusions upon the latter question, the inference or conclusion of negligence is one to be drawn by the trier and not by the court as matter of law." p. 257.

40—Ibid. Negligence cannot be defined and measured by any precise standard. It is always relative to particular facts and circumstances upon which it is sought to be predicated. *Fox v. Oakland Con. St. Ry. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; *Wikberg v. Olson Co.*, 138 Cal. 479, 71 Pac. 511.

41—*Custer v. Baltimore, etc., R. R. Co.*, 206 Pa. St. 529, 55 Atl.

1130; *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215, 35 Atl. 1126; *Peltier v. Bradley D. & C. Co.*, 67 Conn. 42, 34 Atl. 712, 32 L. R. A. 651; *Highland Ave. & B. R. R. Co. v. Donovan*, 94 Ala. 299, 10 So. 139.

42—*Wilson v. Louisville, etc., R. R. Co.*, 85 Ala. 269, 4 So. 701. And see *Van Praag v. Gale*, 107 Cal. 438, 40 Pac. 555; *Fisher v. Monongahela Con. Ry. Co.*, 131 Pa. St. 292, 18 Atl. 1016.

43—*Overacre v. Blake*, 82 Cal. 77, 22 Pac. 979; *Cleghorn v. Thompson*, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 442; *Missouri Pac. Ry. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Maine Water Co. v. Knickerbocker*

the parties on the question of negligence that the court would feel obliged to grant a new trial if the verdict was in favor of the other party, it should direct a verdict for the former.⁴⁴ If the facts are in dispute or in doubt, or if fair-minded men might reasonably draw different conclusions therefrom, then the question of negligence is for the jury.⁴⁵ If there is room

Steam Towage Co., 99 Me. 473; so clearly and conclusively proved Stone *v.* Boston, &c., R. R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; Sadowski *v.* Michigan Car Co., 84 Mich. 100, 47 N. W. 598; Chicago, etc., R. R. Co. *v.* Barnard, 32 Neb. 306, 49 N. W. 362; Seyor *v.* Otoe, 66 Neb. 566, 92 N. W. 756; Hinshaw *v.* Raleigh, etc., R. R. Co., 118 N. C. 1047, 24 S. E. 428; Russell *v.* Carolina Cent. R. R. R. Co., 118 N. C. 1098, 24 S. E. 512; Sheldon *v.* Asheville, 119 N. C. 606, 25 S. E. 781; Ward *v.* Odell Mfg. Co., 123 N. C. 248, 31 S. E. 495; Massey *v.* Seller, 45 Ore. 267, 77 Pac. 397; Wade *v.* Columbia Elec. Co., 51 S. C. 296, 29 S. E. 233, 64 Am. St. Rep. 676; McKeever *v.* Homestake Min. Co., 10 S. D. 599, 74 N. W. 1053; Trac-tion Co. *v.* Carroll, 113 Tenn. 514, 82 S. W. 313; Sanches *v.* San Antonio, etc., Ry. Co., 88 Tex. 117, 30 S. W. 431; Ketterman *v.* Dry Fork R. R. Co., 48 W. Va. 606, 37 S. E. 683; Peterson *v.* Sherry L. Co., 90 Wis. 83, 62 N. W. 948; Toledo, B. & M. Co. *v.* Bosch, 101 Fed. 530, 41 C. C. A. 482. Compare with North Carolina cases cited above, the following: Emry *v.* Raleigh, etc., R. R. Co., 109 N. C. 589, 19 S. E. 636, 15 L. R. A. 332; Knight *v.* Railroad Co., 110 N. C. 58, 14 S. E. 650; State *v.* Roberts, 114 N. C. 389, 19 S. E. 645; Kahn *v.* Atlantic, etc., R. R. Co., 115 N. C. 638, 20 S. E. 169. "When the facts are admitted, or

as to admit of no reasonable doubt, it is the duty of the court to declare the law applicable to them; but, where material facts are disputed, or even in doubt, or inferences of fact are to be drawn from the testimony, it is the exclusive province of the jury to determine what the facts are, and apply them to the law as declared by the court." Fisher *v.* Monongahela Con. Ry. Co., 131 Pa. St. 292, 297, 18 Atl. 1016.

44—Davis *v.* Cal. St. Cable R. R. Co., 105 Cal. 131, 38 Pac. 647; Elliott *v.* Chicago, etc., Ry. Co., 150 U. S. 245, 14 S. C. Rep. 85, 37 L. Ed. 1068.

45—Nugent *v.* Boston, &c., R. Corp., 80 Me. 62, 12 Atl. 797; Penn. R. Co. *v.* Peters, 116 Pa. St. 206, 9 Atl. 317; McDermott *v.* San Francisco, &c., Co., 68 Cal. 33; O'Neill *v.* Chicago, &c., Ry. Co., 1 McCrary 505; Lincoln *v.* Gillilan, 18 Neb. 114; Ohio, &c., R. Co. *v.* Collarn, 73 Ind., 261, 38 Am. Rep. 134; Davies *v.* Oceanic S. S. Co., 89 Cal. 280, 26 Pac. 827; Wabash Ry. Co. *v.* Brown, 152 Ill. 484, 39 N. E. 273; Campbell *v.* Eveleth, 83 Me. 50, 21 Atl. 784; Barry *v.* Hannibal, etc., R. R. Co., 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610; Church *v.* Chicago, etc., R. R. Co., 119 Mo. 203, 23 S. W. 1056; Bolden *v.* Southern Ry. Co., 123 N. C. 614, 31 S. E. 851; Wilson *v.* Pennsylvania R. R. Co., 177 Pa. St. 503,

for two opinions or if negligence is debatable it is a question for the jury.⁴⁶

Many cases would be very clear if they were not complicated with questions of contributory negligence. Such are the cases of a disregard of a law expressly devised to prevent the like injuries. An instance is that of the failure of a railway train to come to a stop before crossing another road, as is required by statute in some States, whereby another train is run into. Here the negligence is plain, but it might happen that some parties injured by it would, by their own negligence, be precluded from any redress. The case might be equally clear if the railway company were to send out a train without brakes, and thereby an injury should result through the impossibility of stopping it when a danger appeared; or if one were to set a bonfire in a town while a fierce wind was raging; or if one were to deliver a loaded gun as a plaything to a young child; or if he were to send a package of dynamite by express without disclosing its *dangerous nature. Concerning such cases no [*805] one should be in doubt. But in the great majority of cases the question of negligence on any given state of facts must be one of fact.⁴⁷

35 Atl. 677; *Evans v. Iowa City*, 125 Ia. 202, 100 N. W. 1112; *Wolf v. City Ry. Co.*, 45 Ore. 446, 72 Pac. 329, 78 Pac. 668. See *Hogan v. Chicago, &c., Ry. Co.*, 59 Wis. 139. See, further, *Smith v. Fletcher*, L. R. 9 Exch. 64; *Bridges v. North London R. Co.*, L. R. 7 H. L. 213. "It is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as matter of law, and, where the facts or the inferences to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury under proper instructions." *Van Praag v. Gale*, 107 Cal. 438, 40 Pac. 555. Though the facts are

admitted or undisputed, yet if different men might reasonably draw different conclusions therefrom, the question of negligence is for the jury. *Fox v. Oakland Con. St. Ry. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; *McDougall v. Ashland, etc., Co.*, 97 Wis. 382, 73 N. W. 327.

46—*Berg v. Boston, etc., Min. Co.*, 12 Mont. 212, 29 Pac. 545; *Buehner Chair Co. v. Feulner*, 164 Ind. 368; *Cohen v. Philadelphia, etc., R. R. Co.*, 211 Pa. St. 227.

47—*Railroad Company v. Stout*, 17 Wall. 657; *Hawks v. Northampton*, 121 Mass. 10; *Chicago, &c., R. Co. v. Hutchinson*, 120 Ill. 587; *Schmidt v. Chicago, &c., R. R. Co.*, 83 Ill. 405; *Chicago, &c., R. R. Co.*

[*806] *And in no case where the facts are in dispute can the judge take the case from the jury and decide against

v. Lee, 60 Ill. 501; *Cramer v. The City of Burlington*, 42 Iowa, 315; *Artz v. Chicago*, &c., R. R. Co., 44 Iowa, 284; *Belair v. Chicago*, &c., R. R. Co., 43 Iowa, 663; *Colorado, &c., R. Co. v. Martin*, 7 Col. 592; *Lake Shore, &c., R. R. Co. v. Miller*, 25 Mich. 274; *Hassenyer v. Mich. Centr. R. R. Co.*, 48 Mich. 205, 42 Am. Rep. 470; *Kan. Pac. R. Co. v. Brady*, 17 Kan. 388; *Atchison, &c., R. Co. v. Bales*, 16 Kan. 252; *Perry v. S. P., &c., R. R. Co.*, 50 Cal. 578; *McNamara v. N. P., &c., R. R. Co.*, 50 Cal. 581; *Conroy v. Vulcan Iron Works*, 65 Mo. 35; *Keegan v. Kavanaugh, et al.*, 62 Mo. 231; *Georgia, &c., Co. v. Neely*, 56 Ga. 541; *Allen v. Hancock*, 16 Vt. 230; *Rice v. Montpelier*, 19 Vt. 470; *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613; *Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322; *Pittsburgh, &c., R. R. Co. v. Pearson*, 72 Pa. St. 169; *Sheehy v. Burger*, 62 N. Y. 558; *Spooner v. Brooklyn*, 54 N. Y. 230; *Delany v. Milwaukee*, &c., R. R. Co., 33 Wis. 67; *Wheeler v. Westport*, 30 Wis. 392; *Townley v. Chicago*, &c., Co., 53 Wis. 626; *Noyes v. Southern Pac. R. R. Co.*, 92 Cal. 285, 28 Pac. 288; *Redington v. Pac. Postal Tel. Cable Co.*, 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132; *Buchel v. Gray*, 115 Cal. 421, 47 Pac. 112; *Wikberg v. Olson Co.*, 138 Cal. 479, 71 Pac. 511; *Fiske v. Forsyth Dyeing Co.*, 57 Conn. 118, 17 Atl. 356; *Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24, 33 Atl. 533; *Szymanski v. Blumenthal*, 4 Penn. (Del.) 511; *Chicago, etc., R. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. 513; *Louisville Gas Co. v. Kaufman*, 105 Ky. 131, 48 S. W. 434; *Bittner v. Cross-town Ry. Co.*, 153 N. Y. 76, 46 N. E. 1044, 60 Am. St. Rep. 588; *Ensign v. Central N. Y. Tel. Co.*, 79 App. Div. 244, 79 N. Y. S. 799; *Corbin v. Philadelphia*, 195 Pa. St. 461, 45 Atl. 1070, 78 Am. St. Rep. 825, 49 L. R. A. 715; *Whaley v. Bartlett*, 42 S. C. 454, 20 S. E. 745; *Gulf, etc., Ry. Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129; *Consumers Elec., etc., Co. v. Pryor*, 44 Fla. 354, 32 So. 797; *Fitzgerald v. Edison Elec. Ill. Co.*, 200 Pa. St. 540, 50 Atl. 161, 86 Am. St. Rep. 732. Failure to give statutory crossing signals is negligence in law. *Chicago, &c., R. Co. v. Boggs*, 101 Ind. 522 and cases page 1405, note 86. So is the sale contrary to statute of cartridges to a child. *Binford v. Johnston*, 82 Ind. 426. The court must declare negligent a failure to observe a duty imposed by statute. *St. Louis, &c., R. R. Co. v. Huggins*, 20 Ill. App. 639. The frightening of horses by the use of a steam whistle may or may not be a negligent injury according to circumstances. *Knight v. Goodyear Co.*, 38 Conn. 438, 9 Am. Rep. 406; *Philadelphia, &c., Co. v. Stinger*, 78 Pa. St. 219. So may be an injury at a road crossing which might have been avoided by stationing a flagman there. *Delaware, &c., R. R. Co. v. Toffey*, 38 N. J. 525, citing *Pennsylvania R. R. Co. v. Mathews*, 36 N. J. 531. It is not negligence in law that the speed of a railroad train is not slackened at a road crossing. *Zeigler v. N. E. R. R. Co.*, 7 S. C. (n. s.) 402. The subject is much

negligence, as matter of law, unless there is a want of evidence fairly tending to establish the negligence which is counted on.⁴⁸

It should be added that the principles here stated are applica-

discussed in *Cleveland v. N. J. track*, the court cannot say as a Steamboat Co., 68 N. Y. 306, 309, matter of law that there was no where FOLGER, J., speaking of the duty of carriers of passengers, says: "That duty is to use the strictest diligence to protect the life and person. By this rule the defendant is liable for any injury which might reasonably be anticipated to occur, in view of all the circumstances, and of the nature of the carriage, and the number and character of the persons on the boat: *Flint v. Nor. & N. Y. Trans. Co.*, 34 Conn. 554; *Putnam v. Broadway, &c., R. R. Co.*, 55 N. Y. 108, 119, 14 Am. Rep. 190. This broad statement has limits. A carrier of passengers is not bound to foresee and provide against casualties never before known and not reasonably to be expected: *Dougan v. Ch. Tr. Co.*, 56 N. Y. 1; see, also, *Wyckoff v. Queens Co. Ferry Co.*, 56 N. Y. 656. Hence his duty is not to be estimated by what, after an accident, then first appears to be a proper precaution against a recurrence of it. *Bowen v. N. Y. Cent. R. R. Co.*, 18 N. Y. 408, 72 Am. Dec. 529; Dougan's case *supra*."

So where gas pipe was made to leak by steam pipe laid by municipal authority in the street and an explosion was caused, the city was held not liable where all precautions had been taken which at the time of laying the pipe seemed needful. *Hunt v. New York*, 109 N. Y. 134, 16 N. E. 320.

Where a passenger is injured by a loaded car running from an inclined side track upon the main

48—*Barber v. Essex*, 27 Vt. 62. See *Marcott v. Marquette, &c., R. R. Co.*, 47 Mich. 1; *Longenecker v. Penn. R. R. Co.*, 105 Pa. St. 328; *Chicago, &c., Ry. Co. v. Carey*, 115 Ill. 115; *Dublin, &c., Ry. Co. v. Slattery*, L. R. 3 App. Cas. 1155. Compare *Randall v. Balt., &c., R. R. Co.*, 109 U. S. 478; *Goodlett v. Louisville, &c., R. R. Co.*, 122 U. S. 391, 410; *Bloomfield v. Burlington, &c., Ry. Co.*, 74 Ia. 607, 38 N. W. 431.

ble as much when negligence is relied upon to defeat an action as when the plaintiff seeks to recover upon it.⁴⁹

[*807] ***Contributory Negligence.** It may happen that the injury complained of was brought about by the concurring negligence of the party injured and of the party of whose conduct he complains. This presents a case for the application of the principle that no man shall base a right of recovery upon his own fault. Between two wrong-doers, [*808] the law will *leave the consequences to rest where they have chanced to fall.⁵⁰ Therefore, although the injury complained of was caused by the negligence of the de-

49—Donaldson *v.* Milwaukee, Rep. 647, 32 L. Ed. 1058; Pyle *v.* &c., R. R. Co., 21 Minn. 293; Mc- Clark, 79 Fed. 747, 25 C. C. A. Mahon *v.* Nor. Cent. R. R. Co., 39 Md. 438; N. J. Cent. R. R. Co. 190; Louisville, etc., R. R. Co. *v.* Bryant, 141 Ala. 292; Maci *v.* Boedker, 127 Ia. 721; Peoples *v.* Railroad Co., 137 N. C. 96; Whisenhant *v.* Railroad Co., 137 N. C. 349. If the facts and inferences from them are undisputed the question is for the court. Lehigh, &c., R. R. Co. *v.* Greiner, 113 Pa. St. 600; Delaware, &c., R. R. Co. *v.* Cadow, 120 Pa. St. 559, 14 Atl. 450; Woodward Iron Co. *v.* Jones, 80 Ala. 123.

Evans *v.* Wabash R. R. Co., 178 Mo. 508, 77 S. W. 515; Knapp *v.* Jones, 50 Neb. 490, 70 N. W. 19; Chicago, etc., R. R. Co. *v.* Winfrey, 67 Neb. 13, 93 N. W. 526; Conkling *v.* Erie R. R. Co., 63 N. J. L. 338, 43 Atl. 666; Kettle *v.* Turl, 162 N. Y. 255, 56 N. E. 626; Baker *v.* Westmoreland, etc., Gas Co., 157 Pa. St. 593, 27 Atl. 789; Johnson *v.* Rio Grande W. Ry. Co., 19 Utah, 77, 57 Pac. 17; Worthington *v.* Central Vt. R. R. Co., 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326; Klinkler *v.* Wheeling S. & I. Co., 43 W. Va. 219, 27 S. E. 237; Dunlap *v.* Northeastern R. R. Co., 130 U. S. 649, 9 S. C.

50—Gibbon *v.* Paynton, 4 Burr. 2298; Clay *v.* Willan, 1 H. Bl. 298. “There must be a wrong as well as damage, and there is no legal injury where the loss is the result of the common fault of both parties.” Rathbun *v.* Payne, 19 Wend. 399, per ROBINSON, J. In Admiralty contributory negligence does not bar recovery. The Max Morris, 28 Fed. Rep. 881, note.

The doctrine of contributory negligence applies to statutory actions. Curry *v.* Chicago, &c., R. R. Co., 43 Wis. 665, where the subject is carefully and ably examined by RYAN, Ch. J. See, also, Keech *v.* Baltimore, &c., R.

fendant, yet if legal fault contributing to *the injury [*809] is imputable to the plaintiff himself, he will not be heard to complain. This is the general rule.

Respecting the application of this rule the following questions will frequently arise:

1. Upon whom is the burden of proof when contributory negligence is in question?

2. What must be the nature and degree of contributory negligence which will disentitle an injured party to maintain a suit?

3. What is the rule where the party injured, and whose want of care contributed to the injury, was not morally accountable therefor, by reason of immaturity, mental unsoundness or imbecility?

Upon each of these questions some remarks seem to be called for.

Burden of Proof. Where negligence is the ground of an action, it devolves upon the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which it occurred. If from these circumstances it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has by showing them disproved his right to recover.⁵¹ But going

R. Co., 17 Md. 32; *Little v. Brockton*, 123 Mass. 511 and cases cited; *Taylor v. Carew Mfg. Co.*, 143 Mass. 470; *Western U. Tel. Co. v. McDaniel*, 103 Ind. 294; *Nugent v. Vanderveer*, 39 Hun, 322; *Victor Coal Co. v. Muir*, 20 Colo. 321, 38 Pac. 378, 46 Pac. 299, 26 L. R. A. 435; *Gartin v. Meredith*, 153 Ind. 16, 53 N. E. 936; *Godfrey v. Beattyville Coal Co.*, 101 Ky. 339, 41 S. W. 10; *Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263, 47 Atl. 827, 82 Am. St. Rep. 939; *Lopes v. Sahuque*, 114 La. 1004, 38 So. 810. Compare *Louisville, &c., R. R. Co. v. Com.* of 1874 as to death of a railway passenger, the rule is otherwise. *McKimble v. Boston, &c.*, R. R. Co., 139 Mass. 542; *Com. v. Boston, &c., R. R. Co.*, 134 Mass. 211. Contributory negligence is a defense to an action against a physician for malpractice. *Lower v. Franks*, 115 Ind. 334, 17 N. E. 630. Contributory negligence held to be no defense where the injury was done to a willful failure to comply with a statute. *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375.

51—See *Railroad Co. v. Gladmon*, 15 Wall. 401; *French v. Philadelphia, &c., R. R. Co.*, 39 Md.

no further, it may be said that there is a legal presumption against negligence upon which he is at liberty to rely,⁵² thus casting the burden of showing contributory negligence upon the defendant. Many cases so hold.⁵³ But in other cases

574; *McQuilken v. Cent. Pac. R.* Westport, 30 Wis. 892; *Thompson R. Co.*, 50 Cal. 7; *Baltimore, etc., v. Nor. Mo. R. R. Co.*, 51 Mo. 190, R. R. Co. v. Stumpf, 97 Md. 78, 11 Am. Rep. 443; *Cleveland, &c., 54 Atl. 978; Nord v. Boston, etc., Min. Co.*, 30 Mont. 48, 75 Pac. 681; *Bradwell v. Pittsburgh, etc., Pass. Ry. Co.*, 139 Pa. St. 404, 20 Atl. 1046; *Bunnell v. Railway Co.*, 13 Utah, 314, 44 Pac. 927; *Clark v. Oregon Short Line, etc., R. R. Co.*, 20 Utah, 401, 59 Pac. 92.

52—*Hoyt v. Hudson*, 10 Wis. 105; *Pennsylvania R. R. Co. v. Weber*, 76 Pa. St. 157, 18 Am. Rep. 407; *Weiss v. Pennsylvania R. R. Co.*, 79 Pa. St. 387; *Paducah, &c., R. R. Co. v. Hoehl*, 12 Bush, 41; *County Comrs. v. Burgess*, 61 Md. 29; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441; *Baltimore, &c., R. R. Co. v. McKenzie*, 81 Va. 71; *Montgomery, &c., Co. v. Chambers*, 79 Ala. 338; *Thorpe v. Miss., &c., Ry. Co.*, 89 Mo. 650, 58 Am. Rep. 120; *McDougall v. Cent. Pac. R. R. Co.*, 63 Cal. 431. At least if plaintiff's evidence does not indicate such negligence; *Gulf, &c., Ry. Co. v. Redeker*, 67 Tex. 100, 60 Am. Rep. 20. If it raises a presumption of it, the burden is on the plaintiff. *Railroad Co. v. Whitacre*, 35 Ohio St. 627. If it shows it clearly, there is nothing for the jury. *State v. Balt., &c., R. R. Co.*, 58 Md. 482; *Hoth v. Feters*, 55 Wis. 405.

53—*Railroad Co. v. Gladmon*, 15 Wall. 401; *McQuilken v. Cent. Pac. R. R. Co.*, 50 Cal. 7; *St. Paul v. Kuby*, 8 Minn. 154; *Wheeler v.*

Westport, 30 Wis. 892; *Thompson R. R. Co. v. Rowan*, 66 Pa. St. 393; *St. Louis, etc., Ry. Co. v. Philpot*, 72 Ark. 23, 77 S. W. 901; *Smith v. Occidental, etc., S. S. Co.*, 99 Cal. 462, 34 Pac. 84; *Chicago, etc., R. R. Co. v. Nuney*, 19 Colo. 36, 34 Pac. 288; *Bogenschutz v. Smith*, 84 Ky. 330; *Clerc v. Morgan's, etc., Co.*, 107 La. 370, 31 So. 886, 90 Am. St. Rep. 319; *Baltimore, etc., R. R. Co. v. Stumpf*, 97 Md. 78, 54 Atl. 978; *Hickman v. Kansas City, etc., R. R. Co.*, 66 Miss. 154, 5 So. 225; *Simms v. Forbes*, 86 Miss. 412; *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 286, 6 S. W. 464; *Nord v. Boston, etc., Min. Co.*, 30 Mont. 48, 75 Pac. 681; *Nelson v. Helena*, 16 Mont. 21, 39 Pac. 905; *Anderson v. Chicago, etc., R. R. Co.*, 35 Neb. 95, 52 N. W. 840; *Union Stock Yards Co. v. Conoyer*, 41 Neb. 617, 59 N. W. 950; *Wood v. Bartholomew*, 122 N. C. 177, 29 S. E. 959; *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *Bradwell v. Pittsburgh, etc., Pass. Ry. Co.*, 139 Pa. St. 404, 20 Atl. 1046; *Baker v. Westmoreland Gas Co.*, 157 Pa. St. 593, 27 Atl. 789; *Sopherstein v. Bertels*, 178 Pa. St. 401, 35 Atl. 1000; *Donahue v. Enterprise R. R. Co.*, 32 S. C. 299, 11 S. E. 95, 17 Am. St. Rep. 854; *Whaley v. Bartlett*, 42 S. C. 454, 20 S. E. 745; *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288; *San Antonio, etc., Ry. Co. v. Ben-*

it is said that neglig*gence in one party presupposes the [*810] duty of care imposed upon him for protection of the other; and that the plaintiff does not show the existence of this duty until he has first shown his own relative position, and that he was himself in the exercise of proper care. In this view the absence of contributory negligence becomes a part of the plaintiff's case, and should appear, *prima facie* at least, before the defendant can be called upon to answer the negligence imputed to himself.⁵⁴ Nor is this calling upon him to prove a

nett, 76 Tex. 151, 13 S. W. 319; 73 Fed. 76, 74 Fed. 362, 20 C. C. Hogan *v.* Missouri, etc., Ry. Co., A. 447.

88 Tex. 679, 32 S. W. 1035; Bunnell *v.* Railway Co., 13 Utah, 314, 44 Pac. 927; Linden *v.* Anchor Min. Co., 20 Utah, 134, 58 Pac. 355; Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901; Northern Pac. R. R. Co. *v.* Hess, 2 Wash. 383, 26 Pac. 866; Johnson *v.* Bellingham Bay Imp. Co., 13 Wash. 455, 43 Pac. 370; Gallagher *v.* Buckley, 81 Wash. 380, 72 Pac. 79; Gill *v.* Homrighausen, 79 Wis. 634, 48 N. W. 862; Mobile, etc., R. R. Co. *v.* Wilson, 76 Fed. 127, 22 C. C. A. 101; Anderson *v.* Seropian, 147 Cal. 201; Davis *v.* Mercer Lumber Co., 164 Ind. 413; Orient Ins. Co. *v.* Northern Pac. Ry. Co., 31 Mont. 502; State *v.* District Court, 32 Mont. 37; Strickland *v.* Capital City Mills, 70 S. C. 211. If the plaintiff's case discloses contributory negligence, the defendant may take advantage of it, though he has not pleaded it as a defense. Nord *v.* Boston, etc., Min. Co., 30 Mont. 48, 75 Pac. 681; Clark *v.* Oregon Short Line, etc., R. R. Co., 20 Utah, 401, 59 Pac. 92; Bunnell *v.* Railway Co., 13 Utah, 314, 44 Pac. 927. Held that contributory negligence may be proved under the general issue. Canadian Pac. Ry. Co. *v.* Clark,

54—Lane *v.* Crombie, 12 Pick. 177; Wilson *v.* Charlestown, 8 Allen, 137; Wheelock *v.* Boston, &c., R. R. Co., 105 Mass. 203; Galena, &c., R. R. Co. *v.* Yarwood, 15 Ill. 468; Dyer *v.* Talcott, 16 Ill. 300; Galena, &c., R. R. Co. *v.* Dill, 22 Ill. 264; Lake Shore, &c., R. R. Co. *v.* Miller, 25 Mich. 274; Teipel *v.* Hilsendegen, 44 Mich. 461; Button *v.* Hudson R. R. Co., 18 N. Y. 248; Warner *v.* N. Y. Cent. R. R. Co., 44 N. Y. 465; Wendell *v.* New York, &c., R. R. Co., 91 N. Y. 420; Merrill *v.* Hampden, 26 Me. 234; Lesan *v.* Maine Centr. R. R. Co., 77 Me. 85; Hyde *v.* Jamaica, 27 Vt. 443; Bovee *v.* Danville, 53 Vt. 183; Moore *v.* Cent. R. R. Co., 24 N. J. 268, 284; Park *v.* O'Brien, 23 Conn. 339; Jeffersonville, &c., R. R. Co. *v.* Lyon, 55 Ind. 477; Indiana, &c., Ry. Co. *v.* Greene, 106 Ind. 279; Murphy *v.* Chicago, &c., R. R. Co., 45 Iowa, 661; Hawes *v.* Burlington, &c., Ry. Co., 64 Ia. 315; Miss. Cent. R. R. Co. *v.* Mason, 51 Miss. 234; Vicksburg *v.* Hennessy, 54 Miss. 391, 28 Am. Rep. 354; Bigelow *v.* Reed, 51 Me. 325; Owens *v.* Richmond, &c., R. R. Co. 88 N. C. 502; Haner *v.* Northern Pac. Ry. Co., 7 Ida. 305, 62 Pac. 1028; North Chicago St.

negative; it is requiring of him merely that he show the duty he counts upon and its breach.

Negligence and Recklessness Co-operating. Where the conduct of the defendant is wanton and willful, or where it indicates that degree of indifference to the rights of others

which may justly be characterized as recklessness, the [*811] *doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts irrespective of the fault which placed the plaintiff in the

Ry. Co. v. Louis, 138 Ill. 9, 27 N. E. 457; West Chicago St. R. R. Co. v. Liderman, 187 Ill. 463, 58 N. E. 367, 79 Am. St. Rep. 226; Gartin v. Meredith, 153 Ind. 16, 53 N. E. 936; Gallagher v. Proctor, 84 Me. 41, 24 Atl. 459; McLane v. Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487; Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441; Weston v. Troy, 139 N. Y. 281, 34 N. E. 780; Whalen v. Citizens' Gas Lt. Co., 151 N. Y. 70, 45 N. E. 363. In Indiana the allegation and proof of due care by the plaintiff have been dispensed with by statute. Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 232, 61 N. E. 197; Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936. In a suit for the death of a person by the negligence of the defendant, when there was no eye witness of the accident, due care on the part of the deceased may be presumed. Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441; Hopkinson v. Knapp, 92 Ia. 328, 60 N. W. 653. In the latter case it is said: "Direct and positive evidence that the decedent did not by his own negligence contribute to the injury is not required. Where such evidence cannot be obtained, it is proper for the jury to consider the instincts of men, which naturally lead them to avoid danger, as evidence of due care on the part of the person injured." pp. 331-2. As to what will satisfy the rule laid down in the text see Raymond v. Burlington, &c., Ry. Co., 65 Ia. 152; Hart v. Hudson River, &c., Co., 84 N. Y. 56. The requisite care without direct proof may be inferred from absence of fault where sufficient circumstances are shown to exclude the idea of negligence. Maguire v. Fitchburg R. R. Co., 146 Mass. 379, 15 N. E. 904; Burns v. Chicago, &c., Ry. Co., 69 Ia. 450, 58 Am. Rep. 227; see Greany v. Long. Isld. R. R. Co., 101 N. Y. 419; Cahill v. Hilton, 106 N. Y. 512. See Northern Cent. R. Co. v. State, 31 Md. 357. In Wakelin v. London, &c., Co., L. R. 12 App. Cas. 41, it is held that the mere fact of death at a level crossing is not a basis for the inference of due care. See Tolman v. Syracuse, &c., Co., 98 N. Y. 198, 50 Am. Rep. 649. But there being nothing to show carelessness it is held in Schum v. Penn. R. R. Co., 107 Pa. St. 8, that care is to be presumed in such case, and see Keim v. Union Ry., &c., Co. 90 Mo. 314.

way of such injury.⁵⁵ The fact that one has carelessly put himself in a place of danger is never an excuse for another purposely or recklessly injuring him. Even the criminal is not out of the protection of the law,⁵⁶ and is not to be struck down with impunity by other persons. If, therefore, the defendant discovered the negligence of the plaintiff in time, by the use of ordinary care, to prevent the injury, and did not make use of such care for the purpose, he is justly chargeable with reckless injury, and cannot rely upon the negligence of the plaintiff as

55—*Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273; *Vandegrift v. Rediker*, 22 N. J. 185; *Lafayette, &c., R. R. Co. v. Adams*, 26 Ind. 76; *Indianapolis, &c., R. R. Co. v. McClure*, 26 Ind. 370; *Mulherrin v. Delaware, &c., R. R. Co.*, 81 Pa. St. 366; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Daley v. Norwich, &c., R. Co.*, 26 Conn. 591, 68 Am. Dec. 413; *Chicago, &c., R. Co. v. Donahue*, 75 Ill. 106; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Tanner v. Louisville, &c., R. R. Co.*, 60 Ala. 621; *Georgia Pac. Ry. Co. v. O'Shields*, 90 Ala. 29, 8 So. 248; *Kansas City, etc., R. R. Co. v. Lackey*, 114 Ala. 152, 21 So. 444; *Essey v. Southern Pac. Co.*, 103 Cal. 541, 37 Pac. 500; *Illinois Central R. R. Co. v. Leiner*, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266; *Kansas Pac. Ry. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Battishill v. Humphreys*, 64 Mich. 514, 31 N. W. 581; *McAdoo v. Richmond, etc., R. R. Co.*, 105 N. C. 140, 11 S. E. 316; *Southern Ry. Co. v. Yancey*, 141 Ala. 246; *Rhymes v. Jackson Elec., etc., Co.*, 85 Miss. 140, 37 So. 708; *Barmore v. Vicksburg, etc., Ry. Co.*, 85 Miss. 426, 38 So. 210; *Rapp. v. St. Louis Transit Co.*, 190 Mo. 144. See Claxton's *Admr. v. Railroad* Co., 13 Bush, 636, and cases cited; *Banks v. Highland St. Ry. Co.*, 136 Mass. 485. To allow one to recover in spite of contributory negligence, the act must have been done with design to produce injury or so that its natural and probable consequence would be to inflict injury on others. *Belt. R. R., &c., Co. v. Mann*, 107 Ind. 89; *Louisville, &c., Co. v. Ader*, 110 Ind. 376. An act may be "willful" in this sense without a direct intent. It may be such if reckless. *Palmer v. Chicago, &c., Co.*, 112 Ind. 250, 14 N. E. 70. Injury caused by dropping of a toll-gate to prevent passage without paying is not willful. *Brannen v. Kokomo, &c., Co.*, 115 Ind. 115, 17 N. E. 202.

56—See *ante*, p. 273. While the mere fact that a plaintiff is doing an unlawful act when he is injured may not charge him, as matter of law, with contributory negligence, he cannot recover if the unlawful act is a cause contributing to the injury and not merely a condition of it. This was a case of collision with plaintiff's cab standing as forbidden by ordinance. *Newcomb v. Boston Prot. Dep't*, 146 Mass. 596, 16 N. E. 555.

a protection.⁵⁷ Or it may be said that in such a case the negligence of the plaintiff only put him in position of danger, and

57—*Brown v. Hannibal, &c., R. R. Co.*, 50 Mo. 461, 11 Am. Rep. 420; *Macon, etc., R. R. Co. v. Davis*, 18 Ga. 679; *State v. Manchester, &c., R. R. Co.*, 52 N. H. 528; *Cooper v. Cent. R. R. Co.*, 44 Iowa, 134; *Kerwhacker v. Cleveland, &c., R. R. Co.*, 3 Ohio St. 172; *Essey v. Southern Pac. Co.*, 103 Cal. 541, 37 Pac. 500; *Fox v. Oakland Con. St. Ry. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238; *Denver, etc., Rapid Transit Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106; *Hector Min. Co. v. Robertson*, 22 Colo. 491, 45 Pac. 406; *Johnson v. Baltimore, etc., R. R. Co.*, 6 Mackey, 232; *Cullen v. Baltimore, etc., R. R. Co.*, 8 App. D. C. 69; *Hawley v. Columbia Ry. Co.*, 25 App. D. C. 1; *Chicago West. Div. Ry. Co. v. Ryan*, 131 Ill. 474, 23 N. E. 385; *Keefe v. Chicago, etc., Ry. Co.*, 92 Ia. 182, 60 N. W. 503, 54 Am. St. Rep. 542; *Sutzin v. Chicago, etc., Ry. Co.*, 95 Ia. 304, 63 N. W. 709; *Louisville, etc., R. R. Co. v. Earl's Admx.*, 94 Ky. 368, 22 S. W. 607; *McGuire v. Vicksburg, etc., R. R. Co.*, 46 La. Ann. 1543, 16 So. 457; *Conley v. Me. Cent. R. R. Co.*, 95 Me. 149, 49 Atl. 668; *North Baltimore Pass. Ry. Co. v. Arnreich*, 78 Md. 589, 28 Atl. 809; *Guenther v. St. Louis, etc., Ry. Co.*, 95 Mo. 286, 8 S. W. 371; *Hicks v. Citizens' St. Ry. Co.*, 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508; *Dailey v. Burlington, etc., R. R. Co.*, 58 Neb. 396, 78 N. W. 722; *Camden, etc., Ry. Co. v. Preston*, 59 N. J. L. 264, 35 Atl. 1119; *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577, 37 Atl. 135; *Clark v. Wilmington, etc., R. R. Co.*, 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749; *Pickett v. Wilmington, etc., R. R. Co.*, 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257; *Railroad Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; *Akulino v. New York, etc., R. R. Co.*, 21 R. I. 263, 43 Atl. 63; *Hays v. Gainesville St. Ry. Co.*, 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; *Texas, etc., Ry. Co. v. Breadow*, 90 Tex. 26, 36 S. W. 410; *Chesapeake, etc., Ry. Co. v. Rodgers*, 100 Va. 324, 41 S. E. 732; *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 886. See *West Chicago, St. R. R. Co. v. Liderman*, 187 Ill. 463, 58 N. E. 367, 79 Am. St. Rep. 226; *Illinois Cent. R. R. Co. v. Leiner*, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266. The defendant must have actual knowledge of the plaintiff's danger. It is not enough that he might have had such knowledge by the exercise of reasonable diligence. *Cullen v. Baltimore, etc., R. R. Co.*, 8 App. D. C. 69; *Keefe v. Chicago, etc., Ry. Co.*, 92 Ia. 182, 60 N. W. 503, 54 Am. St. Rep. 542; *Texas, etc., Ry. Co. v. Breadow*, 90 Tex. 26, 36 S. W. 410. "This, however, does not mean, as seems to be contended, that defendant must know that injury is *inevitable* if he fails to exercise care, and the decisions indicate no such requirement. It is enough that the circumstances of which the defendant has knowledge are such as to

was, therefore, only the remote cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause.⁵⁸ The one who has the last clear chance to avoid an injury and fails to do so is solely responsible for its happening and his negligence is the proximate cause of the same.⁵⁹

***The General Rule of Contributory Negligence.** Re- [*812] garding the case of a negligent injury the general result of the authorities seems to be, that if the plaintiff or party, injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof. This is the English rule, and it has been accepted by the courts in this country with few exceptions. In a leading English case, often quoted, in which the responsibility for the collision of vessels was in question, Mr. Justice WIGHTMAN said: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed

convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury." *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 523, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238. But see *Louisville, etc., R. R. Co. v. Earl*, 99 Ky. 368, 22 S. W. 607; *Railroad Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674.

58—*Railroad Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; *Hays v. Gainesville St. Ry. Co.*, 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 886; *Balt. & Ohio*

R. R. Co. v. State, 33 Md. 542, 554. This seems to be the precise doctrine applied in *Burham v. St. Louis, etc., R. R. Co.*, 56 Mo. 338. See *Greenland v. Chaplin*, 5 Exch. 243; *O'Brien v. McGlinchy*, 68 Me. 552; *Gunter v. Wicker*, 85 N. C. 310, and see cases *post*, pp. 1457-1463.

59—*Essey v. Southern Pac. Co.*, 103 Cal. 541, 37 Pac. 500; *Lloyd v. Albermarle, etc., R. R. Co.*, 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764; *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281, 52 Pac. 92, 67 Am. St. Rep. 621, 40 L. R. A. 172; *Southern Ind. Ry. Co. v. Fine*, 163 Ind. 617, 72 N. E. 589.

to the misfortune by his own negligence or want of ordinary or common care and caution, that but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care and caution would not, however, disentitle him to recover, unless it were such that but for that negligence and want of ordinary care and caution the misfortune could not have happened; nor, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff.⁶⁰ In the note a great many American cases are named which follow this rule.⁶¹

60—*Tuff v. Warman*, 5 C. B. (N. S.) 573, 585. See, also, *Butterfield v. Forester*, 11 East, 60; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Davies v. Mann*, 10 M. & W. 545; *Lewis v. Baltimore*, &c., R. R. Co., 38 Md. 588; *Balt.*, &c., Co. v. *Kean*, 65 Md. 394.

61—*Indianapolis*, &c., R. R. Co. v. *Horst*, 93 U. S. 291; *Railroad Co. v. Jones*, 95 U. S. 439; *Reeves v. Delaware*, &c., R. R. Co., 30 Pa. St. 454, 72 Am. Dec. 713; *Pennsylvania R. R. Co. v. Lewis*, 79 Pa. St. 33; *Mulherrin v. Delaware*, &c., R. R. Co., 81 Pa. St. 366; *Cent. R. R. Co. v. Feller*, 84 Pa. St. 226; *Forks Township v. King*, 84 Pa. St. 230; *Monongahela v. Fischer*, 111 Pa. St. 9, 56 Am. Rep. 241; *Nor. Cent. R. R. Co. v. Price*, 29 Md. 420; *Frech v. Philadelphia*, &c., R. R. Co., 39 Md. 574; *Lewis v. Balt. & Ohio R. R. Co.*, 38 Md. 588, 17 Am. Rep. 521; *Baltimore*, &c., R. R. Co. v. *Mulligan*, 45 Md. 486; *Trow v. Vt. Cent. R. R. Co.*, 24 Vt. 487. 58 Am. Dec. 191; *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613; *Barnes v. Cole*, 21 Wend. 188; *Johnson v. Hudson R. R. R. Co.*, 20 N. Y. 65, 75 Am. Dec. 375; *Gray v. Second Av. R. R. Co.*, 65 N. Y. 561; *Steves v. Osgego*, &c., R. R. Co., 18 N. Y. 422; *Dufer v. Cully*, 3 Ore. 377; *Lucas v. New Bedford*, &c., R. R. Co., 6 Gray, 64; *Smith v. Smith*, 2 Pick. 621; *Farnum v. Concord*, 2 N. H. 392; *State v. Manchester*, &c., R. R. Co., 52 N. H. 528; *Moore v. Cent. R. R. Co.*, 24 N. J. 268; *Cent. R. R. Co. v. Moore*, 24 N. J. 824; *Telfer v. Nor. R. R. Co.*, 30 N. J. 188; *Central R. R. Co. v. Van Horn*, 38 N. J. 133; *Garmon v. Bangor*, 38 Me. 443; *Timmons v. Cent. Ohio R. R. Co.*, 6 Ohio St. 105; *Cleveland*, &c., R. R. Co. v *Terry*, 8 Ohio St. 570; *Sandusky*, &c., R. R. Co. v. *Sloan*, 27 Ohio St. 341; *Williams v. Mich. Cent. R. R. Co.*, 2 Mich. 259; *Lake Shore*, &c., R. R. Co. v. *Miller*, 25 Mich. 274; *Mich. Cent. R. R. Co. v. Campau*, 35 Mich. 468; *New Haven*, &c., Co. v. *Vanderbilt*, 16 Conn. 420; *Birge v. Gardiner*, 19 Conn. 507; *Beers v. Housatonic R. R.*

*But while the English rule has been generally accepted in this country, there has, perhaps in two or

Co., 19 Conn. 566; Park *v.* O'Brien, 23 Conn. 339; Jackson *v.* Commissioners, &c., 76 N. C. 282; Donaldson *v.* Milwaukee, &c., R. R. Co., 21 Minn. 293; Brown *v.* Milwaukee, &c., R. R. Co., 22 Minn. 165; Erd *v.* St. Paul, 22 Minn. 443; New Orleans, &c., R. R. Co. *v.* Hughes, 49 Miss. 258; Memphis, &c., R. R. Co. *v.* Thomas, 51 Miss. 637; Paducah, &c., R. R. Co. *v.* Hoehl, 12 Bush, 41; Koutz *v.* Toledo, &c., R. R. Co., 54 Ind. 515; Louisville, &c., R. R. Co. *v.* Boland, 53 Ind. 398; Jeffersonville, &c., R. R. Co. *v.* Lyon, 55 Ind. 477; West Union Tel. Co. *v.* Eyser, 2 Colorado, 141; Robinson *v.* West Pac. R. R. Co., 48 Cal. 409; Deville *v.* Sou. Pac. R. R. Co., 50 Cal. 383; Hearne *v.* Sou. Pac. R. R. Co., 50 Cal. 482; Macon, &c., R. R. Co. *v.* Baber, 42 Ga. 300; Adams *v.* Wiggins Ferry Co., 27 Mo. 95, 72 Am. Dec. 247; Smith *v.* Union Pac. R. R. Co., 61 Mo. 588; Harlan *v.* St. Louis, &c., R. R. Co., 65 Mo. 22; Laicher *v.* New Orleans, &c., R. R. Co., 28 La. Ann. 320; Johnson *v.* Canal, &c., Co., 27 La. Ann. 53; West U. Tel. Co. *v.* Quinn, 56 Ill. 319; Mobile, etc., R. R. Co. *v.* Ashcraft, 48 Ala. 15; Carter *v.* Chambers, 79 Ala. 223; Lynam *v.* Philadelphia, &c., R. R. Co., 4 Houst. 583; Jefferson *v.* Brady, 4 Houst. 626; Trout *v.* Virginia, &c., R. R. Co., 23 Grat. 619; Rickets *v.* Birmingham St. Ry. Co., 85 Ala. 600, 5 So. 353; Railway Co. *v.* Cox, 60 Ark. 106, 29 S. W. 38; Taylor *v.* Baldwin, 78 Cal. 517, 21 Pac. 124; Trouscclair *v.* Pac. Coast S. S. Co., 80 Cal. 521, 22 Pac. 258; Sego *v.* Southern Pac. Co., 137 Cal. 405, 70 Pac. 279; Kennedy *v.* Denver, etc., Ry. Co., 10 Colo. 493, 16 Pac. 210; Jackson *v.* Criely, 16 Colo. 103, 26 Pac. 331; Rowen *v.* New York, etc., R. R. Co., 59 Conn. 364, 21 Atl. 1073; Morrissey *v.* Bridgeport Traction Co., 68 Conn. 215, 35 Atl. 1126; Washington, etc., R. R. Co. *v.* Wright, 7 App. D. C. 295; Greenwell *v.* Washington Market Co., 21 D. C. Rep. 298; Florida Southern Ry. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631; Brunswick, etc., R. R. Co. *v.* Smith, 97 Ga. 777, 25 S. E. 759; Georgia Southern, etc., Ry. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118; Chicago, etc., R. R. Co. *v.* Hedges, 118 Ind. 5, 20 N. E. 530; Evans *v.* Adams Exp. Co., 122 Ind. 362, 23 N. E. 1039, 7 L. R. A. 678; Banning *v.* Chicago, etc., Ry. Co., 89 Ia. 74, 56 N. W. 277; Keefe *v.* Chicago, etc., Ry. Co., 92 Ia. 182, 60 N. W. 503, 54 Am. St. Rep. 542; Geesen *v.* Saquin, 115 Ia. 7, 87 N. W. 745; Ramsey *v.* Louisville, etc., Ry. Co., 89 Ky. 99, 20 S. W. 162; Houston *v.* Vicksburg, etc., R. R. Co., 39 La. Ann. 796, 2 So. 562; Allen *v.* Me. Cent. R. R. Co., 82 Me. 111, 19 Atl. 105; Whitman *v.* Fisher, 98 Me. 575, 57 Atl. 895; Matta *v.* Chicago, etc., Ry. Co., 69 Mich. 109, 37 N. W. 54; Stainback *v.* Meridian, 79 Miss. 447, 28 So. 947, 30 So. 607; Gleeson *v.* Excelsior Mfg. Co., 94 Mo. 201, 7 S. W. 188; O'Donnell *v.* Patton, 117 Mo. 13, 22 S. W. 903; Culbertson *v.* Met. St. Ry. Co., 140 Mo. 35, 36 S. W. 834; Hurst *v.* Kansas City, etc., R. R. Co., 163 Mo. 309,

three States, been a departure from it. The early Illinois cases accepted the English rule without question,⁶² but in later cases, when the question of contributory negligence has [*814] been presented, *a form of language has been used which is, to say the least, liable to be understood as a departure. The departure, if there is any, in that State, began with

63 S. W. 695, 85 Am. St. Rep. 539; R. Co., 45 Iowa, 661. There is a Zumault *v.* Kansas City Sub. Belt R. R. Co., 175 Mo. 288, 74 S. W. 1015; Chicago, etc., R. R. Co. *v.* Landauer, 36 Neb. 642, 54 N. W. 976; Knapp *v.* Jones, 50 Neb. 490, 70 N. W. 19; Menger *v.* Laur, 55 N. J. L. 205, 26 Atl. 180, 20 L. R. A. 61; North Hudson Co. Ry. Co. *v.* Flanagan, 57 N. J. L. 696, 32 Atl. 216; Kane *v.* Yonkers, 169 N. Y. 392, 62 N. E. 428; Meredith *v.* Cranberry Coal & I. Co., 99 N. C. 576, 5 S. E. 659; Severy *v.* Chicago, etc., Ry. Co., 6 Okl. 153, 50 Pac. 162; Delaware, etc., R. R. Co. *v.* Cadow, 120 Pa. St. 559, 14 Atl. 450, 6 Am. St. Rep. 730; Guess *v.* S. C. Ry. Co., 30 S. C. 163, 9 S. E. 18; Louisville, etc., R. R. Co. *v.* Wilson, 88 Tenn. 316, 12 S. W. 720; Barr *v.* Railroad Co., 105 Tenn. 544, 58 S. W. 849; Cook *v.* Mining Co., 12 Utah, 51, 41 Pac. 557; Kilpatrick *v.* Grand Trunk Ry. Co., 72 Vt. 263, 47 Atl. 827, 82 Am. St. Rep. 939; Norfolk, etc., R. R. Co. *v.* Cottrell, 83 Va. 512, 3 S. E. 123; Cawley *v.* Winifrede R. R. Co., 31 W. Va. 116, 5 S. E. 318; Bremer *v.* Pleiss, 121 Wis. 61, 98 N. W. 945; Smith *v.* Detroit, etc., Ry. Co., 136 Mich. 282, 99 N. W. 15; Pollock *v.* Pennsylvania R. R. Co., 210 Pa. St. 634, 105 Am. St. Rep. 846; Gardner *v.* Paine Lumber Co., 123 Wis. 338, 101 N. W. 700; Patterson *v.* Burlington, &c., R. R. Co., 39 Iowa, 279; Murphy *v.* Chicago, &c., R. R. Co., 45 Iowa, 661. There is a statute in this State which provides that "every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employees of the corporation, to any person sustaining such damage." In the case last cited it is decided that that statute is not intended to disturb the rule that the plaintiff shall not recover when chargeable with contributory negligence. Contributory negligence is ordinarily a question of fact. Beveringham W. W. Co. *v.* Hubbard, 85 Ala. 179, 4 So. 607, 7 Am. St. Rep. 35; Smith *v.* Occidental, etc., S. S. Co., 99 Cal. 462, 34 Pac. 84; Kettle *v.* Turl, 162 N. Y. 255, 56 N. E. 626. But becomes a question of law when the facts are undisputed and but one inference can reasonably be drawn therefrom. Delaware, etc., R. R. Co. *v.* Cadow, 120 Pa. St. 559, 14 Atl. 450, 6 Am. St. Rep. 730; *ante*, p. 1433. Where a parent sues for an injury to a child, the parent's contributory negligence will be a bar. Pratt Coal & I. Co. *v.* Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751; Fox *v.* Oakland Con. St. Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216. 62—Aurora Branch R. R. Co. *v.* Grimes, 13 Ill. 585.

Galena, etc., R. R. Co. v. Jacobs, in which the English cases are reviewed at length, and without at all questioning the leading cases, either English or American, the following remarks are made: "It will be seen from these cases that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care as manifested by both parties; for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think, is, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to entitle him to recover." "We say, then, that in this as in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of his action."⁶³ But was not this equivalent, in the mind of the judge, to saying that if the defendant is chargeable with the want of ordinary care, and the plaintiff is not, the latter may recover, notwithstanding that a higher degree of care might have prevented the injury? In several cases the court has declared that a mere preponderance of negligence on the part of the defendant, where both were

63—*Galena, &c., R. R. Co. v. Jacobs*, 20 Ill. 478, 496, per BREESE, J. The following are some of the later cases in which this doctrine has been approved and applied: Ill. Cent. R. R. Co. v. Benton, 69 Ill. 174; Toledo, &c., R. R. Co. v. McGinnis, 71 Ill. 346; Ill. Cent. R. R. Co. v. Hall, 72 Ill. 222; Rockford, &c., R. R. Co. v. Hillmer, 72 Ill. 235; Ill. Centr. R. R. Co. v. Hammer, 72 Ill. 347; St. Louis, &c., R. R. Co. v. Britz, 72 Ill. 256; Chicago, &c., R. R. Co. v. Donahue, 75 Ill. 106;

Toledo, &c., R. R. Co. v. O'Conor, 77 Ill. 391; Chicago, &c., R. R. Co. v. Hatch, 79 Ill. 187; Sterling Bridge Co. v. Pearl, 80 Ill. 251; Kewanee v. Depew, 80 Ill. 119; Chicago, &c., R. R. Co. v. Damerell, 81 Ill. 450; Chicago, &c., R. R. Co. v. Harwood, 90 Ill. 425; Calumet, &c., Co. v. Martin, 115 Ill. 358; Lake Shore, &c., Ry. Co. v. O'Conner, 115 Ill. 254; Chicago, &c., Co. v. Hutchinson, 120 Ill. 587; Chicago, &c., Co. v. Warner, 123 Ill. 38, 14 N. E. 206.

[*815] in fault, will not justify a *recovery,⁶⁴ and when a jury has been told that the plaintiff may recover unless his negligence contributed to the injury in a *considerable degree* the court has promptly set aside the verdict.⁶⁵ And it seems to be clear that the court has aimed at all times to make the plaintiff's right of recovery—so far as concerned contributory negligence—depend upon the question whether he had or had not been chargeable with a want of ordinary care which directly contributed to the injury.⁶⁶ And as what is ordinary care must of course depend upon the circumstances, this would be equivalent to holding—if the idea of degrees in negligence was put aside—that the plaintiff may recover in such cases, because he was not guilty of what in law is negligence.

The doctrine of comparative negligence as formerly held in Illinois has been repudiated. In *Lake Shore, etc. Ry. Co. v. Hessions*,⁶⁷ the court says: "We have repeatedly held, in effect, in the later decisions, beginning with *Calumet Iron and Steel Co. v. Martin*,⁶⁸ that the doctrine of comparative negligence, as announced in the earlier cases, was no longer the law of this state, and it is no longer to be regarded as a correct rule of law applicable in cases of this character. The doctrine announced in the later decisions, as applied to this class of cases, requires, as

64—Chicago, &c., R. R. Co. v. Clark, 70 Ill. 276; Indianapolis, &c., R. R. Co. v. Flannigan, 77 Ill. 365.

65—Sterling Bridge Co. v. Pearl, 80 Ill. 251.

66—See Ill. Cent. R. R. Co. v. Green, 81 Ill. 19, 25 Am. Rep. 255, and cases cited. See, also, Rockford, &c., R. R. Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308; Schmidt v. Chicago, &c., R. R. Co., 83 Ill. 405. Says RYAN, Ch. J., in Griffin v. Willow, 43 Wis. 509, 512: "Slight negligence is not slight want of ordinary care contributing to the injury which would defeat an action for negligence. 'Slight negligence is

defined to be only an absence of that degree of care and vigilance which persons of extraordinary vigilance and foresight are accustomed to use.' And such want of extraordinary care on the part of the person injured will not defeat an action for negligence. Dreher v. Fitchburg, 22 Wis. 675, 99 Am. Dec. 91; Ward v. Railway Co. 29 Wis. 144; Hammond v. Mukwa, 40 Wis. 35. In ordinary circumstances, persons traveling upon public highways are held to the exercise of ordinary care only."

67—150 Ill. 546, 556, 37 N. E. 905.

68—115 Ill. 358, 3 N. E. 456.

a condition to recovery by the plaintiff, that the person injured be found to be in the exercise of ordinary care for his own safety, and that the injury resulted from the negligence of the defendant.''⁶⁹

In Georgia a rule seems to be laid down not essentially different from that in Illinois. "It is this, that although the plaintiff be somewhat in fault, yet if the defendant be grossly negligent and thereby occasioned or did not prevent the mischief, the action may be maintained."⁷⁰ The same is true of Kansas.⁷¹

In a case in Tennessee, where it appeared that the engine of a railroad company was running in the night time without a head*light, and ran over and killed a man lying [*816] across the track, it was held that the contributory neg-

69—This doctrine is affirmed in Tribble, 112 Ga. 863, 38 S. E. 356. the following cases: Mansfield *v.* Moore, 124 Ill. 133, 16 N. E. 246; Willard *v.* Swansen, 126 Ill. 381, 18 N. E. 548; Pullman Pal. Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285; Winona Coal Co. *v.* Holmquist, 152 Ill. 581, 38 N. E. 946; Lanark *v.* Dougherty, 153 Ill. 163, 38 N. E. 892; Macon *v.* Holcomb, 205 Ill. 643, 69 N. E. 79. In Chicago, etc., R. R. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142, the court says: "Slight negligence is not incompatible with due and ordinary care, and if one has proceeded with ordinary care, though slightly negligent, he has observed the degree of care required by law." p. 128.

70—Augusta, &c., R. R. Co. *v.* McElmurry, 24 Ga. 75, 80. See Atlanta, &c., Co. *v.* Wyly, 65 Ga. 120. By statute in this state the plaintiff may recover though guilty to some extent of contributory negligence but such negligence may go in mitigation of damages. Americus, etc., R. R. Co. *v.* Luckie, 87 Ga. 6, 13 S. E. 105; Central of Ga. Ry. Co. *v.*

71—Union Pacific R. R. Co. *v.* Rollins, 5 Kan. 167. In later cases the court disclaim asserting the doctrine of comparative negligence, but hold nevertheless that if the plaintiff's negligence is slight he may recover. Kansas, &c., Ry. Co. *v.* Peavey, 29 Kan. 169, 44 Am. Rep. 630; Atchison, &c., R. R. Co. *v.* Morgan, 31 Kan. 77. Doctrine of comparative negligence held not to obtain in this state. Atchison, etc., R. R. Co. *v.* Henry, 57 Kan. 154, 45 Pac. 576. So in Texas while holding the doctrine of comparative negligence erroneous, the court has allowed a recovery if the plaintiff's negligence is not such as to amount to want of ordinary care. Houston, &c., Ry. Co. *v.* Gorbett, 49 Tex. 573. But the doctrine of comparative negligence is expressly repudiated in the later cases. McDonald *v.* International, etc., Ry. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803; Missouri, etc., Ry. Co. *v.* Rodgers, 89 Tex. 675, 36 S. W. 243.

ligence of the deceased was no bar to a recovery for the killing, though it might be taken into account in mitigation of damages.⁷² That would be in effect an attempt at an apportionment of damages, and that, too, in a case where the want of care in the party killed was at least equal to that of the party sued.

Plaintiff's Negligence Must Have Been Proximate to the Injury. The negligence that will defeat a recovery must be such as proximately contributed to the injury.⁷³ The remote cause will no more be noticed as a ground of defense than as a ground of recovery. It would be quite impossible, within such limits as can here be assigned to the subject, to enter upon an examination of specific instances, and the mention of a few must suffice. Where the injury is inflicted upon the plaintiff upon his own premises, it is not contributory negligence that he had not guarded his premises as perfectly against such injuries as pru-

72—Nashville, &c., R. R. Co. v. Smith, 6 Heisk, 174. The jury allowed it to "mitigate" the damages to \$10,000. The early case in Tennessee of Whirley v. Whiteman, 1 Head, 610, seems to have adopted the English rule, and while this is approved in Nashville, &c., R. R. Co. v. Carroll, 6 Heisk, 347, yet the rule is so far qualified as to support an instruction that where the plaintiff could have avoided the injury by ordinary care he cannot recover, unless the defendant was guilty of gross negligence. In Dusk v. Fitzhugh, 2 Lea, 307, it is held the plaintiff, though in some degree negligent, may recover if defendant's neglect more immediately produced the injury. This seems to allow the jury full liberty to return a verdict for the plaintiff where both were in fault, if in their opinion the defendant was the more culpable. The doctrine of comparative negligence was repudiated in Railway Co. v. Hall, 88 Tenn. 33, 12 S. W. 419. And so in other states: Sego v. Southern Pac. Co., 137 Cal. 405, 70 Pac. 279; Denver, etc., R. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. 211; Pennsylvania Co. v. Meyers, 136 Ind. 242, 36 N. E. 32; Banning v. Chicago, etc., Ry. Co., 89 Ia. 74, 56 N. W. 277; Matta v. Chicago, etc., Ry. Co., 69 Mich. 109, 37 N. W. 54; Hurt v. St. Louis, etc., Ry. Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; Culbertson v. Holliday, 50 Neb. 229, 69 N. W. 853; McAdoo v. Richmond, etc., R. R. Co., 105 N. C. 140, 11 S. E. 316; Tesch v. Milwaukee Elec. Ry. & Lt. Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; Wolf v. Washington Ry. & Nav. Co., 37 Wash. 491, 79 Pac. 997.

73—Kansas City, etc., R. R. Co. v. Lackey, 114 Ala. 152, 21 So. 444; Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 Atl. 924, 21 Am. St. Rep. 104, 12 L. R. A. 279; Middendorf v. Schulz, 105

dence might dictate.⁷⁴ Thus, one's buildings near the line of a railway, by reason of very combustible material, may be peculiarly exposed to take fire from passing engines; but while the owner must take upon himself all such risks as may result from a careful management of trains, he has a right to redress if his buildings are negligently burned.⁷⁵ It is not contributory negligence that one allows his *cattle to pasture by [*817] an unfenced railway track, on land belonging to or controlled by himself, provided it is the fault of the railway company that the track is not fenced.⁷⁶ In neither of these cases

Ill. App. 221; St. Louis, etc., Ry. *Mansfield v. Richardson*, 118 Ia. Co. v. McClain, 80 Tex. 85, 15 S. W. 250, 252, 45 S. E. 269.

W. 789.

74—McCarty *v. Boise City Canal Co.*, 2 Idaho, 245, 10 Pac. 623; *Shields v. Orr Extension Ditch Co.*, 22 Nev. 349, 47 Pac. 194; *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973. “Both law and morals require the plaintiff to lessen his damage and to avoid the injury altogether when it can be done by the exercise of ordinary care. But he is not bound to anticipate that someone else will be negligent or injure his property. He is not required to guard against the possible results of defendant's act so long as it is uncertain whether that act will culminate in an injury to his property. When negligence becomes active, and a plaintiff knows it, he too must be active to avoid consequences which he now sees and knows to be impending. But as long as the defendant's force is quiescent, the plaintiff himself may remain quiescent. In the presence of a seen danger he must protect his goods, but he is not required to guard against a possible or contingent calamity.”

75—*Philadelphia, &c., R. R. Co. v. Hendrickson*, 80 Pa. St. 182, 21 Am. Rep. 97. See, for the same principle, *Underwood v. Waldron*, 33 Mich. 232; *King v. Morris, &c., R. R. Co.*, 3 C. E. Green, 397; *Salmon v. Delaware, &c., R. R. Co.*, 38 N. J. 5, 20 Am. Rep. 356. Not contributory negligence to erect buildings without metallic roofs near a dangerous waste burner. *Alpern v. Churchill*, 53 Mich. 607. See *King v. Am. Tr. Co.*, 1 Flipp 1, and cases p. 1227, n. 23, *supra*. But if one employs in his business an engine known to throw sparks, he cannot recover of the owner. *Marquette, &c., R. R. Co. v. Spear*, 44 Mich. 169, 38 Am. Rep. 242. Piling lumber on inflammable waste in a dry season close to a track is contributory negligence. *Post v. Buffalo, &c., R. R. Co.*, 108 Pa. St. 585. See *Miss. Pac. Ry. Co. v. Cornell*, 30 Kan. 35.

76—*Blaine v. Ches. & Ohio R. R. Co.*, 9 W. Va. 252. And see *Trow v. Vt. Cent. R. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191. Compare *Fritz v. First Div., &c., R. R. Co.*, 22 Minn. 404; *Wilder v. Maine*

does the party neglect any duty he owes to the railway company; he merely does what he may rightfully do with his own.

Taking Risks to Save Life or Property. So highly does the law regard human life, that it will not impute negligence to an effort to preserve it if, from the appearances, the party had reason to believe he might succeed in the attempt, though not without danger of failure and injury to himself.⁷⁷ "A rescuer, one who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril, ought not to hear from the law words of condemnation of his bravery, because he rushed into danger, to snatch from it the life of a fellow creature, imperiled by the negligence of another; but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence. This conscience and reason approve, and the best judgment of thoughtful and intelligent judges has declared it to be the law of the land."⁷⁸ The conditions of recovery in such cases are that the person whose

Cent. R. R. Co., 65 Me. 332, 20 Am. Rep. 698; *Trout v. Virginia*, &c., R. R. Co., 23 Grat. 619; *Van Horn v. Burlington*, &c., Ry. Co., 59 Ia. 33.

77—*Eckert v. Long Island*, &c., R. R. Co., 43 N. Y. 502, 3 Am. Rep. 721. Compare *Nor. Penn. R. R. Co. v. Mahoney*, 57 Pa. St. 187; *Donaheo v. Wabash*, &c., Co., 83 Mo. 560, 53 Am. Rep. 594; *Clark v. Famous Shoe*, &c., Co., 16 Mo. App. 463.

78—*Corbin v. Philadelphia*, 195 Pa. St. 461, 468, 469, 45 Atl. 1070, 78 Am. St. Rep. 825, 49 L. R. A. 715. And see in support of same views: *West Chicago St. R. R. Co. v. Liderman*, 187 Ill. 463, 58 N. E. 367, 79 Am. St. Rep. 226; *Chicago Terminal Transfer R. R. Co. v. Kotoski*, 101 Ill. App. 300; *Saylor v. Parsons*, 122 Ia. 679, 98 N. W. 500, 101 Am. St. Rep. 283, 64 L. R. A. 542; *Peyton v. Texas*,

etc., Ry. Co., 41 La. Ann. 861, 6 So. 690, 17 Am. St. Rep. 430; *Whitworth v. Shreveport Belt Ry. Co.*, 112 La. 363, 36 So. 414, 65 L. R. A. 129; *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842; *Omaha, etc., Ry. Co. v. Krayonbuhl*, 48 Neb. 553, 67 N. W. 447; *Dailey v. Burlington*, etc., R. R. Co., 58 Neb. 396, 78 N. W. 722; *Manthey v. Rauenbuehler*, 71 App. Div. 173, 75 N. Y. S. 714; *Muhs v. Fire Ins. Salvage Corps*, 89 App. Div. 389, 85 N. Y. S. 911; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 28 N. E. 172, 29 Am. St. Rep. 553; *Pittsburg*, etc., Ry. Co. v. *Lynch*, 69 Ohio St. 123, 68 N. E. 703, 100 Am. St. Rep. 658, 63 L. R. A. 504; *Kansas City*, etc., R. R. Co. v. *Thornhill*, 141 Ala. 215; *Railroad Co. v. Ridley*, 114 Tenn. 727.

rescue is attempted must be in a position of peril from the negligence of the defendant, and the rescue must not be attempted under such circumstances, or in such a manner, as to constitute recklessness.⁷⁹

Mistake in Sudden Peril. Where one is placed by the negligent acts of another in such a position that he is compelled to choose upon the instant, and in the face of a grave and impending peril, between two hazards, and he makes such a choice as a person of ordinary prudence in the same position might make, and an injury results therefrom, the fact that if he had chosen the other hazard he would have escaped injury does not prove contributory negligence.⁸⁰ "A party suddenly realizing that

79—*Sann v. Johns Mfg. Co.*, 16 App. Div. 252, 44 N. Y. S. 641; *Pittsburg, etc., Ry. Co. v. Lynch*, 69 Ohio St. 123, 68 N. E. 703, 100 Am. St. Rep. 658, 63 L. R. A. 504. *In Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 28 N. E. 172, 29 Am. St. Rep. 553, the court says: "The attendant circumstances must be regarded; the alarm, the excitement and confusion usually present on such occasions, the uncertainty as to the proper move to be made, the promptness required, and the liability to mistake as to what is best to be done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one, who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is neither supported by principle nor authority." pp. 322-3. Whether the same rules apply to the attempts to save property see *Burnett v. Atlantic*

Coast Line R. R. Co., 132 N. C. 261, 43 S. E. 797; *Chattanooga L. & R. Co. v. Hodges*, 109 Tenn. 331, 70 S. W. 616, 97 Am. St. Rep. 844, 60 L. R. A. 459; *Pegram v. Railroad Co.*, 139 N. C. 303.

80—*Twomley v. Railroad Co.*, 69 N. Y. 158, 25 Am. Rep. 162. For the same principle, see *Stokes v. Saltonstall*, 13 Pet. 181; *Penn. R. R. Co. v. Kilgore*, 32 Penn. St. 292, 72 Am. Dec. 787; *Frink v. Potter*, 17 Ill. 406; *Macon, &c., R. R. Co. v. Winn*, 26 Ga. 250; *Filer v. New York Cent., &c., Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Railroad Co. v. Mowery*, 36 Ohio St. 418; *Mark v. St. Paul, &c., Co.*, 30 Minn. 493; *Brown v. Chicago, &c., Co.*, 54 Wis. 342; *Richmond, etc., R. R. Co. v. Farmer*, 97 Ala. 141, 12 So. 86; *Mitchell v. Southern Pac. R. R. Co.*, 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; *Peoria, etc., Ry. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951; *Kleiber v. Peoples Ry. Co.*, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; *Chicago, etc., R. R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976; *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, 55 N. W. 872, 20 L. R. A. 853; *Tuttle*

he is in danger from the negligence of another is not to be charged with contributory negligence for every error of judgment when practically instantaneous action is required."⁸¹

v. Atlantic City R. R. Co., 66 N. J. L. 327, 49 Atl. 450, 88 Am. St. Rep. 491, 54 L. R. A. 582; Nosler *v.* Coos Bay R. R. Co., 39 Ore. 331, 64 Pac. 644; Malone *v.* Pittsburgh, etc., R. R. Co., 152 Pa. St. 390, 25 Atl. 638; Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479; Missouri, etc., Ry. Co. *v.* Rogers, 91 Tex. 52, 40 S. W. 956; Haney *v.* Pittsburgh, etc., Ry. Co., 38 W. Va. 570, 18 S. E. 748; Berg *v.* Milwaukee, 83 Wis. 599, 53 N. W. 890; South Chicago City Ry. Co. *v.* Kinnare, 216 Ill. 451, 75 N. E. 179; Kansas City, etc., R. R. Co. *v.* Langley, 70 Kan. 453, 78 Pac. 858; Chretien *v.* Northern Rys. Co., 113 La. 761, 37 So. 716; Howell *v.* Lansing City Elec. Ry. Co., 136 Mich. 432, 99 N. W. 406; Murphy *v.* St. Louis Transit Co., 189 Mo. 42, 87 S. W. 945. The maxim does not apply where one is negligent in getting in to the dilemma. Aiken *v.* Pennsylvania R. R. Co., 130 Pa. St. 380, 18 Atl. 619, 17 Am. St. Rep. 775. If one, lulled by another into a feeling of security, is hurt, the latter cannot say he should have been on his guard. Chicago, &c., R. Co. *v.* Goebel, 119 Ill. 515.

Where alternatives are presented to a traveler upon a highway as modes of escape from collision with an approaching traveler, it is a question of fact whether either might not fairly be chosen by an intelligent and prudent person. Larrabee *v.* Sewall, 66 Me. 376.

81—Denver, etc., Rapid Transit

Co. *v.* Dwyer, 20 Colo. 132, 36 Pac. 1106. Where a passenger jumped from a train to avoid a collision and was injured it was held that he could recover, though he would have been unhurt if he had remained on the train. Railway Co. *v.* Murray, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787. The court says: "In order to render the railroad company liable for injuries received in an effort to escape an apprehended danger there must have been a reasonable cause of alarm occasioned by the negligence or misconduct of the company. If the effort of the passenger to escape resulted from a rash apprehension of danger which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. But if, on the other hand, he be placed, through the negligent or unskillful operation of its trains by the railroad company, in a situation apparently so perilous as to render it prudent for him to leap from the train, whereby he is injured, he will be entitled to recover damages, although he would not have been hurt if he had remained on the train. On occasions where a passenger is confronted by imminent danger and peril he cannot reasonably be expected to calculate chances, or to deliberate upon the means of escape, but must of necessity judge hastily of the danger of remaining where he is, as also of the danger of attempting to escape, by

Contributory Negligence. Illustrations. Where a party in the exercise of his own right, is in the enjoyment of that which is common to others also, or which may in any way narrow, impede, or restrict the enjoyment of rights by others, his duty to observe a vigilance proportionate to the danger of interference is manifest. Thus, one about to cross a railway track by the public highway, where the liability to collision is great, will be held precluded, by his contributory negligence, from a recovery for an injury, if he drives upon the track without looking for approaching trains, even though the railway company has neglected to sound the alarm which the statute requires of it at such places.⁸² If the view is temporarily obstructed or the hear-

the circumstances as they, at the instant, appear to him, and not by the result. He acts upon the probabilities as they appear to him, and if he acts as a man of ordinary prudence, placed in the same circumstances and under a like necessity of immediate action and decision, would have acted, and in so doing makes an effort to escape and is injured, the railroad company is responsible to him for his damages." pp. 254, 255.

82—*Railroad Co. v. Whitton*, 13 Wall. 270; *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Chicago*, &c., Ry. Co., 114 U. S. 615; *Butterfield v. Western R. R. Co.*, 10 Allen, 533, 87 Am. Dec. 678; *Allyn v. Boston*, &c., R. R. Co., 105 Mass. 77; *Craig v. New York*, &c., R. R. Co., 118 Mass. 431; *Wheelwright v. Boston*, &c., Co., 135 Mass. 225; *Grippen v. N. Y. Cent. R. R. Co.*, 40 N. Y. 34; *Baxter v. Troy*, &c., R. R. Co., 41 N. Y. 502; *Massoth v. Delaware*, &c., R. R. Co., 64 N. Y. 524; *Salter v. Utica*, &c., R. R. Co., 88 N. Y. 42; *Tolman v. Syracuse*, &c., Co., 98 N. Y. 198, 50 Am. Rep. 649; *Bellefontaine, &c., R. R. Co. v. Hunter*, 33 Ind. 365; *Indianapolis, &c., Ry. Co. v. Green*, 106 Ind. 279; *Nor. Penn. R. R. Co. v. Heileman*, 49 Pa. St. 60; *Gerety v. Phila.*, &c., R. R. Co., 81 Pa. St. 274; *Reading, &c., Co. v. Ritchie*, 102 Pa. St. 425; *Fletcher v. Atlantic*, &c., R. R. Co., 64 Mo. 484; *Stepp v. Chicago*, &c., Co., 85 Mo. 229; *Taylor v. Miss. Pac. Ry. Co.*, 86 Mo. 457; *Brown v. Milwaukee*, &c., R. R. Co., 22 Minn. 165; *Marty v. Chicago*, &c., Co., 38 Minn. 108, 35 N. W. 670; *Bellefontaine, &c., R. R. Co. v. Snyder*, 24 Ohio St. 671; *Zeigler v. Nor. East. R. R. Co.*, 5 Sou. Car. 221; *Chicago, &c., R. R. Co. v. Hatch*, 79 Ill. 137; *Chicago, &c., R. R. Co. v. Harwood*, 80 Ill. 88; *Rockford, &c., R. R. Co. v. Byam*, 80 Ill. 528; *Chicago, &c., R. R. Co. v. Damerell*, 81 Ill. 451; *Myers v. Ind., &c., Ry. Co.*, 113 Ill. 386; *Chicago, &c., Co. v. Hutchinson*, 120 Ill. 587; *Lake Shore, &c., R. R. Co. v. Miller*, 25 Mich. 274; *Staal v. Grand Rapids*, &c., Co., 57 Mich. 239; *Rhoades v. Chicago*, &c., Ry. Co., 58 Mich. 263; *Kwiotkowski v. Chicago*, &c., Ry. Co., 70 Mich. 549, 38 N. W.

ing made ineffective by a transient noise or disturbance, one should wait or should exercise care in proportion to the diffi-

463; *Williams v. Chicago, &c., Ry. Co.*, 64 Wis. 1; *Lesan v. Maine Centr. R. Co.*, 77 Me. 85; *Baltimore, &c., R. R. Co. v. Mali*, 66 Md. 53; *Penn. R. R. Co. v. Righter*, 42 N. J. L. 180; *Merkle v. New York, &c., Co.*, 49 N. J. L. 473, 9 Atl. 680; *Kennedy v. Chicago, &c., Ry. Co.*, 68 Ia. 559; *Reed v. Chicago, &c., Co.*, 74 Ia. 188, 37 N. W. 149; *Bloomfield v. Burlington, &c., Ry. Co.*, 74 Ia. 607, 38 N. W. 431; *Cullen v. Delaware, etc., Co.*, 113 N. Y. 667, 21 N. E. 1115; *Scaggs v. Delaware, etc., Co.*, 145 N. Y. 201, 39 N. E. 716; *Kimball v. Friend*, 95 Va. 125, 27 S. E. 901; *Beyel v. Newport News, etc., R. R. Co.*, 34 W. Va. 538, 12 S. E. 532; *Potter v. Flint, etc., R. R. Co.*, 62 Mich. 22, 28 N. W. 714; *Grosstick v. Detroit, etc., R. R. Co.*, 90 Mich. 594, 51 N. W. 667; *Magner v. Truesdale*, 53 Minn. 436, 55 N. W. 607; *Boyd v. Wabash Western Ry. Co.*, 105 Mo. 371, 16 S. W. 909; *Lane v. Missouri Pac. Ry. Co.*, 132 Mo. 4, 33 S. W. 645, 1128; *Omaha, etc., Ry. Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599; *Hamilton v. Delaware, etc., R. R. Co.*, 50 N. J. L. 263, 13 Atl. 29; *Delaware, etc., R. R. Co. v. Hefferan*, 57 N. J. L. 149, 30 Atl. 578; *Brickell v. New York, etc., R. R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; *McAdoo v. Richmond, etc., R. R. Co.*, 105 N. C. 140, 11 S. E. 316; *New York, etc., R. R. Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130; *Cleary v. Philadelphia, etc., R. R. Co.*, 140 Pa. St. 19, 21 Atl. 242; *Marland v. Pittsburgh, etc., R. R. Co.*, 123 Pa. St. 487, 16 Atl. 624, 10 Am. St. Rep. 541; *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514, 18 Atl. 718, 15 Am. St. Rep. 733, 6 L. R. A. 143; *Aiken v. Pennsylvania R. R. Co.*, 130 Pa. St. 380, 18 Atl. 619, 17 Am. St. Rep. 775; *Blight v. Camden, etc., R. R. Co.*, 143 Pa. St. 10, 21 Atl. 995; *Meyers v. Balt. R. R. Co.*, 150 Pa. St. 386, 24 Atl. 747; *Gray v. Pennsylvania R. R. Co.*, 172 Pa. St. 383, 33 Atl. 694; *Railway Co. v. Howard*, 90 Tenn. 144, 19 S. W. 116; *Galveston, etc., Ry. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *New York, etc., R. R. Co. v. Kellam's Admr.*, 83 Va. 851, 3 S. E. 703; *Woolf v. Washington Ry. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997; *Berkeley v. Chesapeake, etc., Ry. Co.*, 43 W. Va. 11, 26 S. E. 349; *White v. Chicago, etc., Ry. Co.*, 102 Wis. 489, 78 N. W. 585; *Pyle v. Clark*, 79 Fed. 744, 25 C. C. A. 190; *Lambert v. Southern Pacific R. R. Co.*, 146 Cal. 231, 79 Pac. 873; *Wabash R. R. Co. v. Keister*, 163 Ind. 609, 67 N. E. 521; *Schmidt v. Missouri Pac. Ry. Co.*, 191 Mo. 215. The track is a warning of danger. *Matta v. Chicago, &c., Co.*, 69 Mich. 109, 37 N. W. 54. So is a siding. *Mynning v. Detroit, &c., Co.*, 59 Mich. 257. But one has a right to assume a crossing is safe without stopping or careful looking, when a gate is open and the gatekeeper by it. *Schneider v. Cincinnati, &c., Ry. Co.*, 17 N. E. Rep. 321 (Ohio). The rule is of course liable to be affected by obstructions which prevent the track on each side being seen as the team approaches. Cases of foot passengers. *Laverenz v. Chicago, &c.,*

culty and danger.⁸³ If one is seen on the track in time for him to get out of the way, the engineer has a right to assume he will do so, unless he has reason to suppose he is laboring under some disability, or that he does not hear or comprehend the signals.⁸⁴

Co., 56 Ia. 689; *Young v. New York, &c.*, Co., 107 N. Y. 500, 14 N. E. 434; *Woodard v. New York, &c.*, Co., 106 N. Y. 369; *Davey v. London, &c.*, Co., L. R. 12 Q. B. D. 70; *Mahlen v. Lake Shore, &c.*, Ry. Co., 49 Mich. 585; *Ormsbee v. Boston, &c.*, Corp., 14 R. I. 102, a valuable case. *South, &c., R. Co. v. Donovan*, 84 Ala. 141, 4 So. 142. Cases of crossing after one train has passed and being hit by another. *Moore v. Phila., &c.*, R. R. Co., 108 Penn. St 349; *Allerton v. Boston, &c.*, Co., 146 Mass. 241, 15 N. E. 621; *Chicago, &c.*, Co. v. *Hedges*, 105 Ind. 398; *Cleary v. Philadelphia*, etc., R. R. Co., 140 Pa. St. 19, 21 Atl. 242. Where gates are used, it is held the traveler is not bound to so much caution in looking and listening. *Kane v. New York*, etc., R. R. Co., 132 N. Y. 160, 30 N. E. 256. It is negligence to cross in front of a nearby train. *Brunette v. Chicago, etc.*, Ry. Co., 86 Wis. 197, 56 N. W. 478. See *Morris v. Lake Shore*, etc., Ry. Co., 148 N. Y. 182, 42 N. E. 579. In a suit by a woman for an injury at a crossing it was held proper to take into account the plaintiff's sex in determining whether she exercised the care she ought. *Denver, etc., R. R. Co. v. Lorentzen*, 79 Fed. 291, 24 C. C. A. 592.

83—*Colorado, etc., Ry. Co. v. Thomas*, 33 Colo. 517; *Central R. R. Co. v. Smalley*, 61 N. J. L. 277, 39 Atl. 695; *Swanson v. Central R. R. Co.*, 63 N. J. L. 605, 44 Atl. 852; *Conklin v. Erie R. R. Co.*, 63 N. J. L. 338, 43 Atl. 666; *Baltimore, etc., R. R. Co. v. McClellan*, 69 Ohio St. 142, 68 N. E. 816; *Sherwin v. Rutland R. R. Co.*, 74 Vt. 1, 51 Atl. 1089; *Beyel v. Newport News, etc.*, R. R. Co., 34 W. Va. 538, 12 S. E. 532. See *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 274; *Craig v. N. Y., &c., R. R. Co.*, 118 Mass. 431; *Miss. Pac. Ry. Co. v. Lee*, 70 Tex. 496, 7 S. W. 857; *Atchison, &c., R. R. Co. v. Townsend*, 39 Kan. 115, 17 Pac. 804; *Strong v. Sacramento, &c., Co.*, 61 Cal. 326; *Klanowski v. Grand Trunk, &c., Co.*, 57 Mich. 525; *Chase v. Maine Centr. R. R. Co.*, 78 Me. 346; *Seefeld v. Chicago, &c., Co.*, 70 Wis. 216, 35 N. W. 278.

84—*Frech v. Philadelphia R. R. Co.*, 39 Md. 574, and cases cited. *Bouwmeester v. Grand Rapids, &c., Co.*, 67 Mich. 87, 34 N. W. 414; *Nichols v. Louisville, &c., Co.*, 6 S. W. Rep. 339 (Ky.); *Gregory v. Cleveland, &c., Co.*, 112 Ind. 385, 14 N. E. 228; *Maloy v. Wabash, &c., Co.*, 84 Mo. 270; *Terre Haute, &c., Ry. Co. v. Graham*, 95 Ind. 286, 48 Am. Rep. 719; *Boyd v. Wabash Western Ry. Co.*, 105 Mo. 371, 16 S. W. 909. But it is held that if, after discovering a trespasser in time to avoid him, reasonable effort is not made to prevent injuring him, his negligence is not the cause of the injury. *Meeks v. South. Pac. R. R. Co.*, 56 Cal. 513; *Maryland, &c., R. R. Co. v. Neubeur*, 62 Md. 391;

Where a blind man was injured at a crossing, it was held gross negligence for such a person to go alone and unattended where sight is necessary for safety.⁸⁵ The same degree of precaution

Balt., &c., Co. v. Kean, 65 Md. 394; Miss. Pac. Ry. Co. v. Weisen, 65 Tex. 443; Burnett v. Burlington, &c., Co., 16 Neb. 332; Louisville, &c., Co. v. Coleman, 86 Ky. 556, 6 S. W. 438, 8 S. W. 875. See Keyser v. Chicago, &c., Co., 56 Mich. 559; State v. Balt., &c., R. R. Co., 69 Md. 339, 14 Atl. 686. So if at a point where two tracks cross, trains meet and the engineer of the one which has the right of way sees that by the other's mistake a collision will occur if he attempts to cross first, he must stop or his company will be liable for the injury suffered. Pratt v. Chicago, &c., Ry. Co., 38 Minn. 455, 38 N. W. 356. When a child is seen on the track an engineer is bound to use only reasonable care. Chrystal v. Troy, &c., Co., 105 N. Y. 164. See Morrissey v. Eastern R. R. Co., 126 Mass. 377, 30 Am. Rep. 686; Nolan v. New York, &c., Co., 53 Conn. 461; Jamison v. Illinois Centr., &c., Co., 63 Miss. 33; Kansas Pac. Ry. Co. v. Whipple, 39 Kan. 531, 18 Pac. 730. But compare Ind., &c., Co. v. Pitzer, 109 Ind. 179, 58 Am. Rep. 387; Payne v. Humeston, &c., Co., 70 Ia. 584. That a trespasser is not discovered in time to avoid injuring him is not negligence. Frazer v. South, &c., R. R. Co., 81 Ala. 185, 60 Am. Rep. 145; Masser v. Chicago, &c., Co., 68 Ia. 602; St. Louis, &c., Ry. Co. v. Monday, 49 Ark. 257, 4 S. W. 782; Denman v. St. Paul, &c., Ry. Co., 26 Minn. 357; Memphis, &c., R. Co. v. Womack, 84 Ala. 149, 4 So. 618. But see Georgia, &c., R. Co. v. Blanton, 84 Ala. 154, 4 So. 621; Louisville, &c., R. R. Co. v. Schuster, 7 S. W. Rep. 874 (Ky.); Citizens' St. Ry. Co. v. Steen, 42 Ark. 321; Kansas, &c., Ry. Co. v. Cramner, 4 Col. 524; Townley v. Chicago, &c., Ry. Co., 53 Wis. 626. In Missouri it has been held that liability arises only from negligence after discovering the trespasser. Yarnall v. St. Louis, &c., Co., 75 Mo. 575; Bell v. Hannibal, &c., Co., 72 Mo. 50; 86 Mo. 599; Rine v. Chicago, &c., Co., 88 Mo. 392; Kelly v. Un. Ry., &c., Co., 95 Mo. 279, 8 S. W. 420; but also that failure to discover is negligent where precautions required by law are not observed in moving the train. Bergman v. St. Louis, &c., Co., 88 Mo. 678; Keim v. Union Ry., &c., Co., 90 Mo. 314; Dunkman v. Wabash, &c., Co., 4 S. W. Rep. 670; or it is moved recklessly. Donahoe v. Wabash, &c., Co., 83 Mo. 543. One who passes through a chance opening in a train one hundred feet from a street, is a trespasser and acts at his peril. Dahlstrom v. St. Louis, &c., Ry. Co., 96 Mo. 99, 8 S. W. 777.

85—Florida Central, etc., R. R. Co. v. Williams, 37 Fla. 406, 20 So. 558. “The engineer in charge of a railroad locomotive has the right to presume that an adult person whom he sees upon or beside the track ahead of his approaching engine, is in possession of his faculties, and that he will obey the instinctive law of self-

is not required in crossing street car tracks as in crossing the tracks of a steam railroad.⁸⁶

It is held to be contributory negligence to get on or off a moving train of cars,⁸⁷ or to ride on the platform when there is

preservation by getting off the track, if already on it, or that he will not get on, if already off; and, in such case, it would not be negligence on the engineer's part if he failed to attempt to stop the engine, unless he knew the party, and that he labored under some disability that prevented him from knowing of his danger, or that would prevent his getting or keeping out of the way, or unless he sees evidence of such disability from the party's actions or appearance, or that he cannot or will not get or keep out of the way." *Ibid.* "An infirmity in any of the senses makes it necessary for a person to be more vigilant and cautious in the use of his other senses." *Fenneman v. Holden*, 75 Md. 1, 22 Atl. 1049.

86—*Cincinnati St. Ry. Co. v. Snell*, 54 Ohio St. 197, 43 N. E. 702, 32 L. R. A. 276; *Bass v. Norfolk Ry. & Lt. Co.*, 100 Va. 1, 40 S. E. 100; *Roberts v. Spokane St. Ry. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184; *Tesch v. Milwaukee Elec. Ry. & Lt. Co.*, 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618. See *Birmingham Ry. & Elec. Co. v. Baker*, 126 Ala. 135, 28 So. 87; *Hicks v. Citizens' St. Ry. Co.*, 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508; *Memphis St. Ry. Co. v. Riddick*, 110 Tenn. 227, 75 S. W. 924. But in Pennsylvania the rule appears to be the same for street railroads as for steam roads. *Ehrisman v. East Harrisburg City Pass. Ry.*

Co., 150 Pa. St. 180, 24 Atl. 596, 17 L. R. A. 448; *Wheelahan v. Phila. Traction Co.*, 150 Pa. St. 187, 24 Atl. 688. And see *Birmingham Ry. L. & P. Co. v. Oldham*, 141 Ala. 195; *Wolf v. City Ry. Co.*, 45 Ore. 446, 72 Pac. 329, 78 Pac. 668.

87—*Howell v. Illinois Central R. R. Co.*, 75 Miss. 242, 21 So. 746, 36 L. R. A. 545; *Hunter v. Cooperstown*, etc., R. R. Co., 112 N. Y. 371, 19 N. E. 820, 8 Am. St. Rep. 752, 2 L. R. A. 832; *Bacon v. Delaware*, etc., R. R. Co., 143 Pa. St. 14, 21 Atl. 1002; *Bardwell v. Mobile*, &c., R. R. Co., 63 Miss. 574, 56 Am. Rep. 842; *Lake Shore, &c., Ry. Co. v. Bangs*, 47 Mich. 470; *Reibel v. Cincinnati, &c., Co.*, 114 Ind. 476, 17 N. E. 107. But, under peculiar circumstances, held a question for the jury. *Shannon v. Boston, &c., R. R. Co.*, 78 Me. 52; *Birmingham Elec. Ry. Co. v. Clay*, 108 Ala. 233, 19 So. 309; *Chicago, &c., R. R. Co. v. Winfrey*, 67 Neb. 13, 93 N. W. 526; *Kansas, &c., Ry. Co. v. Dorough*, 72 Tex. 108, 10 S. W. 711. For a child to jump off in excitement and through fear of being carried by is not negligence. *Hemmingway v. Chicago, &c., Co.*, 72 Wis. 42, 37 N. W. 804. If ordered by the conductor, and the train going slowly, it is not negligence *per se*. *Balt., &c., R. R. Co. v. Leapley*, 66 Md. 571. See *McIntyre v. New York, &c., R. R. Co.*, 37 N. Y. 287. Compare *Stewart v. Boston, &c., R. Co.*, 146 Mass. 605, 16 N. E.

room inside.⁸⁸ If one uses knowingly a defective or obstructed sidewalk or roadway, the question of his negligence is usually

466. Getting on a moving train is negligent. *Gulf, &c., Ry. Co. v. Ryan*, 69 Tex. 665, 7 S. W. 83; *Solomon v. Manhattan Ry. Co.*, 103 N. Y. 437, 57 Am. Rep. 760; *Novock v. Mich. Cent. R. R. Co.*, 63 Mich. 121, 29 N. W. 525. So may be the entering of a street car when in motion. *Eppendorf v. Railroad Co.*, 69 N. Y. 193. Going between cars in a train temporarily cut, knowing the facts. *Lake Shore, &c., Ry. Co. v. Pinchin*, 112 Ind. 592, 13 N. E. 677. Lying down drunk on a track. *Yarnall v. St. Louis, &c., Ry. Co.*, 75 Mo. 575; *Denman v. St. Paul, &c., R. R. Co.*, 26 Minn. 357. But intoxication to some extent is not conclusive of contributory negligence in case of an injury upon a highway. *Seymer v. Lake*, 66 Wis. 651.

It is negligence in law to leave a street railway car by the front entrance in disregard of the known rule of the road forbidding it, even though allowed by the driver. *Baltimore, &c., R. Co. v. Wilkinson*, 30 Md. 224. So it is negligence not to look out upon the track in approaching a railroad crossing to cross it. *Cent. R. R. Co. v. Feller*, 85 Pa. St. 226. See, also, *Cleveland, &c., R. R. Co. v. Elliott*, 28 Ohio St. 340, and see cases p. 1457, *ante*. Getting off street car in motion held contributory negligence. *Calderwood v. North Birmingham St. Ry. Co.*, 96 Ala. 318, 11 So. 66; *Boulfrois v. United Traction Co.*, 210 Pa. St. 263, 105 Am. St. Rep. 808. See *Joyce v. Los Angeles Ry. Co.*, 147 Cal. 274. So to get on side step before car stops. *State v. Lake Roland El. Ry. Co.*, 84 Md. 163, 34 Atl. 1130; *Baltimore Consol. Ry. Co. v. Forman*, 94 Md. 226, 51 Atl. 83.

88—*Worthington v. Central Vt. R. R. Co.*, 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326; *Fisher v. W. Va. etc., R. R. Co.*, 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69. But not necessarily so when car crowded. *Trumbull v. Erickson*, 97 Fed. 891, 38 C. C. A. 536; *Jackson v. Natchez, etc., Ry. Co.*, 114 La. 982, 38 So. 701. Nor on platform of street car. *Holloway v. Pasadena, etc., Ry. Co.*, 130 Cal. 177, 62 Pac. 478; *Archer v. Fort Wayne, etc., Ry. Co.*, 87 Mich. 101, 49 N. W. 488; *Chicago City Ry. Co. v. McCaughna*, 216 Ill. 202, 74 N. E. 819; *Alton Ry., etc., Co. v. Webb*, 219 Ill. 563. Nor on foot board of open car. *City Ry. Co. v. Lee*, 50 N. J. L. 435, 14 Atl. 883; *Alton Lt. & Traction Co. v. Oller*, 217 Ill. 15, 75 N. E. 419; *Ft. Wayne Traction Co. v. Hardendorf*, 164 Ind. 403. But otherwise when there is room inside. *Kirchner v. Oil City St. Ry. Co.*, 210 Pa. St. 45. Nor that passenger by coach at night knows that no lights are carried nor that an overset is caused by driving at his suggestion out of road. *Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125. See, for further illustrations, *Chappell v. Bradshaw*, 13 Atl. Rep. 50 (Md.); *Ala., &c., R. Co. v. Yarbrough*, 83 Ala. 238, 3 So. 447; *Coleman v. Second Ave., &c., Co.*, 41 Hun. 380. As to allowing arm to project out of car window, see *Clarke v. Louisville, etc., R. R. Co.*, 18 Ky. L. R. 1082, 39 S. W.

for the jury.⁸⁹ But the danger may be so great and apparent as to render the use of the way negligent in law,⁹⁰ especially if another route is open.⁹¹ Some additional cares are referred to in the margin.⁹²

840; *Kird v. New Orleans*, etc., 1085; *Styles v. Decatur*, 131 Mich. R. R. Co., 105 La. 226, 29 So. 729; *Clerc v. Morgan's*, etc., Co., 107 La. 370, 31 So. 886, 90 Am. St. Rep. 319; *McCord v. Atlanta*, etc., R. R. Co., 134 N. C. 53, 45 S. E. 1031; *Carrico v. W. Va. Cent.*, etc., Ry. Co., 35 W. Va. 389, 14 S. E. 12; *Carrico v. W. Va. Cent.*, etc., R. R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

89—*Bullock v. Mayor, &c., of New York*, 99 N. Y. 654; *Gilbert v. Boston*, 139 Mass. 313; *Emporia v. Schmidling*, 33 Kan. 485; *Baltimore v. Holmes*, 39 Md. 243; *Fulliam v. Muscatine*, 70 Ia. 436; *Spearbracker v. Larrabee*, 64 Wis. 573; *Henry, &c., Turnp. Co. v. Jackson*, 86 Ind. 111; *Evansville, &c., Co. v. Carvener*, 113 Ind. 51, 14 N. E. 739; *Gulf, &c., Ry. Co. v. Gascamp*, 69 Tex. 545, 7 S. W. 227; *Cantwell v. Appleton*, 71 Wis. 463, 37 N. W. 813; *Shook v. Cohoes*, 108 N. Y. 648, 15 N. E. 531; *Lowell v. Watertown*, 58 Mich. 568; *Monongahela Bridge Co. v. Bevard*, 11 Atl. Rep. 575 (Penn.); *Altoona v. Lotz*, 114 Pa. St. 238, 60 Am. Rep. 346; *Powers v. Chicago*, 20 Ill. App. 178; *Cullom v. Justice*, 161 Ill. 372, 43 N. E. 1098; *Board of Commissioners v. Mutchler*, 137 Ind. 140, 36 N. E. 534; *Byerly v. Anamosa*, 79 Ia. 204, 44 N. W. 359; *Bailey v. Centerville*, 115 Ia. 271, 88 N. W. 379; *People's Bank v. Morgolofski*, 75 Md. 432, 23 Atl. 1027, 32 Am. St. Rep. 403; *Harris v. Clinton*, 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842; *Argus v. Sturgis*, 86 Mich. 344, 48 N. W.

90—*Merrill v. North Yarmouth*, 78 Me. 200, 57 Am. Rep. 794; *Schaefer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Bruker v. Covington*, 69 Ind. 33; *Hartman v. Muscatine*, 70 Ia. 511.

91—*Pittsburgh, &c., Ry. Co. v. Taylor*, 104 Pa. St. 306; *McGinty v. Keokuk*, 66 Ia. 725. See *St. Louis, &c., Ry. Co. v. Morgart*, 8 S. W. Rep. 179 (Ark.). Where the plaintiff's horse took fright at a pile of rubbish in the road and turned back, and the plaintiff turned him about and tried to force him by, when he reared and fell over upon the plaintiff, the plaintiff was held guilty of contributory negligence. *Salem v. Walker*, 16 Ind. App. 687, 46 N. E. 90. Where one uses a street on which danger signals are displayed, he should use greater care. *Walsh v. Central, etc., Tel. & Tel. Co.*, 176 N. Y. 163, 68 N. E. 146.

92—Failing to get off a hand car and walk or to go to a fire

[*818] ***Negligence of Infants, etc.** In an action brought in New York for a negligent injury to a child two years of age, who was run over while at play in the public street, the court held that he *was not entitled to recover, because it was negligent for him to be thus exposed to injury. It is true he was not of an age to be able to judge for himself whether or not the place was one of danger, but it was the duty of parents or others having charge of him to judge for him, and if they neglected this duty, their negligence

when one's feet are freezing is negligent. *Farmer v. Centr. Ia. Ry. Co.*, 67 Ia. 136. So if one in the hurry of working falls into an elevator shaft, the danger of which he appreciates. *Taylor v. Carew Mfg. Co.*, 140 Mass. 150. So carelessly grasping uninsulated part of a wire in repairing electric light line. *Piedmont El. &c., Co. v. Patteson*, 84 Va. 747, 6 S. E. 4. So if one knowing danger continues to work, undermining a dangerous wall. *Campbell v. Lunsford*, 83 Ala. 512, 3 So. 522. See *Naylor v. Chicago, &c., Ry. Co.*, 53 Wis. 661. Leaving valuables in sleeping car berth while in washroom. *Root v. New York, &c., Co.*, 28 Mo. App. 199. Not contributory negligence in law that blind man, accustomed to walk in street, fell into an open hatchway where men were working. *Smith v. Wildes*, 143 Mass. 556. Nor for one rightfully on an engine to ride on the footboard at engineer's order. *Lake Shore, &c., Ry. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197. One who, to demonstrate the correctness of his opinion that an electric light wire was properly insulated, took hold of the wire and was injured, was held guilty of contributory negligence. An- derson *v. Jersey City Elec. Lt. Co.*, 64 N. J. L. 664, 46 Atl. 593. Intoxication is no excuse for the plaintiff's contributory negligence. *Louisville, etc., R. R. Co. v. Johnson*, 92 Ala. 204, 9 So. 269, 25 Am. St. Rep. 35; *Nash v. Southern Ry. Co.*, 136 Ala. 177, 33 So. 932, 96 Am. St. Rep. 19; *Woods v. Board of Commissioners*, 128 Ind. 289, 27 N. E. 611; *Bageard v. Consolidated Traction Co.*, 64 N. J. L. 316, 45 Atl. 620, 81 Am. St. Rep. 498, 49 L. R. A. 424; *Fisher v. W. Va., etc., Ry. Co.*, 39 W. Va. 366, 19 S. E. 382, 23 L. R. A. 758. And see the following additional cases on contributory negligence: *Deep Min. & Dr. Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210; *Walters v. Denver Con. Elec. Lt. Co.*, 12 Colo. App. 145, 54 Pac. 960; *Walters v. Denver Con. Elec. Lt. Co.*, 17 Colo. App. 192, 68 Pac. 117; *Dashiell v. Washington Market Co.*, 10 App. D. C. 81; *North Chicago Elec. Ry. Co. v. Penser*, 190 Ill. 67, 60 N. E. 78; *Noblesville G. & I. Co. v. Loehr*, 124 Ind. 79, 24 N. E. 579; *Lapeine v. Morgan's, etc., Co.*, 40 La. Ann. 661, 4 So. 875, 1 L. R. A. 378; *Engel v. Smith*, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549; *Yore v. Transfer Co.*, 147 Mo. 679, 49 S. W. 855; *Magar v. Hammond*, 171

was to be imputed to him.⁹³ This case has been followed as authority in several States,⁹⁴ but rejected *in others. [*820] It was very soon questioned by Ch. J. REDFIELD, of Vermont, in an opinion, the pith of which is comprised in the following words: "We are satisfied that although a child, or idiot, or lunatic may, to some extent, have escaped into the highway, through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but or-

N. Y. 377, 64 N. E. 150, 59 L. R. A. 315; *Mattimore v. Erie*, 144 Pa. St. 14, 22 Atl. 817.

93—*Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273. See *Man-gam v. Brooklyn R. R. Co.*, 38 N. Y. 455, 98 Am. Dec. 66; *Flynn v. Hatton*, 4 Daly, 552.

94—*Wright v. Malden*, &c., R. R. Co., 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; *Holly v. Bos-ton Gas Light Co.*, 8 Gray, 123, 69 Am. Dec. 233; *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188; *Brown v. European*, &c., R. R. Co., 58 Me. 384; *Leslie v. Lewiston*, 62 Me. 468; *Pittsburgh*, &c., R. R. Co. v. *Vining*, 27 Ind. 513, 92 Am. Dec. 269; *Lafayette*, &c., R. R. Co. v. *Huffman*, 28 Ind. 287, 92 Am. Dec. 318; *Jeffersonville R. R. Co. v. Bowen*, 40 Ind. 545; *East Sag-inaw*, &c., R. Co. v. *Bohn*, 27 Mich. 503; *Karr v. Parks*, 40 Cal. 188; *Fitzgerald v. St. Paul*, &c., Ry. Co., 29 Minn. 336, 43 Am. Rep. 212; *Reed v. Minn. St. Ry. Co.*, 34 Minn. 557; *Meeks v. South. Pac. R. R. Co.*, 52 Cal. 602; *Cumberland v. Lottig*, 95 Md. 42, 51 Atl. 841; *Casey v. Smith*, 152 Mass. 294, 25 N. E. 734, 23 Am. St. Rep. 842, 9 L. R. A. 259; *Bamberger v. Citi-*

zens St. Ry. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486. Where the ac-tion in case of death is by the ad-ministrator for the benefit of the next of kin it is intimated that there can be no recovery. *Toledo*, &c., Ry. Co. v. *Grable*, 88 Ill. 441. If the child is injured in obeying the directions of the parent, it cannot recover. *Stillson v. Han-nibal*, &c., R. R. Co., 67 Mo. 671. In *Ewen v. Chicago*, &c., R. R. Co., 38 Wis. 613, 628, where the com-plaint was that a boy nine years of age had been negligently run over, by the cars of the defendant, COLE, J., said: "Were it clear, from the undisputed facts of the case that the boy himself, consid-ering his age and intelligence, was at fault, while crossing the rail-road track, when he was killed, and did not exercise proper care; or, if it appeared that he was too young to be *sui juris*, and that the negligence of his mother in per-mitting him to go alone on the errand on which he was sent, con-tributed to the accident, then we could say, as a proposition of law, that there could be no recovery." This rule applied where a boy of

dinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger.'⁹⁵ The conclusions in many other States have been to the same effect.⁹⁶ The law on the subject in this country is thus

eight riding on a sleigh runner cox, 138 Ill. 370, 27 N. E. 899, 21 jumped off in front of a horse. L. R. A. 76; Evansville *v.* Sen-Messenger *v.* Dennie, 137 Mass. 197, 50 Am. Rep. 295, 141 Mass. 335. For a somewhat peculiar case, where negligence of parent was imputed to child, see Leslie *v.* Lewiston, 62 Me. 468.

95—Robinson *v.* Cone, 22 Vt. 213, 224, 54 Am. Dec. 67.

96—Philadelphia, &c., R. R. Co. *v.* Kelly, 31 Pa. St. 372; Philadelphia, &c., R. R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544; Oakland R. Co. *v.* Fielding, 48 Pa. St. 320; Nor. Penn. R. R. Co. *v.* Mahoney, 57 Pa. St. 187; Kay *v.* Penn. R. R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Bellefontaine, &c., R. R. Co. *v.* Snyder, 18 Ohio St. 399; Daley *v.* Norwich, &c., R. R. Co., 26 Conn. 591, 68 Am. Dec. 413; Norfolk, &c., R. R. Co. *v.* Ormsby, 27 Grat. 455; St. Paul *v.* Kuby, 8 Minn. 154; Cahill *v.* Eastman, 18 Minn. 324, 10 Am. Rep. 184; Whirley *v.* Whiteman, 1 Head, 610; Boland *v.* Missouri R. R. Co., 36 Mo. 484; Huff *v.* Ames, 16 Neb. 139, 49 Am. Rep. 716; Pratt, &c., Co. *v.* Brawley, 3 So. Rep. 556; Erie Pass. Ry. Co. *v.* Schuster, 113 Pa. St. 412, 57 Am. Rep. 471; Galveston, &c., Ry. Co. *v.* Moore, 59 Tex. 64, 46 Am. Rep. 265; St. Louis, etc., Ry. Co. v. Colum, 72 Ark. 1, 77 S. W. 596; Jacksonville Elec. Co. *v.* Adams, (Fla.) 39 So. 183; Ferguson *v.* Columbus, etc., Ry. Co., 77 Ga. 102; Chicago City Ry. Co. *v.* Wil-

L. henn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 68 Am. St. Rep. 218, 41 L. R. A. 728; Toner *v.* South Covington, etc., St. Ry. Co., 109 Ky. 41, 58 S. W. 439; South Covington, etc., St. Ry. Co. *v.* Herrklotz, 20 Ky. L. R. 750, 47 S. W. 265; Barnes *v.* Shreveport City Ry. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. Rep. 400; Shippy *v.* Au Sable, 85 Mich. 280, 48 N. W. 584; Westbrook *v.* Mobile, etc., R. R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587; Winters *v.* Kansas City Cable Ry. Co., 99 Mo. 509, 12 S. W. 652, 17 Am. St. Rep. 591, 6 L. R. A. 536; Tucker *v.* Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; Newman *v.* Phillipsburg Horse R. R. Co., 52 N. J. L. 446, 19 Atl. 1102, 8 L. R. A. 842; Bottoms *v.* Seaboard, etc., R. R. Co., 41 Am. St. Rep. 799, 25 L. R. A. 784; Norfolk, etc., R. R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718; Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791; Roth *v.* Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855. See, as having some bearing, Paducah, &c., R. R. Co. *v.* Hoehl, 12 Bush, 41; Baltimore, &c., R. R. Co. *v.* McDonnell, 43 Md. 534; Baltimore, &c., R. R. Co. *v.* State, 30 Md. 47; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; Chicago *v.* Starr, 42 Ill. 174; Keeffe *v.* Milwaukee, &c., R. R. Co., 21 Minn.

*left in a very unsatisfactory state. The English rule [*821] corresponds to that of the New York courts.⁹⁷ In a suit by the parent in his own behalf for an injury to the child, the plaintiff's contributory negligence is a defense.⁹⁸

But the fact that a party who is not *sui juris* is found in a place of danger, does not establish a case of negligence against his proper custodian. Very young children are properly allowed some liberties: a child of five may be allowed on a city

207, 18 Am. Rep. 393; *Wood v. Co. v. Gravitt*, 93 Ga. 319, 20 S. E. School District, 44 Iowa, 27. 550, 44 Am. St. Rep. 149; *Toner*

97—*Waite v. Nor. East. R. Co.*, El. Bl. & El. 719, 728; *Singleton v. Eastern Counties R. Co.*, 7 C. B. (n. s.) 287; *Mangan v. Atterton*, L. R. 1 Exch. 239. See *Gardner v. Grace*, 1 Fost. & F. 359. It may be urged, with some plausibility, that this doctrine is more likely to guard the interests of children and imbeciles than is the opposite. If a heartless parent or guardian may suffer a child to take his first lessons in walking in the crowded streets of a city, and then, when he is injured or killed, as in all probability he would be, may recover for such injury or killing, on the ground that the child himself is too young to be chargeable with negligence, there will not, perhaps, be wanting depraved custodians of children, unrestrained by any considerations of humanity, willing enough to count upon probable gains from such reckless conduct.

98—*Frazer v. South., &c.*, R. R. Co., 81 Ala. 185, 60 Am. Rep. 145; *Williams v. Texas, &c.*, Co., 60 Tex. 205; *St. Louis, &c., Co. v. Freeman*, 36 Ark. 41; *Mayhew v. Burns*, 103 Ind. 328; *Cauley v. Pittsburgh, &c., Co.*, 95 Pa. St. 398; *St. Louis, etc., Ry. Co. v. Colum*, 72 Ark. 1, 77 S. W. 596; *Atlanta, etc., Ry.* 550, 44 Am. St. Rep. 149; *Toner v. South Covington, etc., St. Ry. Co.*, 109 Ky. 41, 58 S. W. 439; *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321. So if the father entrusts his child to a third person, the latter's negligence will bar a suit for the father's benefit for injury to the child. *Atlanta, etc., Ry. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 149. The mother's negligence held no bar to a suit by the father. *Donk Bros. C. & C. Co. v. Leavitt*, 109 Ill. App. 385, citing as in point, *Cleveland, etc., R. R. Co. v. Crawford*, 24 Ohio St. 631; *Wolf v. Lake Erie, etc., Ry. Co.*, 55 Ohio St. 517, 45 N. E. 708. *Contra*, *Toner v. South Covington, etc., St. Ry. Co.*, 109 Ky. 41, 58 S. W. 439. Where a father sued for the death of his minor son employed as a brakeman, it was held that the son's negligence was a bar if the employment was with the consent of the father, otherwise not. *Williams v. South & North Ala. R. R. Co.*, 91 Ala. 635, 9 So. 77. Where an infant of 14 is employed with the consent of the father, both assume the ordinary risks of the service. *Lovell v. De Bardelaben C. & I. Co.*, 90 Ala. 13, 7 So. 756.

sidewalk, and a child of ten to run on errands without any one feeling shocked by the risks to which he is exposed, though confessedly these would be greater than in the case of an adult. Suffering such liberties is not an exercise of the highest care, but it is, nevertheless, not inconsistent with ordinary care. It is, therefore, not negligence. Moreover a child in a dangerous position may have reached it by escape from his proper custodian, who was at the time in the exercise of proper care. In such a case no question of concurring negligence arises, and whether suit is brought by the parent for the injury to his rights as such, or by the child, there is nothing in the exposure which, under the doctrine of any of the courts, should preclude recovery.⁹⁹

[*822] *But the extreme youth of a child is always an important circumstance in its bearing on the question of negligence in the party by whose act or neglect he is injured.¹

99—*Railroad Company v. Stout, &c., Co.*, 94 Mo. 600, 7 S. W. 407; 17 Wall. 657; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455, 98 Am. Dec. 66; *Karr v. Parks*, 40 Cal. 188; *Mulligan v. Curtis*, 100 Mass. 512, 97 Am. Dec. 121; *Pittsburgh, &c., R. R. Co. v. Bumstead*, 48 Ill. 221, 95 Am. Dec. 539; *Koons v. St. Louis, &c., R. R. Co.*, 65 Mo. 592; *Rauch v. Lloyd*, 31 Pa. St. 358, 72 Am. Dec. 747; *Bronson v. Southbury*, 37 Conn. 199; *Baltimore, &c., R. R. Co. v. State*, 30 Md. 47; *Farris v. Cass Ave., &c., Co.*, 80 Mo. 325; *Gavin v. Chicago*, 97 Ill. 66, 37 Am. Rep. 99. See *Brown v. European, &c., R. R. Co.*, 58 Me. 384. It is not negligence *per se* in a parent to allow a child to play in the street. *Kunz v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508. In the following cases it has been held a question of fact whether the parent was negligent in allowing the child to remain unattended or to go out in charge of an older child. *Reilly v. Hannibal,*

Gibbons *v. Williams*, 135 Mass. 333; *Collins v. South Boston, &c., Co.*, 142 Mass. 301, 56 Am. Rep. 675; *Payne v. Humeston, &c., Co.*, 70 Ia. 584; *Dahl v. Milwaukee, &c., Co.*, 65 Wis. 371; *Bliss v. South Hadley*, 145 Mass. 91, 13 N. E. 352; *Stafford v. Rubens*, 115 Ill. 196. See *Gulline v. Lowell*, 144 Mass. 491, 59 Am. Rep. 102; *Johnson v. Chicago, &c., Ry. Co.*, 56 Wis. 274. If the conduct of the infant, relied upon as showing negligence, would not have been negligence in an adult, of course the questions discussed in the text become unimportant. *McGary v. Loomis*, 63 N. Y. 104, 20 Am. Rep. 510; *Ihl v. Ferry Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *O'Brien v. McGlinchy*, 68 Me. 552.

1—Where infants are the actors, that might probably be considered an unavoidable accident which would not be so considered where the actors are adults. Bul-

One has no right to demand of a child, or of any other person known to be wanting in ordinary judgment or discretion, a prudence beyond his years or capacity, and therefore in his own conduct, where it may possibly result in injury, a degree of care is required commensurate to the apparent immaturity or imbecility that exposes the other to peril.² Thus, a person driving rapidly *along a highway where he sees [*823] boys engaged in sports, is not at liberty to assume that they will exercise the same discretion in keeping out of his way that would be exercised by others; and ordinary care demands *lock v. Babcock*, 3 Wend. 391, 394; *child than of an adult. Barry v. Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361. As to duty to child trespassing on cars, see *Chicago, &c., Ry. Co. v. Smith*, 46 Mich. 504; *Cauley v. Pittsburgh, &c., Co.*, 95 Pa. St. 398; *Ecliff v. Wabash, &c., Co.*, 64 Mich. 196, 31 N. W. 180; *Bishop v. Union R. R. Co.*, 14 R. I. 314, 51 Am. Rep. 386; *Emerson v. Peteler*, 35 Minn. 481, 59 Am. Rep. 337; trespassing on railway track, see cases note 82, p. 1457, *ante*.

2—See, as to persons of apparently unsound mind, or deprived of one or more of their senses, *Chicago, &c., R. R. Co. v. Gregory*, 58 Ill. 226; *Chicago, &c., R. R. Co. v. McKean*, 40 Ill. 218; *Ill. Cent. R. R. Co. v. Buckner*, 28 Ill. 293, 81 Am. Dec. 282; *Worthington v. Mencer*, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407. In crossing a track the law requires the same degree of care in a woman as in a man. *Hassenyer v. Mich. Centr. R. R. Co.*, 48 Mich. 205, 42 Am. Rep. 470. Contributory negligence is not possible in a child which has not the ability to foresee danger. *Bay Shore, &c., R. R. Co. v. Harris*, 67 Ala. 6; *Phila., &c., R. R. Co. v. Layer*, 112 Pa. St. 414. Less care is demanded of a

lock v. Babcock, 3 Wend. 391, 394; *child than of an adult. Barry v. New York, &c., R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377; *Cooper v. Lake Shore, &c., Ry. Co.*, 66 Mich. 261, 33 N. W. 306. But if *sui juris* some care on his part is demanded. *Wendell v. New York, &c., R. R.*, 91 N. Y. 420. See *Ecliff v. Wabash, &c., Co.*, 64 Mich. 196, 31 N. W. 180; *Baltimore, &c., R. R. Co. v. Schwindling*, 107 Pa. St. 258, 47 Am. Rep. 706; *Moore v. Penn. R. R. Co.*, 99 Pa. St. 301, 44 Am. Rep. 106. If in excavating an unguarded precipice likely to attract children is left, a city may be liable. *Mackey v. Vicksburg*, 64 Miss. 777. So if an explosive is left within reach of children. *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154. So if a railroad turntable is left unsecured and a child playing about it is injured. *Railroad Co. v. Stout*, 17 Wall. 657; *Evansich v. Gulf, &c., Ry. Co.*, 57 Tex. 126, 44 Am. Rep. 586; *Nagel v. Miss. Pac. Ry. Co.*, 75 Mo. 653. See *Brider v. Asheville, &c., Co.*, 25 S. C. 24. *Contra*, *Frost v. Eastern R. R. Co.*, 64 N. H. 220, 9 Atl. 790. Not liable if the child displaces the fastening. *Kolsti v. Minn., &c., Co.*, 32 Minn. 133.

of him that he shall take notice of their immaturity and govern his action accordingly.³ And if a carrier of persons receives an infant passenger without any guardian, he should give him the care and attention required by his age, and cannot object, when an injury happens to him, that it was negligence in those responsible for his care, in permitting him thus to move about by himself.⁴ Very young children are held incapable of contributory negligence as matter of law.⁵ Some authorities hold that this rule applies to all children under seven years of age,⁶ and that children between seven and fourteen are presumed incapable of contributory negligence, but that the contrary may be shown.⁷ But the general rule is that a child is required to exercise the degree of care which children of the same age ordinarily exercise under the same circumstances, taking into account the age, experience, capacity and understanding of the child.⁸

3—*Railroad Co. v. Gladmon*, 15 *Wall.* 401; *Lynch v. Smith*, 104 Mass. 52, 6 *Am. Rep.* 188; *Walters v. Chicago, &c., R. R. Co.*, 41 *Iowa*, 71; *East Tenn. R. R. Co. v. St. John*, 5 *Sneed*, 524; *Hund v. Geier*, 72 *Ill.* 394; *Kerr v. Forgue*, 54 *Ill.* 482, 5 *Am. Rep.* 146.

4—*East Saginaw, &c., Co. v. Bohn*, 27 *Mich.* 503; *Maher v. Central Park, &c., Co.*, 67 *N. Y.* 52; *Baltimore, &c., R. Co. v. McDonnell*, 43 *Md.* 534.

5—Children four years or younger. *Crawford v. Southern Ry. Co.*, 106 *Ga.* 870, 32 *S. E.* 826; *Chicago West Division Ry. Co. v. Ryan*, 131 *Ill.* 474, 23 *N. E.* 385; *Indianapolis St. Ry. Co. v. Schomberg*, 164 *Ind.* 111; *South Covington, etc., St. Ry. Co. v. Herrklotz*, 20 *Ky. L. R.* 750, 47 *S. W.* 265; *Barnes v. Shreveport City Ry. Co.*, 47 *La. Ann.* 1218, 17 *So.* 782, 49 *Am. St. Rep.* 400; *Shippy v. Au Sable*, 85 *Mich.* 280, 48 *N. W.* 584; *Macdonald v. O'Reilly*, 45 *Ore.* 589, 78 *Pac.*

753; *Summers v. Bergner Brewing Co.*, 143 *Pa. St.* 114, 22 *Atl.* 707, 24 *Am. St. Rep.* 518. So a child of five or six. *Gunn v. Ohio River R. R. Co.*, 42 *W. Va.* 676, 26 *S. E.* 546, 36 *L. R. A.* 575. Compare cases cited in following notes.

6—*Chicago City Ry. Co. v. Tuohy*, 196 *Ill.* 410, 63 *N. E.* 997, 58 *L. R. A.* 370 and cases cited; *Illinois Cent. R. R. Co. v. Jernigan*, 198 *Ill.* 297, 65 *N. E.* 88.

7—*Vicksburg v. McLain*, 67 *Miss.* 4, 6 *So.* 774; *Roanoke v. Shull*, 97 *Va.* 419, 34 *S. E.* 34, 75 *Am. St. Rep.* 791; *Lynchburg Cotton Mills v. Stanley*, 102 *Va.* 590, 46 *S. E.* 908.

8—*Quill v. Southern Pac. Co.*, 140 *Cal.* 268, 73 *Pac.* 991; *Pueblo Elec. St. Ry. Co. v. Sherman*, 25 *Colo.* 114, 53 *Pac.* 322, 71 *Am. St. Rep.* 116; *Rohloff v. Fair Haven, etc., R. R. Co.*, 76 *Conn.* 689, 58 *Atl.* 5; *Western, etc., R. R. Co. v. Young*, 83 *Ga.* 512; *Central R. R., etc., Co. v. Rylee*, 87 *Ga.* 491, 13

Concurring Negligence Subsequent to Injury. It is no answer to an action that the injured party, subsequent to the injury, was guilty of negligence which aggravated it. The negligence that will constitute a defense must have concurred in producing the injury.⁹

Negligence of Third Parties. Imputed Negligence.

In general the negligence *of third parties concurring [*824] with that of the defendant to produce an injury is no defense: it could at most only render the third party liable to be sued also as a joint wrong-doer.¹⁰ But in some cases where the person injured was for the time being with and under the direction of the third party, whose negligence concurred in pro-

S. E. 584; Georgia Mid., etc., R. R. 809; Young *v.* Clark, 16 Utah, 42, Co. *v.* Evans, 87 Ga. 673, 13 S. E. 50 Pac. 832; Roth *v.* Union Depot 580; Fishburn *v.* Burlington, etc., Co., 13 Wash. 525, 43 Pac. 641, 44 Ry. Co. 127 Ia. 483; Hayes *v.* Norcross, 162 Mass. 546, 39 N. E. 282; Hepfel *v.* St. Paul, etc., Ry. Co., 49 Minn. 263, 51 N. W. 1049; Westbrook *v.* Mobile, etc., R. R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587; Holmes *v.* Missouri Pac. Ry. Co., 190 Mo. 98; Anderson *v.* Central R. R. Co., 68 N. J. L. 269, 53 Atl. 391; Stone *v.* Dry Dock, etc., R. R. Co., 115 N. Y. 104, 21 N. E. 712; Tucker *v.* New York Central, etc., R. R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Rolling Mill Co. *v.* Corrigan, 46 Ohio St. 283, 20 N. E. 466, 15 Am. St. Rep. 596, 3 L. R. A. 385; Schliger *v.* Northern Terminal Co., 43 Ore. 4, 72 Pac. 324; Dubiver *v.* City Ry. Co., 44 Ore. 227, 74 Pac. 915, 75 Pac. 693; Strawbridge *v.* Bradford, 128 Pa. St. 200, 18 Atl. 346, 15 Am. St. Rep. 670; Kelly *v.* Pittsburg, etc., Traction Co., 204 Pa. St. 623, 54 Atl. 482; Dynes *v.* Bromley, 208 Pa. St. 633, 57 Atl. 1123; Avery *v.* Galveston, etc., Ry. Co., 81 Tex. 243, 16 S. W. 1015, 26 Am. St. Rep.

809; Young *v.* Clark, 16 Utah, 42, 50 Pac. 832; Roth *v.* Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Ry. Co. 127 Ia. 483; Hayes *v.* Norcross, 162 Mass. 546, 39 N. E. 282; Hepfel *v.* St. Paul, etc., Ry. Co., 49 Minn. 263, 51 N. W. 1049; Westbrook *v.* Mobile, etc., R. R. Co., 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587; Holmes *v.* Missouri Pac. Ry. Co., 190 Mo. 98; Anderson *v.* Central R. R. Co., 68 N. J. L. 269, 53 Atl. 391; Stone *v.* Dry Dock, etc., R. R. Co., 115 N. Y. 104, 21 N. E. 712; Tucker *v.* New York Central, etc., R. R. Co., 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; Rolling Mill Co. *v.* Corrigan, 46 Ohio St. 283, 20 N. E. 466, 15 Am. St. Rep. 596, 3 L. R. A. 385; Schliger *v.* Northern Terminal Co., 43 Ore. 4, 72 Pac. 324; Dubiver *v.* City Ry. Co., 44 Ore. 227, 74 Pac. 915, 75 Pac. 693; Strawbridge *v.* Bradford, 128 Pa. St. 200, 18 Atl. 346, 15 Am. St. Rep. 670; Kelly *v.* Pittsburg, etc., Traction Co., 204 Pa. St. 623, 54 Atl. 482; Dynes *v.* Bromley, 208 Pa. St. 633, 57 Atl. 1123; Avery *v.* Galveston, etc., Ry. Co., 81 Tex. 243, 16 S. W. 1015, 26 Am. St. Rep.

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9—Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Loeser *v.* Humphrey, 41 Ohio St. 378, 52 Am. Rep. 86; Page *v.* Sumpster, 53 Wis. 652; Wilmet *v.* Howard, 39 Vt. 447; Hathorn *v.* Richmond, 48 Vt. 557. These last were actions against physicians, where the defense was that the cases were taken out of their hands and committed to others who were negligent. It is nevertheless the duty of the party injured to take care that the damage shall be as light as possible. Plummer *v.* Penobscot Ass'n, 67 Me. 363.

10—North Penn. R. Co. *v.* Mahoney, 57 Pa. St. 187; Cleveland, &c., R. R. Co. *v.* Terry, 8 Ohio St. 570; Pittsburgh, &c., R. Co. *v.* Spencer, 98 Ind. 186; Wabash,

duing the injury, this negligence has been held to be a bar to any recovery. In the leading English case the plaintiff, in alighting from a public omnibus, was knocked down and injured by an omnibus belonging to the defendant. The case was put to the jury under instructions that if it was found that the driver of each omnibus was guilty of negligence contributing to the injury, the plaintiff was not entitled to recover; he being so far identified with the driver of the vehicle he was riding in that he must be considered a party to the negligence.¹¹ The like rule has been frequently laid down in this country.¹² But in several States its soundness is denied.¹³ In New Jersey [*825] it is held *that the negligence of the driver of a street car in which the plaintiff was riding is not to be imputed

&c., Ry. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Consolidated Gas Co. v. Getty, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603; Koelsch v. Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759.

11—Thorogood v. Bryan, 8 C. B. 115. See, also, Bridge v. Grand Junction R. Co., 3 M. & W. 244; Child v. Hearn, L. R. 9 Exch. 176; Armstrong v. Lancashire, &c., R. Co., L. R. 10 Exch. 47.

12—Lake Shore, &c., R. R. Co. v. Miller, 25 Mich. 274; Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568; Prideaux v. Mineral Point, 42 Wis. 513, 28 Am. Rep. 558; Otis v. Janesville, 47 Wis. 422; Lockhart v. Lichtenthaler, 46 Pa. St. 151; Forks Township v. King, 84 Pa. St. 230; Phila., &c., R. R. Co. v. Boyer, 97 Pa. St. 91; Crescent v. Anderson, 114 Pa. St. 643, 60 Am. Rep. 367; Hershey v. Road Com'rs, 9 Atl. Rep. 454 (Penn.); Payne v. Chicago, &c., R. R. Co., 39 Iowa, 523; Stafford v. Oska-loosa, 57 Ia. 748; Slater v. Burlington, &c., Co., 71 Ia. 209, 32 N.

W. 264; Joliet v. Seward, 86 Ill. 402, 29 Am. Rep. 35; Huntoon v. Trumbull, 2 McCrary 314.

13—Chapman v. New Haven, &c., R. R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Colegrove v. New York, &c., R. R. Co., 6 Duer, 382, and 20 N. Y. 492, 75 Am. Dec. 418; Robinson v. New York Cent. R. R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Masterson v. New York, &c., Co., 84 N. Y. 247, 38 Am. Rep. 510; McCallum v. Long Isl. R. R. Co., 38 Hun, 569. And, see Webster v. Hudson Riv. R. R. Co., 38 N. Y. 260; Arctic, &c., Co. v. Austin, 69 N. Y. 471. Otherwise if driving with another engaged in a common employment. Donnelly v. Brooklyn, &c., Co., 109 N. Y. 16, 15 N. E. 733. So if driver, known to be unfit, is driving recklessly and plaintiff is riding at his own request. Smith v. New York, &c., Co., 38 Hun, 33. In Maryland, Minnesota, Indiana and New Hampshire, the person riding at the invitation of the driver is not affected by his negligence. Phila., &c., Co. v. Hogeland, 65

to the plaintiff as a bar to an action for the injurious negligence of a third party,¹⁴ and in the United States Supreme Court, and some of the other States, a like ruling has been made.¹⁵ The English Court of Appeal has recently overruled *Thorogood v. Bryan* in so far as it applies to public conveyances.¹⁶

Since the second edition the decisions have been strongly opposed to the doctrine that the negligence of the driver of a vehicle may be imputed to one riding therein, whether the vehicle is public or private.¹⁷ If the driver is the plaintiff's servant or under his control, the negligence of the driver is im-

Md. 149; *Follman v. Mankato*, 35 Minn. 522, 59 Am. Rep. 340; *Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; *Noyes v. Boscowen*, 64 N. H. 361, 10 Atl. 690; *So. Carlisle v. Brisbane*, 113 Pa. St. 544, 57 Am. Rep. 483; *Mann v. Weiland*, *81 Pa. St. 243. But if one riding with an intoxicated driver makes no remonstrance against his attempt to run a toll-gate, he is not free from contributory negligence. *Brannen v. Kokomo*, &c., 115 Ind. 115, 17 N. E. 202. In Ohio a girl riding with her father is not affected by his carelessness. *Street Ry. Co. v. Eadie*, 43 Ohio St. 91.

14—*Bennett v. New Jersey R. R. Co.*, 36 N. J. 225; *Matthews v. Delaware*, etc., R. R. Co., 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261; *O'Toole v. Pittsburgh*, etc., R. R. Co., 158 Pa. St. 99, 27 Atl. 737, 38 Am. St. Rep. 830, 22 L. R. A. 606. See *New York*, &c., Co. v. *Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126. But one is chargeable with the negligence of his servant, *Penn. R. R. Co. v. Righter*, 42 N. J. L. 180.

15—*Railway Co. v. Harrell*, 58 Ark. 454, 25 S. W. 117; *Chicago*,

etc., R. R. Co. v. *Mochell*, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318; *Colegrove v. New York*, etc., R. R. Co., 20 N. Y. 492; *Gulf, etc., Ry. Co. v. Pendry*, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. Rep. 125. So where plaintiff's train collides with another. *Bunting v. Hogsett*, 139 Pa. St. 363, 21 Atl. 31, 22 Am. St. Rep. 192, 12 L. R. A. 268. *Little v. Hackett*, 116 U. S. 366. Here a person hired a public hack and told the driver where to go. See *Holzab v. New Orleans*, &c., Co., 38 La Ann. 185, 58 Am. Rep. 177; *Transfer Co. v. Kelly*, 36 Ohio St. 86, 38 Am. Rep. 558, cases of a street car. So in case of a passenger on a boat. *Cuddy v. Horn*, 46 Mich. 596; *Markham v. Houston Direct Nav. Co.*, 73 Tex. 247, 11 S. W. 131; *New York*, etc., R. R. Co. v. *Cooper*, 85 Va. 939, 9 S. E. 321.

16—The *Bernina* L. R. 12 Prob. Div. 58, case of fault in the engineer of a steamer whereby a passenger was injured in a collision.

17—In favor of the doctrine of imputed negligence: *McFadden v. Santa Ana*, etc., Ry. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252;

Mullen *v.* Owosso, 100 Mich. 103, Ry. Co., 85 Ia. 492, 52 N. W. 480; 58 N. W. 663, 43 Am. St. Rep. 436, 23 L. R. A. 696; Hills *v.* Foote, 125 Mich. 241, 84 N. W. 139; Whitaker *v.* Helena, 14 Mont. 124, 35 Pac. 904, 43 Am. St. Rep. 621; Omaha, etc., Ry. Co. *v.* Talbot, 48 Neb. 627, 67 N. W. 599; Ritger *v.* Milwaukee, 99 Wis. 190, 74 N. W. 815; Lightfoot *v.* Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30.

Opposed to the doctrine: Georgia Pac. Ry. Co. *v.* Hughes, 87 Ala. 610, 6 So. 413; Elyton Land Co. *v.* Mingea, 89 Ala. 521, 7 So. 666; Birmingham Ry. & Elec. Co. *v.* Baker, 132 Ala. 507, 31 So. 618; Colorado, etc., Ry. Co. *v.* Thomas, 33 Colo. 517; Baltimore, etc., R. R. Co. *v.* Adams, 10 App. D. C. 97; Metropolitan St. R. R. Co. *v.* Powell, 89 Ga. 601, 16 S. E. 118; Roach *v.* Western, etc., R. R. Co., 93 Ga. 785, 21 S. E. 67; Wabash, etc., Ry. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Springfield Consol. Ry. Co. *v.* Puntenny, 26 Ill. 9, 65 N. E. 442; Chicago Union Traction Co. *v.* Leach, 215 Ill. 184, 74 N. E. 119; Chicago City Ry. Co. *v.* Wall, 93 Ill. App. 411; Buckler *v.* Newman, 116 Ill. App. 546; Brannen *v.* Kokomo, etc., Gravel Road Co., 115 Ind. 115, 17 N. E. 202, 7 Am. St. Rep. 411; Knightstown *v.* Musgrove, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; Miller *v.* Louisville, etc., Ry. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416; Louisville, etc., Ry. Co. *v.* Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Lake Shore, etc., Ry. Co. *v.* McIntosh, 140 Ind. 261, 38 N. E. 476; Nesbit *v.* Garner, 75 Ia. 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152; Larkin *v.* Burlington, etc., Ry. Co., 85 Ia. 492, 52 N. W. 480; Leavenworth *v.* Hatch, 57 Kan. 57, 45 Pac. 65, 57 Am. St. Rep. 309; Reading Tp. *v.* Telfer, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355; State *v.* Boston, etc., R. R. Co., 80 Me. 430, 15 Atl. 36; Whitman *v.* Fisher, 98 Me. 575, 57 Atl. 895; Baltimore, etc., R. R. Co. *v.* State, 79 Md. 335, 29 Atl. 518, 47 Am. St. Rep. 415; United Rys. & Elec. Co. *v.* Biedler, 98 Md. 564, 56 Atl. 813; Randolph *v.* O'Rordon, 155 Mass. 331, 29 N. E. 583; Cunningham *v.* Thief River Falls, 84 Minn. 21, 86 N. W. 763; Alabama, etc., Ry. Co. *v.* Davis, 69 Miss. 444, 13 So. 693; Becke *v.* Missouri Pac. Ry. Co., 102 Mo. 544, 13 S. W. 1053; Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648; Noyes *v.* Boscawen, 64 N. H. 361, 10 Atl. 690, 10 Am. St. Rep. 410; Noonan *v.* Consol. Traction Co., 64 N. J. L. 579, 46 Atl. 770; Hoag *v.* New York Central, etc., R. R. Co., 111 N. Y. 199, 18 N. E. 648; Lewis *v.* Long Island R. R. Co., 162 N. Y. 52, 56 N. E. 548; Bailey *v.* Jourdan, 18 App. Div. 387, 46 N. Y. S. 399; Crampston *v.* Ivie Bros., 126 N. C. 894, 36 N. E. 351; Duval *v.* Atlantic Coast Line R. R. Co., 134 N. C. 331, 46 S. E. 750, 101 Am. St. Rep. 830, 65 L. R. A. 722; Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676; Cincinnati St. Ry. Co. *v.* Wright, 54 Ohio St. 181, 43 N. E. 688; 32 L. R. A. 340; Dean *v.* Pennsylvania R. R. Co., 129 Pa. St. 514, 18 Atl. 718, 15 Am. St. Rep. 733, 6 L. R. A. 143; Galveston, etc., Ry. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127; Atlantic, etc., R. R. Co. *v.* Ironmonger, 95 Va. 625, 29 S. E. 319; Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76; Union Pac.

putable to the plaintiff.¹⁸ So if the two are engaged in a joint enterprise and each has an equal right to direct the movement of the vehicle.¹⁹ "Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest or purpose appears, there is no sound principle upon which it can be held that one who is

Ry. Co. v. Lapsley, 51 Fed. 174, do so, than of the driver, to learn of danger and avoid it if practicable." p. 293. See, also, Illinois Central R. R. Co. v. McLeod, 78 Miss. 334, 29 So. 76, 84 Am. St. Rep. 630, 52 L. R. A. 954; Dean v. Pennsylvania R. R. Co., 129 Pa. St. 514, 18 Atl. 718, 15 Am. St. Rep. 733, 6 L. R. A. 143.

or listen for a train when approaching a crossing will preclude his recovery for an injury received by colliding with a train. Brickell v. New York, etc., R. R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648. Speaking of the rule that the negligence of the driver is not imputable to the plaintiff, the court, in the case just cited, says: "Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver or is separated from the driver by an inclosure and is without opportunity to discover danger and to inform the driver of it. It is no less the duty of the passenger, where he has the opportunity to

18—Read v. City & Suburban Ry. Co., 115 Ga. 366, 41 S. E. 629; Smith v. New York Central, etc., R. R. Co., 4 App. Div. 493, 38 N. Y. S. 666.

19—Roach v. Western, etc., R. R. Co., 93 Ga. 785, 21 S. E. 67; New York, etc., R. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130; Boyden v. Fitchburg R. R. Co., 72 Vt. 89, 47 Atl. 409. "Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other in respect thereto." Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763.

himself blameless and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law enjoined upon him.”²⁰

Contracts Against Liability for Negligence. The right of common carriers to agree for a limitation of their common law liability has been supported in many cases, while their right to force contracts upon those who come to do business with them has been denied. The contracts are supported on the ground that the parties respectively have found it for their interest to make them, and no reason exists to preclude it.²¹ But there

20—*Knightstown v. Musgrove*, 14 S. W. 743, 20 Am. St. Rep. 636, 116 Ind. 121, 124, 18 N. E. 452, 9 Am. St. Rep. 827.

21—See *Central R. R. & B. Co. v. Smith*, 85 Ala. 47, 4 So. 708; *Georgia Pac. Ry. Co. v. Hughart*, 90 Ala. 36, 8 So. 62; *Tallassee Falls Mfg. Co. v. Western Ry. Co.*, 128 Ala. 167, 29 So. 203; *Mouton v. Louisville*, etc., R. R. Co., 128 Ala. 537, 29 So. 602; *Railway Co. v. Cravens*, 57 Ark. 112, 20 S. W. 803, 38 Am. St. Rep. 230, 18 L. R. A. 527; *Railway Co. v. Spann*, 57 Ark. 127, 20 S. W. 914; *Pacific Express Co. v. Wallace*, 60 Ark. 100, 29 S. W. 32; *Coupland v. Housatonic R. R. Co.*, 61 Conn. 531, 23 Atl. 870; *Southern Ry. Co. v. White*, 108 Ga. 201, 33 S. E. 952; *Baxter v. Louisville*, etc., Ry. Co., 165 Ill. 78, 45 N. E. 1003; *Insurance Co. v. Lake Erie*, etc., R. R. Co., 152 Ind. 333, 53 N. E. 382; *Lake Erie*, etc., R. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138; *Carpenter v. Eastern Ry. Co.*, 67 Minn. 188, 69 N. W. 720; *Baltimore*, etc., Exp. Co. v. Cooper, 66 Miss. 558, 6 So. 327, 14 Am. St. Rep. 586; *Newberger Cotton Co. v. Illinois Central R. R. Co.*, 75 Miss. 303, 23 So. 186; *Wilting v. St. Louis*, etc., Ry. Co., 101 Mo. 631, 15 L. R. A. 602; *Russell v. Erie R. R. Co.*, 70 N. J. L. 808, 59 Atl. 150, 67 L. R. A. 433; *Park v. Preston*, 108 N. Y. 434, 15 N. E. 705; *Pennsylvania R. R. Co. v. Raiordon*, 119 Pa. St. 577, 13 Atl. 324, 4 Am. Rep. 670; *Merchants' Dispatch Trans. Co. v. Boch*, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; *Louisville*, etc., R. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; *Louisville*, etc., R. R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; *Railway Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586; *Deming v. Merchants' Cotton Press Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; *Illinois Central R. R. Co. v. Craig*, 102 Tenn. 298, 52 S. W. 164; *Nashville*, etc., Ry. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955; *Gulf*, etc., Ry. Co. v. Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A. 419; *Gulf*, etc., Ry. Co. v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494; *Gulf*, etc., Ry. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; *Gulf*, etc., Ry. Co. v. Stanley, 89

may be contracts which, perhaps, public policy would forbid. This has been held to be the case with the contracts of common carriers which assume to exempt them, not only from liability for the inevitable risks attendant upon their business, but for risks from the negligence of themselves and their servants. In numerous cases it has been held that they could not by any stipulation relieve themselves from responsibility for injuries resulting from a want of ordinary care.²² Says the federal su-

Tex. 42, 33 S. W. 109; *Davis v. R. Co.*, 31 Me. 228, 50 Am. Dec. Central Vt. R. R. Co., 66 Vt. 290, 659; Indianapolis, &c., R. R. Co. 29 Atl. 313, 44 Am. St. Rep. 852; *v. Allen*, 31 Ind. 394; Michigan, Cau v. Texas, etc., Ry. Co., 194 U. S. 427, 24 S. C. Rep. 663, 48 L. Ed. 1053; Charnock v. Texas, etc., Ry. Co., 194 U. S. 432, 24 S. C. Rep. 671, 48 L. Ed. 1057; New York, etc., R. R. Co. v. Sayles, 87 Fed. 444, 32 C. C. A. 485.

22—Camden, &c., R. R. Co. v. Baldauf, 16 Pa. St. 67; Goldey v. Pennsylvania R. R. Co., 30 Pa. St. 242, 72 Am. Dec. 703; Pennsylvania R. R. Co. v. Henderson, 51 Pa. St. 315; Farnham v. Camden, &c., R. R. Co., 55 Pa. St. 53; Colton v. Cleveland, &c., R. R. Co., 67 Pa. St. 211, 5 Am. Rep. 424; Bickham v. Smith, 62 Pa. 45; Lackawanna, &c., R. R. Co. v. Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168; Penn. R. R. Co. v. Rordon, 119 Pa. St. 577, 13 Atl. 324; Orndorff v. Adams Express Co., 3 Bush, 194, 96 Am. Dec. 207; Smith v. Nor. Car. R. R. Co., 64 N. C. 235; Great West. R. Co. v. Hawkins, 18 Mich. 427; S. C. 17 Mich. 57; Steele v. Burgess, 37 Ala. 247; Mobile, &c., R. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Sou. Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; South., &c., R. R. Co. v. Henlein, 52 Ala. 606; Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211; Sager v. Portsmouth, &c., R.

v. Union Trans. Co., 42 Mo. 88, 97 Am. Dec. 320; Sturgeon v. St. Louis, &c., R. R. Co., 65 Mo. 569; Swindler v. Hilliard, 2 Rich. 286, 45 Am. Dec. 732; Berry v. Cooper, 28 Ga. 543; Georgia R. R. Co. v. Gann, 68 Ga. 350; Whitesides v. Thurlkill, 20 Miss. 599, 51 Am. Dec. 128; Sou. Exp. Co. v. Moon, 39 Miss. 822; Chicago, &c., Ry. Co. v. Abels, 60 Miss. 1017; Welch v. Boston, &c., R. R. Co., 41 Conn. 333; Kansas City, &c., Co. v. Simpson, 30 Kan. 645; Moulton v. St. Paul, &c., Co., 31 Minn. 85, 47 Am. Rep. 781; Black v. Goodrich Tr. Co., 55 Wis. 319, 42 Am. Rep. 713; Cream City, &c., Co. v. Chicago, &c., Ry. Co., 63 Wis. 93, 53 Am. Rep. 267; Central R. R. & B. Co. v. Smithe, 85 Ala. 47, 4 So. 708; Alabama Great Southern Ry. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; Georgia Pac. Ry. Co. v. Hughart, 90 Ala. 36, 8 So. 62; Mouton v. Louisville, etc., R. R. Co., 128 Ala. 537,

preme court: "By the law of this country, as declared by this court, in the absence of any statute controlling the subject, any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or his servants is void as against public policy, as attempting to put off the es-

29 So. 602; *Southern Ry. Co. v. Co.*, 138 N. C. 68; *Pittsburgh, etc., Jones*, 132 Ala. 437, 31 So. 501; *California Powder Works v. Atlantic & Pac. R. R. Co.*, 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648; *Union Pac. Ry. Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986; *Cooper v. Raleigh*, etc., R. R. Co., 110 Ga. 659, 36 S. E. 240; *Central of Ga. Ry. Co. v. Liffman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; *Louisville*, etc., Ry. Co. v. *Faylor*, 126 Ind. 126, 25 N. E. 869; *Insurance Co. v. Lake Erie*, etc., R. R. Co., 152 Ind. 333, 53 N. E. 382; *Pittsburg*, etc., Ry. Co. v. *Viers*, 113 Ky. 526, 68 S. W. 469; *Smith v. Am. Express Co.*, 108 Mich. 572, 66 N. W. 479; *Boehl v. Chicago*, etc., R. R. Co., 44 Minn. 191, 43 N. W. 333; *Southern Exp. Co. v. Seide*, 67 Miss. 609, 7 So. 547; *Illinois Central R. R. Co. v. Bogard*, 78 Miss. 1, 27 So. 879; *Yazoo*, etc., R. R. Co. v. *Grant*, 86 Miss. 565; *Welting v. St. Louis*, etc., Ry. Co., 101 Mo. 631, 14 S. W. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602; *Nelson v. Great Northern R. R. Co.*, 28 Mont. 297, 72 Pac. 642; *Atchison*, etc., R. R. Co. v. *Lawler*, 40 Neb. 356, 58 N. W. 968; *Union Pac. Ry. Co. v. Vincent*, 58 Neb. 171, 78 N. W. 457; *Russell v. Erie R. R. Co.*, 70 N. J. L. 808, 59 Atl. 150; *Gardner v. Southern Ry. Co.*, 127 N. C. 293, 37 S. E. 328; *Thomas v. Southern Ry. Co.*, 131 N. C. 590, 42 S. E. 964; *Everett v. Railroad* 29 So. 602; *Southern Ry. Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732; *Richmond v. Southern Pac. Co.*, 41 Ore. 54, 67 Pac. 947, 93 Am. St. Rep. 694, 57 L. R. A. 616; *Normile v. Oregon Nav. Co.*, 41 Ore. 177, 69 Pac. 928; *Armstrong v. U. S. Express Co.*, 159 Pa. St. 640, 28 Atl. 448; *Willcock v. Pennsylvania R. R. Co.*, 166 Pa. St. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228; *Johnson v. Charleston*, etc., Ry. Co., 55 S. C. 152, 32 S. E. 2, 32 S. E. 174, 44 L. R. A. 645; *MERCHANTS' DISPATCH TRANS. CO. v. Boch*, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; *Louisville*, etc., R. R. Co. v. *Wynn*, 88 Tenn. 320, 14 S. W. 311; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586; *Nashville*, etc., Ry. Co. v. *Stone*, 112 Tenn. 348, 79 S. W. 1031; *Missouri Pac. Ry. Co. v. Edwards*, 78 Tex. 307, 14 S. W. 607; *Richmond*, etc., R. R. Co. v. *Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; *Johnson v. Richmond*, etc., R. R. Co., 86 Va. 975, 11 S. E. 829; *Abrams v. Milwaukee*, etc., Ry. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55; *Liverpool*, etc., Co. v. *Phenix Ins. Co.*, 129 U. S. 397, 9 S. C. Rep. 469, 32 L. Ed. 788; *Chicago*, etc., R. R. Co. v. *Solan*, 169 U. S. 133, 18 S. C. Rep. 552, 42 L. Ed. 688.

sential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle on which the law of common carriers was established—the securing of the utmost care and diligence in the performance of their important duties to the public.”²³ Therefore, any general stipulation inserted in a carrier’s bill [*826] of lading or receipt, by which the consignor is made to take upon himself the risks of conveyance, or any special risks like those of fire, will be read with an implied exception of injuries for the want of ordinary care on the part of the carrier himself or his servants.²⁴ The rule which forbids a common carrier to limit his liability for negligence, applies as well to a partial limitation as to a total limitation. Any stipulation in the carrier’s contract, the purpose and effect of which is to limit the liability of the carrier, in case of loss, to a sum less than the value of the property and fixed without any reference to such value, would seem to be clearly within the general rule and, therefore, void as against public policy.²⁵ But where the car-

23—Chicago, etc., R. R. Co. v. Georgia R. R. Co., 68 Ga. 644. Solan, 169 U. S. 133, 135, 18 S. C. Rep. 552, 42 L. Ed. 688.

24—New Jersey, &c., Co. v. Merchants’ Bank, 6 How. 344; York Co. v. Central R. R. Co., 3 Wall. 107; School Dist. v. Boston, &c., R. R. Co., 102 Mass. 552, 3 Am. Rep. 502; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Powell v. Pennsylvania R. R. Co., 32 Pa. St. 414, 75 Am. Dec. 564; Delaware, &c., R. R. Co. v. Starrs, 69 Pa. St. 36; Mo. Val. R. R. Co. v. Caldwell, 8 Kan. 244; N. O. Ins. Co. v. New Orleans, etc., R. R. Co., 20 La. Ann. 302; Erie, &c., Tr. Co. v. Dater, 91 Ill. 195; Merch. Desp. Tr. Co. v. Leysor, 89 Ill. 43; McFadden v. Miss. Pac. Ry. Co., 92 Mo. 343; California Powder Works v. Atlantic & Pac. R. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648. See Mitchell v. Moulton v. St. Paul, etc., R. R. Co., 31 Minn. 85; Louisville, etc., R. R. Co. v. Wynn, 88 Tenn. 320; Chicago, etc., R. R. Co. v. Witty, 32 Neb. 275, 49 N. W. 183; Chicago, etc., R. R. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417; Kansas City, etc., R. R. Co. v. Simpson, 30 Kan. 645; Louisville, etc., R. R. Co. v.

rier graduates his compensation according to the value of the property and a contract is fairly made agreeing upon such value and the rate for transportation is based upon the valuation, the contract is binding and only the stipulated amount can be recovered, though it is less than the true value and the loss was due to negligence.²⁶ There is, however, much confusion in the authorities upon this branch of the subject and the same stipulation limiting the amount of recovery or fixing the value of the property is held valid in one jurisdiction and void in others.²⁷

Owens, 93 Ky. 201, 19 S. W. 590; McFadden *v.* Missouri Pac. R. R. Co., 92 Mo. 343; Nickey *v.* St. Louis, etc., R. R. Co., 35 Mo. App. 79; Doan *v.* St. Louis, etc., R. R. Co., 38 Mo. App. 408; Southern Pac. R. R. Co. *v.* Maddox, 75 Tex. 300, 12 S. W. 815; Ullman *v.* Chicago, etc., Ry. Co., 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949, 56 L. R. A. 246; Eells *v.* St. Louis, etc., R. R. Co., 52 Fed. 903.

26—Louisville, etc., R. R. Co. *v.* Sherrod, 84 Ala. 178, 4 So. 29; Coupland *v.* Housatonic R. R. Co., 61 Conn. 531, 23 Atl. 870; Pacific Exp. Co. *v.* Foley, 46 Kan. 457, 26 Pac. 665, 26 Am. St. Rep. 107; Brehme *v.* Adams Express Co., 25 Md. 328; Graves *v.* Lake Shore, etc., R. R. Co., 137 Mass. 33; Hill *v.* Boston, etc., R. R. Co., 144 Mass. 284; Graves *v.* Adams Exp. Co., 176 Mass. 280, 57 N. E. 462; Smith *v.* Am. Exp. Co., 108 Mich. 572, 66 N. W. 479; Alair *v.* Northern Pac. R. R. Co., 53 Minn. 160, 54 N. W. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764; J. J. Douglas Co. *v.* Minn. Transfer Ry. Co., 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860; O'Malley *v.* Great Northern Ry. Co., 86 Minn. 380, 90 N. W. 974; Kellerman *v.* Kansas City, etc., R. R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Duntley *v.* Boston, etc., R. R. Co., 66 N. H. 263, 20 Atl. 327, 49 Am. St. Rep. 610, 9 L. R. A. 449; Belger *v.* Dinsmore, 51 N. Y. 166; Zimmer *v.* New York Central, etc., R. R. Co., 137 N. Y. 460, 33 N. E. 642; Gardner *v.* Southern Ry. Co., 127 N. C. 293, 37 S. E. 328; Baltimore, etc., R. R. Co. *v.* Hubbard, 72 Ohio St. 302; Ballou *v.* Earle, 17 R. I. 441, 22 Atl. 1113, 33 Am. St. Rep. 881, 14 L. R. A. 433; Elkins *v.* Empire Trans. Co., *81 Pa. St. 315; Johnstone *v.* Richmond, etc., R. R. Co., 39 S. C. 55, 17 S. E. 512; Levy *v.* Southern Exp. Co., 4 Rich. 234; Louisville, etc., R. R. Co. *v.* Sowell, 90 Tenn. 17, 15 S. W. 837; Starnes *v.* Louisville, etc., R. R. Co., 91 Tenn. 516, 19 S. W. 675; Richmond, etc., R. R. Co. *v.* Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; Hill *v.* Northern Pac. Ry. Co., 33 Wash. 697, 74 Pac. 1054; Zouch *v.* Chesapeake, etc., Ry. Co., 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116; Loeser *v.* Chicago, etc., Ry. Co., 94 Wis. 571, 69 N. W. 372; Hart *v.* Pennsylvania Co., 112 U. S. 331.

27—The following additional cases are referred to. Stipulation

Carriers of passengers, it is also held, cannot relieve themselves from the obligation to observe ordinary [*827] care by any contract whatsoever, even in the case of "drover's passes," which are given without charge to those who accompany consignments of cattle,²⁸ or in cases where free

held valid: South & North Ala. R. R. Co. v. Harlein, 56 Ala. 368; Western Ry. of Ala. v. Harwell, 91 Ala. 340, 8 So. 649, 11 So. 781; St. Louis, etc., R. R. Co. v. Lesser, 46 Ark. 236; St. Louis, etc., R. R. Co. v. Weakley, 50 Ark. 397; Lawrence v. New York, etc., R. R. Co., 36 Conn. 63; Oppenheimer v. U. S. Express Co., 69 Ill. 62; Squire v. New York Central R. R. Co., 98 Mass. 239; Harvey v. Terre Haute, etc., R. R. Co., 74 Mo. 538; Durgin v. Am. Exp. Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; Steers v. Liverpool, etc., S. S. Co., 57 N. Y. 1; Bowman v. Am. Exp. Co., 21 Wis. 152.

Stipulation held invalid: Georgia Southern R. R. Co. v. Hughart, 90 Ala. 36, 8 So. 623; Southern Ry. Co. v. Jones, 132 Ala. 437, 31 So. 501; Overland Mail & Exp. Co. v. Carroll, 7 Colo. 43; Boscowitz v. Adams Exp. Co., 93 Ill. 523; Rosenfield v. Peoria, etc., R. R. Co., 103 Ind. 121; Kansas City, etc., R. R. Co. v. Rodebaugh, 38 Kan. 45; Adams Express Co. v. Hoeing, 88 Ky. 373; Boehl v. Chicago, etc., R. R. Co., 44 Minn. 191, 43 N. W. 333; Chicago, etc., R. R. Co. v. Abels, 60 Miss. 1017; Illinois Central R. R. Co. v. Bogard, 78 Miss. 11, 27 So. 879; Chicago etc., R. R. Co. v. Gardner, 51 Neb. 70, 70 N. W. 508; Union Pac. Ry. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457; United States Exp. Co. v. Backman, 28 Ohio St. 144; Pittsburgh, etc., Ry. Co. v. Sheppard,

56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732; Normile v. Oregon Nav. Co., 41 Ore. 177, 69 Pac. 928; Grogan v. Adams Exp. Co., 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360; Weiller v. Pennsylvania R. R. Co., 134 Pa. St. 310, 19 Atl. 702, 19 Am. St. Rep. 700; Willcock v. Pennsylvania R. R. Co., 166 Pa. St. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228; Louisville, etc., R. R. Co. v. Gilbert, 88 Tenn. 430; Missouri Pac. Ry. Co. v. Edwards, 78 Tex. 307, 14 S. W. 607; Galveston, etc., Ry. Co. v. Ball, 80 Tex. 602, 16 S. W. 441; Fort Worth, etc., Ry. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834; Black v. Goodrick Trans. Co., 55 Wis. 319. In Calderon v. Atlas S. S. Co., 170 U. S. 272, 18 S. C. Rep. 588, 42 L. Ed. 1033, the bill of lading stipulated that "the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks or goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." It was held that this exempted the carrier altogether for the loss of packages of \$100 in value.

28—Flinn v. Philadelphia, &c., R. R. Co., 1 Houst. 469; Cleveland, &c., R. R. Co. v. Curran, 19 Ohio St. 1; Ohio, &c., R. R. Co. v. Selby,

passage is given as mere matter of courtesy or favor.²⁹ In New York and New Jersey, however, it is held to be entirely competent to contract against liability for any negligence but the personal negligence of the carrier himself; which, in the case of corporations, would embrace any negligence of their servants, and of all but the managing board.³⁰ The weight of

47 Ind. 471, 17 Am. Rep. 719; *ger, State v. Western Md. R. R. Carroll v. Mo. Pac. Ry. Co.*, 88 Mo. 239, 57 Am. Rep. 382; *Mo. Pac. Ry. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312; *Lawson v. Chicago, &c., Ry. Co.*, 64 Wis. 447, 54 Am. Rep. 634; *Illinois Cent. R. R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210; *Saunders v. Southern Pac. Co.*, 13 Utah, 275, 44 Pac. 932; *Nelson v. Southern Pac. Co.*, 18 Utah, 244, 55 Pac. 364. Compare *Gardner v. New Haven, &c., R. R. Co.*, 51 Conn. 143, 50 Am. Rep. 12.

29—*Philadelphia, &c., R. R. Co. v. Derby*, 14 How. 468; *Pennsylvania R. R. Co. v. McCloskey*, 23 Penn. St. 526; *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St. 335; *Ind. Cent. R. R. Co. v. Mundy*, 31 Ind. 48; *Ill. Cent. R. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Gulf, &c., Ry. Co. v. McGown*, 65 Tex. 640. See, also, *Waterbury v. New York, &c., Co.*, 17 Fed. Rep. 671 and note; *Prince v. International, &c., R. R. Co.*, 64 Tex. 144; *Sherman v. Hannibal, &c., R. R. Co.*, 72 Mo. 62; *Gradin v. St. Paul, &c., Co.*, 30 Minn. 217; *Louisville, etc., Ry. Co. v. Taylor*, 126 Ind. 126, 25 N. E. 869; *McNeill v. Durham, etc., R. R. Co.*, 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227, overruling *S. C. McNeill v. Durham, etc., R. R. Co.*, 132 N. C. 510, 44 S. E. 34, 95 Am. St. Rep. 641. So a servant carried free on his own business is a passenger

carried to his work as part of his contract of service. *Vick v. New York, &c., R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36. 30—*Bissell v. N. Y. Cent. R. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Wells v. New York Cent. R. R. Co.*, 24 N. Y. 181; *Perkins v. N. Y. Cent. R. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 281; *Smith v. N. Y. Cent. R. R. Co.*, 24 N. Y. 222; *Poucher v. N. Y. Cent. R. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Wilson v. New York, &c., Co.*, 97 N. Y. 87; *Kinney v. Cent. R. R. Co.*, 32 N. J. 407; *S. C. 34 N. J.* 513; *Ulrich v. New York Central, etc., R. R. Co.*, 108 N. Y. 80, 15 N. E. 60, 2 Am. St. Rep. 369. So in *Payne v. Terre Haute, etc., Ry. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472 and *Quimby v. Boston, etc., R. R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846. See *Knowlton v. Erie R. Co.*, 19 Ohio St. 260, 2 Am. Rep. 395. But there must be an express contract to that effect. *Holsapple v. Rome, &c., Co.*, 86 N. Y. 275; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438, 28 N. E. 394. Shipping at “owner’s risk” will not excuse gross negligence, *Canfield v. Balt., &c., Co.*, 93 N. Y. 532, 45 Am. Rep. 268. That one riding in a parlor car and paying for that privilege does not abrogate his agreement in his railroad pass against lia-

authority, *however, is most distinctly the other way, [*828] both in this country and in England.³¹

bility for negligence of the railroad company, see *Ulrich v. New York, &c., R. R. Co.*, 108 N. Y. 80, 15 N. E. 60. The carrier does not escape liability to a U. S. mail agent for negligence, by which he is injured in the course of his duty, because he has a pass with an exemption clause endorsed on it. *Seybolt v. New York, &c., Co.*, 95 N. Y. 562, 47 Am. Rep. 75; and see cases in note to this case, 18 A. & E. R. R. Cas. 169. So of Pullman porter. *Jones v. St. Louis S. W. Ry. Co.*, 125 Mo. 666, 28 S. W. 883, 46 Am. St. Rep. 514, 26 L. R. A. 718. Under Penn. statutes such agent is not entitled to the care due a passenger. *Penn. R. R. Co. v. Price*, 96 Pa. St. 256. In Massachusetts an express messenger riding under a release contract in a baggage car is held bound by the contract if injured there. *Bates v. Old Colony R. R. Co.*, 147 Mass. 255, 17 N. E. 633.

31—The subject is exhaustively considered by Mr. Justice BRADLEY, in *Railroad Company v. Lockwood*, 17 Wall. 357, which was the case of a drover's pass. The authorities are all examined with care, and the principle of the decision is that carefulness and fidelity are essential duties of the carrier's employment, which cannot be abdicated. It was recognized in that case, as it has been generally, that a drover's pass is not in reality gratuitous, but must be considered as taken into account in paying for the transportation of stock. Whether in the case of a strictly gratuitous carriage the carrier might stipulate against li-

ability, the court was not called upon to decide. See, also, *Railway Company v. Stevens*, 95 U. S. 655. In *Jacobs v. St. Paul, &c., R. R. Co.*, 20 Minn. 125, 18 Am. Rep. 360, it was said that the carrier is held to the same extreme care in such cases as in others, but in Illinois where comparative negligence is recognized, the court say of a stipulation against liability for negligence in the case of a gratuitous carriage, "While we hold this agreement did not exempt the railroad company from the gross negligence of its employees, we are free to say that it does exempt it from all other species or degrees of negligence not denominated gross, or which might have the character of recklessness." *Ill. Cent. R. R. Co. v. Read*, 37 Ill. 484. In Wisconsin if a strictly gratuitous pass is given upon an agreement endorsed thereon to release from liability for negligence, there can be no recovery except for recklessness or such carelessness as is made a crime by statute. *Annas v. Milwaukee, &c., Co.*, 67 Wis. 46, 58 Am. Rep. 843.

In Connecticut in such case there can be no recovery. *Griswold v. New York, &c., R. R. Co.*, 53 Conn. 371, 55 Am. Rep. 115.

The English law is affected by statute, which leaves the court to determine the reasonableness of exemptions in carrier's contracts; but the courts hold contracts for exemption from liability for negligence in the transportation of goods unreasonable. *Peek v. N. Stafford R. Co.*, 10 H. L. Cas. 473.

Restrictions of Liability by Telegraph Companies. It is customary for telegraph companies to send messages subject to a condition that they shall not be responsible for errors or delays, unless the message is repeated at the sender's cost. Such conditions have frequently been supported as reasonable.³² But

the condition to be available must be brought to the
[*829] *knowledge of the party interested in the message,
sender or receiver,³³ and in the absence of a provision

They however hold that carriers passes to drovers that the carrier shall not be responsible for any risks. *McCawley v. Furness, L. R.* 8 Q. B. 57.

32—*McAndrews v. Elec. Tel. Co.*, 17 C. B. 3; *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Clement v. West. U. Tel. Co.*, 137 Mass. 463; *Young v. West. U. Tel. Co.*, 65 N. Y. 163; *Camp v. West. U. Tel. Co.*, 1 Met. (Ky.) 164, 71 Am. Dec. 461; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *De Rutte v. N. Y., &c., Tel. Co.*, 1 Daly 547; *Breese v. U. S. Tel. Co.*, 45 Barb. 274; S. C. 48 N. Y. 132, 8 Am. Rep. 526; *Birney v. N. Y., &c., Tel. Co.*, 18 Md. 341; *Passmore v. W. U. Tel. Co.*, 78 Pa. St. 238; *Wann v. West. U. Tel. Co.*, 37 Mo. 472, 90 Am. Dec. 395; *West. U. Tel. Co. v. Edsall*, 63 Tex. 668; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Wertz v. Western Union Tel. Co.*, 8 Utah, 499, 33 Pac. 136. Contra: *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 Am. St. Rep. 744; *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495; *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611.

May limit its liability for error in unrepeat message where it is not guilty of gross negligence. *Hart v. West. U. Tel. Co.*, 66 Cal. 579, 56 Am. Rep. 119; *Becker v. West. U. Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356; *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132. See *Thompson v. Western Union Tel. Co.*, 64 Wis. 531, 54 Am. Rep. 644; *Kirby v. Western Union Tel. Co.*, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612; *Kirby v. Western Union Tel. Co.*, 7 S. D. 623, 65 N. W. 37. Telegraph companies cannot limit their liability for negligence. *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844; *American Union Tel. Co. v. Dougherty*, 89 Ala. 191, 7 So. 660; *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428, 25 So. 232, 82 Am. St. Rep. 89; *Garrett v. Western Union Tel. Co.*, 83 Ia. 257, 49 N. W. 88; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 24 L. R. A. 492; *Sherill v. Western Union Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *Marr v. Western Union Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660, 33—*N. Y., &c., Tel. Co. v. Dry*

requiring the message to be repeated, it would be void as an attempt by the company to relieve itself of the consequences of its own fault.³⁴

The cases of carriers and telegraph companies have been specifically mentioned, because it is chiefly in these cases that such contracts are met with. But although the reasons which forbid such contracts have special force in the business of carrying persons and goods, and of sending messages, they apply universally, and should be held to defeat all contracts by which a

burg, 35 Penn. St. 298. Compare Ellis *v.* Am. Tel. Co., 13 Allen, 226. In Louisiana it is said it can be available, if at all, only against the sender. LaGrange *v.* Sou. Wes. Tel. Co., 25 La. Ann. 383.

34—True *v.* Int. Tel. Co., 60 Me. 9, 11 Am. Rep. 156. In Illinois the force of the condition seems to be restricted to errors arising from causes beyond the company's control. Tyler *v.* West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; West. U. Tel. Co. *v.* Tyler, 74 Ill. 168, 24 Am. Rep. 279. And see Sweatland *v.* Ill., &c., Tel. Co., 27 Iowa, 432, 1 Am. Rep. 285; Candee *v.* West. U. Tel. Co., 34 Wis. 471, 17 Am. Rep. 452. In Missouri it is denied that telegraph companies can contract not to be responsible for their own carelessness. Wann *v.* West. U. Tel. Co., 37 Mo. 472. See West. U. Tel. Co. *v.* Harris, 19 Ill. App. 347; West. U. Tel. Co. *v.* Shotter, 71 Ga. 760; West. U. Tel. Co. *v.* Crall, 38 Kan. 679, 17 Pac. 309. In Colorado and Texas it is held that the condition not to be responsible for unrepeated messages is no defense to an action for failure to deliver. West. U. Tel. Co. *v.* Graham, 1 Col. 230, 9 Am. Rep.

136; Gulf, &c., Co. *v.* Wilson, 69 Tex. 739, 7 S. W. 653. So when there is a failure to send at all. Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309. In Maine and Wisconsin, it is decided that a condition in sending a night message that the company shall be liable for errors or delay only to the extent of what is received for sending the message is void, as contrary to public policy. Bartlett *v.* West. U. Tel. Co., 62 Me. 209; Hibbard *v.* West. U. Tel. Co., 33 Wis. 559. Nor can it limit the damage to ten times the price. Marr *v.* West. U. Tel. Co., 85 Tenn. 529, 3 S. W. 496; West. U. Tel. Co. *v.* Shotter, 71 Ga. 760; West. U. Tel. Co. *v.* Harris, 19 Ill. App. 347. And, see Sweatland *v.* Illinois, &c., Tel. Co., 27 Iowa, 433; West. U. Tel. Co. *v.* Fenton, 52 Ind. 1; West. U. Tel. Co. *v.* Meek, 49 Ind. 53; Birney *v.* N. Y., &c., Tel. Co., 18 Md. 341. Stipulation requiring claim for damages to be presented within sixty days held valid. Kirby *v.* Western Union Tel. Co., 7 S. D. 623, 65 N. W. 37. So within thirty days. Western Union Tel. Co. *v.* Culberson, 79 Tex. 65, 15 S. W. 219.

party undertakes to put another at the mercy of his own faulty conduct.³⁵

Liability of Maker, Vendor or Furnisher of an Article to Persons Not in Privity of Contract. The general rule is that a contractor, manufacturer, vendor or furnisher of an article is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of such article. Thus in *Winterbottom v. Wright*,³⁶ the defendant contracted with the postmaster general to furnish and keep in repair a mail coach. By reason of the defendant's negligence the coach broke down and injured the driver of the coach. It was held that the latter could not maintain an action against the defendant for the injury. In *Curtin v. Somerset*,³⁷ the defendant contracted with a company to erect a hotel. After the work was completed and accepted, the plaintiff, a guest in the hotel, was injured by the fall of a porch, due to inferior construction and a failure of the defendant to comply with the plans and specifications. A recovery was denied and the general rule above stated was applied. "The consequences of holding the opposite doctrine," says the court, "would be far reaching. If a contractor who erects a house, who builds a bridge, or performs any other work; a manufacturer who con-

35—A contract exempting the tract between a railroad company master from liability to his servant for negligence is void. *N. N. & N. V. Co. v. Eifort*, 15 Ky. L. R. 600; *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149. See *Starr v. Great Northern Ry. Co.*, 67 Minn. 18, 69 N. W. 632. Where a railroad company permits an elevator to be built on its right of way, it may stipulate that it shall not be liable for its destruction by fire even by its own negligence. *Griswold v. Illinois Central Ry. Co.*, 90 Ia. 265, 57 N. W. 843; *Greenwich Ins. Co. v. Louisville, etc.*, R. R. Co., 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 99 Am. St. Rep. 313, 56 L. R. A. 477. A con-

and a news company that the latter should indemnify the former for any loss which it might sustain by being held liable for injuries to its agents, was held valid in Kansas City, etc., *R. R. Co. v. Southern Ry. News Co.*, 151 Mo. 373, 52 S. W. 205, 74 Am. St. Rep. 545, 45 L. R. A. 380. A contract which exempts one from liability for negligence will be strictly construed. *Crew v. Bradstreet Co.*, 134 Pa. St. 161, 19 Atl. 500, 19 Am. St. Rep. 681, 7 L. R. A. 661.

36—10 M. & W. 109.

37—140 Pa. St. 70, 21 Atl. 244, 23 Am. St. Rep. 220, 12 L. R. A. 322.

structs a boiler, piece of machinery, or a steamship, owes a duty to the whole world, that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concurred." The general rule is illustrated by numerous cases briefly described in the margin.³⁸

38—In the following cases third parties, without any fault on their part, were injured by the negligence of the manufacturer, vendor, or furnisher of the articles specified, while the parties thus injured were innocently using them for the purposes for which they were made or furnished, and the court held that there could be no recovery, because the makers, vendors, or furnishers owed no duty to strangers to their contracts. A leaky lamp, *Longmeid v. Holiday*, 6 Exch. 764, 765; a defective chain furnished one to lead stone, *Blakemore v. Railway Co.*, 8 El. & Bl. 1035; an improperly hung chandelier, *Collis v. Selden*, L. R. 3 C. P. 495, 497; an attorney's certificate of title, *Savings Bank v. Ward*, 100 U. S. 195, 204, 25 L. Ed. 621; a defective valve in an oil car, *Goodlander v. Standard Oil Co.*, 63 Fed. 401, 406, 11 C. C. A. 253, 259, 27 L. R. A. 583; a defective sidesaddle, *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, 30 C. C. A. 567; a defective rim in a balance wheel, *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513; a defective boiler, *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 623; a defective cylinder in a threshing machine, *Heizer v. Kingsland & D. Mfg. Co.*, 110 Mo. 605, 19 S. W. 630, 33 Am. St. Rep. 481, 15 L. R. A. 821; a defective wall which fell on a pedestrian, *Dougherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 57 Am. St. Rep. 204, 32 L. R. A. 837; a defective rope on a derrick, *Burke v. Refining Co.*, 11 Hun, 354; a defective shelf for a workman to stand upon in placing ice in a box, *Swan v. Jackson*, 55 Hun, 194, 7 N. Y. S. 821; a defective hoisting rope of an elevator, *Barrett v. Mfg. Co.*, 31 N. Y. Supr. Ct. 545; a runaway horse, *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; a defective hook holding a heavy weight in a drop press, *McCaffery v. Mossburg & G. Mfg. Co.*, 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822; a defective bridge, *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; shelves in a dry goods store, whose fall injured a customer, *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; a staging erected by a contractor for the use of his employees, which gave way and injured the servant of another party, *Maguire v. Magee (Pa.)*, 13 Atl. 551; the tongue of a land roller, defective by reason of a plugged knot hole concealed by paint, *Kuelling v. Roderick Lean Mfg. Co.*, 88 App. Div. 309, 84 N. Y. S. 622; lubricating oil which generated explosive gases, *Standard Oil Co. v. Murray*, 119 Fed. 572, 57 C.

To the general rule there are various exceptions. One is that a person who deals with an emminently dangerous article owes a public duty to all to whom it may come to exercise care in proportion to the peril involved.³⁹ A poisonous drug is such an article and, if one sells such a drug under a wrong name, he will be liable to any one who, without fault on his part, is injured by taking the drug for what it is represented to be.⁴⁰ So of a patent medicine, if it contains an ingredient which, taken in the doses prescribed, is calculated to produce injury and does in fact cause injury.⁴¹ So of a hair dressing which injures the health.⁴² So of unwholesome food.⁴³ The same principle has been applied to a gun, which if defective is an article imminently dangerous to human life.⁴⁴ Crude petroleum and petroleum oil have been held not to be within the exception.⁴⁵ In one

C. A. 1; an architect's certificate of work done, *Le Lievre v. Gould* (1893) 1 Q. B. 491. A contractor for a public work or work upon real estate is not liable to third parties for negligence in construction, where the injuries occur after the work has been completed and accepted. *Mayor, etc., of Albany v. Cunliff*, 2 N. Y. 165, 174; *Fitzmaurice v. Fabian*, 147 Pa. St. 199, 23 Atl. 444; *Salliolte v. King Bridge Co.*, 122 Fed. 378, 58 C. C. A. 466. And see further: *Snyder v. Holt Mfg. Co.*, 134 Cal. 324, 66 Pac. 311; *Byrd v. English*, 117 Ga. 191, 43 S. E. 419; *Gould v. Slater Woolen Co.*, 147 Mass. 315, 17 N. E. 531; *Eaton v. Fairbury W. W. Co.*, 37 Neb. 546, 56 N. W. 201, 40 Am. St. Rep. 510, 21 L. R. A. 653; *Schutte v. United Elec. Co.*, 68 N. J. L. 435, 53 Atl. 204; *Conklin v. Staats*, 70 N. J. L. 771, 59 Atl. 144. "There would be no bounds to actions and litigious intricacies, if the ill effects of the negligence of men could be followed down the chain of results

to the final effect." *Beasley, C. J. in Kahl v. Love*, 37 N. J. L. 5, 8.

39—*McCaffrey v. Mossberg & G. Mfg. Co.*, 23 R. I. 381, 50 Atl. 651, 91 Am. St. Rep. 637, 55 L. R. A. 822.

40—*Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Fisher v. Golladay*, 38 Mo. App. 531; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; *Davidson v. Nichols*, 11 Allen, 519; *McDonald v. Snelling*, 14 Allen, 290.

41—*Blood Balm Co. v. Cooper*, 82 Ga. 457.

42—*George v. Skivington*, L. R. 5 Exch. 1.

43—*Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154.

44—*Faro v. Remington Arms Co.*, 67 App. Div. 414, 73 N. Y. S. 788; *Levy v. Langridge*, 2 M. & W. 519; S. C. 4 M. & W. 337.

45—*Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11

of the cases referred to it is said: "The duty owing to the public, for breach of which one injured may recover, has respect to and is limited to instruments and articles in their nature calculated to do injury, such as are essentially and in their elements instruments of danger, and to acts that are ordinarily dangerous to life and property. If the wrongful act be not imminently dangerous to life and property, the negligent vendor is liable only to the party with whom he contracted."⁴⁶

Another exception is that a person who knowingly sells or furnishes an article which, by reason of defective construction or otherwise, is imminently dangerous to life or property, without notice or warning of the defect or danger, is liable to third parties who suffer therefrom. This principle has been applied in case of a folding bed, represented as safe but known to be otherwise and which caused injury to a guest of the purchaser.⁴⁷ Also in case of champagne cider which exploded and injured a servant of the purchaser.⁴⁸ Also in case of a thresh-

C. C. A. 253; Cleveland, etc., Ry. defendant. The declaration was Co. v. Ballentine, 84 Fed. 935, 28 C. C. A. 572; Standard Oil Co. v. Murray, 119 Fed. 572, 57 C. C. A. 1.

46—Standard Oil Co. v. Murray, 119 Fed. 572, 575, 57 C. C. A. 1.

47—Lewis v. Terry, 111 Cal. 39, 43 Pac. 398.

48—Weiser v. Holzman, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932. The case was decided on demurrer. The plaintiff was injured by the explosion of a bottle of champagne cider manufactured and sold by the defendant. The declaration set forth the circumstances of the injury and alleged that the cider was made by the defendant and sold to the plaintiff's employer, that it was a dangerous explosive and known to be such by the defendant and that no warning of danger was given to the purchaser by the de-

held to be sufficient and the court says: "One who sells and delivers to another an article intrinsically dangerous to human life and health, such as a poison, an explosive, or the like, knowing it to be such, without notice to the purchaser that it is intrinsically dangerous, is responsible to any person who is, without fault on his part, injured thereby. The rule does not rest upon any principle of contract, or contractual relation existing between the person delivering the article and the person injured, for there is no contract or contractual relation between them. It rests on the principle that the original act of delivering the article is wrongful, and that every one is responsible for the natural consequences of his wrongful act."

ing machine with a defective and insufficient covering over the cylinder, which was necessarily used by those who operated it to walk upon and which collapsed and injured an employe of the purchaser.⁴⁹ So where a refiner, knowing naphtha to be dangerous for illuminating purposes, sold it to a retailer to be used for such purposes and a purchaser from the latter was injured by so using it.⁵⁰ The case of *Schubert v. J. R. Clark Co.*⁵¹ must be regarded as falling within this exception or else as in conflict with the general rule. In this case the plaintiff was injured by the breaking of a step ladder which was made of de-

49—*Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, 57 C. C. A. 237. This case was a decision upon demurrer. The whole question is very elaborately considered and many authorities are cited and reviewed. After referring to the general rule the court says that there are three exceptions to that rule which it formulates as follows:

“The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence.” Citing *Dixon v. Bell*, 5 Maule & S. 198; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Elkins v. McKean*, 79 Pa. St. 493, 502; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 191, 57 L. R. A. 428.

“The second exception is that an owner’s act of negligence which causes injury to one who is invited by him to use his defec-

tive appliance upon the owner’s premises may form the basis of an action against the owner.” Citing *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Bright v. Barnett & R. Co.*, 88 Wis. 299, 60 N. W. 418, 420, 26 L. R. A. 524; *Heaven v. Pender*, L. R. 11 Q. B. D. 503; *Roddy v. Railway Co.*, 104 Mo. 234, 241, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746.

“The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to anyone who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not.” Citing *Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 337; *Wellington v. Oil Co.*, 104 Mass. 64, 67; *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398.

50—*Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64.

51—49 Minn. 331, 51 N. W. 1103, 32 Am. St. Rep. 559, 15 L. R. A. 818.

fective and poor material and the defects concealed by paint and varnish. The step ladder was manufactured by the defendant and was purchased from a retailer by the plaintiff's employer. A complaint setting forth the facts and alleging that the defendant knew or ought to have known of the defective construction was held good on demurrer. If the defendant knew of the defective construction, then the case falls within the exception last stated. But if the defendant ought to have known and did not, which is all that the complaint positively alleges, then it was a case of simple negligence and the decision would seem to be at variance with the general rule.⁵²

Another exception to the general rule which the authorities seem to establish is that where one undertakes with another to construct a place for the doing of certain work, such as a scaffold or staging, he will be liable to any who, while using the place in the performance of such work, are injured by reason of negligent or defective construction.⁵³ There is some difference of opinion as to the grounds of liability in these cases but implied invitation is the prevailing one.

Two additional cases may be noticed. The Standard Oil Company shipped to the city of Richmond a tank car of naphtha for use in making gas. In unloading the car, owing to a defective valve the flow could not be regulated, the naphtha escaped, ran into a sewer near the gas works, was ignited and killed an employe of the city who was helping to unload the car. In a suit against the Standard Oil Company for negligently causing the death of this employe, the supreme court of Virginia held that the company was liable on the ground "that a person who negligently uses a dangerous instrument, or article, or causes or authorizes its use by another in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured who is not him-

52—It is so regarded in *Huset Smith*, 89 N. Y. 470, 42 Am. Rep. *v. J. I. Case Threshing Machine* 311; *Bright v. Barnett & R. Co., Co.*, 120 Fed. 865, 57 C. C. A. 237. 88 Wis. 299, 60 N. W. 418, 26 L.

53—*Mulchey v. Methodist R. R. A.* 524; *Heaven v. Pender, L. Soc.*, 125 Mass. 487; *Devlin v. R.* 11 Q. B. D. 503.

self at fault.⁵⁴ Naphtha is thus classed among those articles that are imminently dangerous to life and property, and the reason of the case brings it under the first exception to the general rule above stated. In a very similar case in the federal courts crude petroleum was held not to be such an article. The case arose out of the following facts: The same company shipped to the Ft. Scott Gas Company a tank car of crude petroleum. The car had no valve to control the outflow, and in an attempt to unload the car near the plaintiff's mill the oil discharged so rapidly that it overflowed, ran into the plaintiff's engine room, exploded and destroyed the mill. The company was held not liable. Assuming that it was negligent to use a car without a valve, it was held that crude petroleum was not so dangerous to life or property as to impose upon the company a public duty in dealing with it.⁵⁵

Electricity. Electricity is an invisible, impalpable force, highly dangerous to life and property, and those who make, sell, distribute, use or handle it are bound to exercise care in proportion to the danger involved.⁵⁶ This is the general rule.

54—Standard Oil Co. v. Wakefield, 102 Va. 824, 47 S. E. 830.

55—Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253. The decision was also put upon other grounds. The following additional cases upon the general subject are referred to. Bickford v. Richards, 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 224; Boston Woven Hose & R. Co. v. Kendall, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781; Roddy v. Missouri Pac. R. R. Co., 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746.

56—Denver Con. Elec. Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; McAdam v. Central Ry. & Elec. Co., 67 Conn. 445, 35 Atl. 341; Nelson v. Branford L. & W. Co., 75 Conn. 548, 54 Atl. 303; Broyles v. Prisock, 97 Ga.

643, 25 S. E. 389; Heidt v. Southern Tel. & Tel. Co., 122 Ga. 474; Economy Lt. & P. Co. v. Hiller, 203 Ill. 518, 68 N. E. 72; Rowe v. Taylorville Elec. Co., 213 Ill. 318, 72 N. E. 711; Leavenworth Coal Co. v. Ratchford, 5 Kan. App. 150, 48 Pac. 927; McLaughlin v. Louisville Elec. Lt. Co., 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; Thomas v. Maysville Gas Co., 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 147; Macon v. Paducah St. Ry. Co., 110 Ky. 680, 62 S. W. 496; Lexington Ry. Co. v. Fain, 24 Ky. L. R. 1443, 71 S. W. 628; Owensboro v. Knox, 25 Ky. L. R. 680; Potts v. Shreveport Belt Ry. Co., 110 La. 1, 34 So. 107, 98 Am. St. Rep. 452; Gannon v. Laclede Gas Lt. Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907; Newark Elec. Lt. Co. v. McGilverry, 62 N. J. L. 451, 41 Atl.

"Electricity," says the Supreme Court of Kentucky, "is a powerful and subtle force, and its nature and manner of use are not well understood by the public, nor its presence easily determined or ascertained. Its use for private gain is very extensive, and becoming more and more so. The daily avocations of many thousands of necessity bring them near to this subtle force, and it seems clear that the electric companies should be held to the use of the utmost care to avoid injuring those whose business or pleasure requires them to come near such a death-dealing force."⁵⁷

Those using the public ways for electric wires carrying a dangerous current are bound to use a very high degree of care in the construction, use and repair of such lines, to prevent injury to those lawfully upon such ways.⁵⁸ A broken or fallen

955; New York, etc., Tel. Co. v. 834; Newark Elec. L. & P. Co. v. Bennett, 62 N. J. L. 742, 42 Atl. Garden, 78 Fed. 74, 23 C. C. A. 759; Perham v. Portland Elec. Co., 649.

33 Ore. 451, 53 Pac. 14, 72 Am. 57—McLaughlin v. Louisville St. Rep. 730, 40 L. R. A. 799; Boyd v. Portland Elec. Co., 40 Ore. 37 S. W. 851, 34 L. R. A. 812. 126, 66 Pac. 576, 57 L. R. A. 619; Boyd v. Portland Elec. Co. 41 Ore. 336, 68 Pac. 810; Mooney v. Luzerne, 186 Pa. St. 161, 40 Atl. 311, 40 L. R. A. 811; Herron v. Pittsburgh, 204 Pa. St. 509, 54 Atl. 311, 92 Am. St. Rep. 798; Dalmat v. Media Elec. Lt., etc., Co., 208 Pa. 57—McAdam v. Central Ry. & St. 403, 57 Atl. 833; Emery v. Philadelphia, 208 Pa. St. 492, 57 Atl. 977; Sorrell v. Titusville Elec. 341; Clare v. Sacramento Elec. P. Traction Co., 23 Pa. Supr. Ct. 425; Moran v. Corliss Steam Engine & L. Co., 122 Cal. 504, 55 Pac. 326; Moran v. Corliss Steam Engine Co., 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267; Miles v. Postal Tel. 496; Gannon v. Laclede Gas Lt. Cable Co., 55 S. C. 403, 33 S. E. Co., 145 Mo. 502, 46 S. W. 968, 47 493; Parsons v. Charleston Con. S. W. 907; Newark Elec. Lt. Co. Ry., &c., Co., 69 S. C. 305; Wehner v. McGilvery, 62 N. J. L. 451, 41 v. Lagerfelt, 27 Tex. Civ. App. 520, 66 S. W. 221; Cole v. Parker, Atl. 955; Turton v. Powelton Elec. 27 Tex. Civ. App. 563, 66 S. W. 135; Richmond, etc., Elec. Ry. Co. Co., 185 Pa. St. 406, 39 Atl. 1053; v. Rubin, 102 Va. 809, 47 S. E. Wehner v. Lagerfelt, 27 Tex. Civ. App. 520, 66 S. W. 221; Cole v.

App. 520, 66 S. W. 221; Cole v.

wire in a street, charged with a dangerous current of electricity, affords a presumption of negligence on the part of the owner of the wire.⁵⁹ Wires carried on a bridge or attached to an elevated station, where boys are accustomed to play, should be properly insulated.⁶⁰ When a storm occurs that is liable to prostrate the wires, due care requires prompt efforts to discover and repair broken lines.⁶¹ Where the wires of two companies cross or are otherwise so related that there is danger of contact between them, there is a duty on both to guard against such contact, and for a neglect of this duty the companies are jointly and severally liable.⁶² Cases of this sort arise mainly where telegraph or telephone wires cross or parallel light or trolley

Parker, 27 Tex. Civ. App. 563, 66 L. & P. Co., 45 S. C. 146, 22 S. E. S. W. 135.

59—Newark Elec. Lt. Co. v. Ruddy, 62 N. J. L. 505, 41 Atl. 712, 57 L. R. A. 624; Jones v. Union Ry. Co., 18 App. Div. 267, 46 N. Y. S. 321; Clancy v. New York, etc., Ry. Co., 82 App. Div. 563, 81 N. Y. S. 875; Chaperon v. Portland Elec. Co., 41 Ore. 39, 67 Pac. 928; Boyd v. Portland Elec. Co., 40 Ore. 126, 66 Pac. 576, 57 L. R. A. 619; Boyd v. Portland Elec. Co., 41 Ore. 336, 68 Pac. 810. See United Elec. L. & P. Co. v. State, 100 Md. 634.

60—Nelson v. Branford L. & W. Co., 75 Conn. 548, 54 Atl. 303; Wittleder v. Citizens' Elec. Ill. Co., 47 App. Div. 410, 62 N. Y. S. 297; Wittleder v. Citizens' Elec. Ill. Co., 50 App. Div. 478, 64 N. Y. S. 114.

61—Texarkana Gas & Elec. L. Co. v. Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30; Boyd v. Portland Elec. Co., 37 Ore. 567, 62 Pac. 378, 52 L. R. A. 509; Boyd v. Portland Elec. Co., 40 Ore. 126, 66 Pac. 576, 57 L. R. A. 619; Boyd v. Portland Elec. Co., 41 Ore. 336, 68 Pac. 810; Mitchell v. Charleston

62—McKay v. Southern Bell Tel. Co., 111 Ala. 337, 19 So. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589; Broyles v. Prisock, 97 Ga. 643, 25 S. E. 389; Economy Lt. & P. Co. v. Hiller, 203 Ill. 518, 68 N. E. 72; New York, etc., Telephone Co. v. Bennett, 62 N. J. L. 742, 42 Atl. 759; Rowe v. New York, etc., Telephone Co., 66 N. J. L. 19, 48 Atl. 523; Dillon v. Allegheny County Lt. Co., 179 Pa. St. 482, 36 Atl. 164; Parsons v. Charleston Con. Ry. etc., Co., 69 S. C. 305; United Elec. Ry. Co. v. Shelton, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614; Block v. Milwaukee St. Ry. Co., 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365; McAdam v. Central Ry. & Elec. Co., 67 Conn. 445, 35 Atl. 341; Cumberland Tel. & Tel. Co. v. Ware, 115 Ky. 581, 74 S. W. 289; Western Union Tel. Co. v. State, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572; Paine v. Elec. Illuminating, etc., Co., 64 App. Div. 477, 72 N. Y. S. 279; Western Union Tel. Co. v. Thorn, 64 Fed. 287, 12 C. C. A. 104. See Heidt v. Southern Tel.

wires. Where the plaintiff's store was set on fire and burned by an electric current from the defendant's trolley wires which had come in contact with the telephone wire to the plaintiff's premises, it was held that the defendant owed a high degree of care in the management of its wires, that both the defendant and the telephone company were bound to guard against a contract of their wires, and that it was immaterial which wires were first installed.⁶³ Wires attached to buildings or carried near or over them should be so placed that there is no danger of contact on the part of persons about the buildings or the wires should be so insulated that contact will be harmless, and a neglect to so place the wires or to have and keep them properly insulated will render the owners liable.⁶⁴ And generally where dangerous wires are maintained in a place where people have a right to go for business or pleasure, the utmost care, or,

& Tel. Co., 122 Ga. 474; Albany *v.* Watervliet, etc., R. R. Co., 76 Hun, 136, 27 N. Y. S. 848. proper insulation, received a shock, the defendant was held liable and the court says: "It

63—Richmond, etc., Elec. Ry. Co. *v.* Rubin, 102 Va. 809, 47 S. E. 834.

64—Wales *v.* Pac. Elec. Motor Co., 130 Cal. 521, 62 Pac. 1120; Walters *v.* Denver Con. Elec. Lt. Co., 12 Colo. App. 145, 54 Pac. 960; Walters *v.* Denver Con. Elec. Lt. Co., 17 Colo. App. 192, 68 Pac. 117; Leavenworth Coal Co. *v.* Ratchford, 5 Kan. App. 150, 48 Pac. 927; Brown *v.* Edison Elec. Co., 90 Md. 400, 45 Atl. 182, 78 Am. St. Rep. 442, 46 L. R. A. 745; Brooks *v.* Consolidated Gas Co., 70 N. J. L. 211, 57 Atl. 396; Fitzgerald *v.* Edison Elec. Ill. Co., 207 Pa. St. 118, 56 Atl. 350. In McLaughlin *v.* Louisville Elec. Lt. Co., 100 Ky. 173, 193, 37 S. W. 851, 34 L. R. A. 812, where the plaintiff, while painting a house, came in contact with the defendant's light wire in the street and, in consequence of the lack of and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. Very great care might be sufficient as to the wires at points remote from public passways, buildings or places where persons need not go for work or business, but the rule should be different as to points where people have a right to go for work, business or pleasure. At the latter points or places the insulation or protection should be made perfect, and the utmost care used to keep it so." p. 193. Light wires placed where there is no reason to suppose anyone will go, need not be insulated. Brush Elec. Lt. & P. Co. *v.* Lefevre, 93 Tex. 604, 57 S. W. 640, 77 Am. St. Rep. 898, 49 L. R. A. 771.

at least a very high degree of care, must be exercised to make and keep them safe.⁶⁵ It is held in Louisiana that "it is the duty of the company under such conditions to keep its wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places."⁶⁶ And in Kentucky the rule is held to be "that those who manufacture or use electricity for private advantage must do so at their peril, and the only way to prevent accidents, where a deadly current is used, is to have perfect protection at those points where people are likely to come in contact with it."⁶⁷

Those who equip buildings for the use of electricity and those who furnish the current are bound to exercise proper care to prevent damage to the buildings or to those who use the electric appliances. Thus where, owing to defendant's negligence in wiring a jail, the building was set on fire and an occupant burned to death, the defendant was held liable.⁶⁸ So where, owing to defects in the equipment installed by the defendant, an electric explosion occurred and injured the plaintiff.⁶⁹ Where a person in turning on an ordinary electric light in a house, received a shock, negligence was presumed and the company furnishing the light held liable.⁷⁰ In two of the cases cited the person was killed. Where a person was killed by lightning conducted to his house over a telephone wire of the defendant,

65—New Omaha T.-H. Elec. Lt. Co. v. Johnson, 67 Neb. 393, 93 N. W. 778; Perham v. Portland Elec. Co., 33 Ore. 451, 53 Pac. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799; Mooney v. Luzerne, 186 Pa. St. 161, 40 Atl. 311, 40 L. R. A. 811; Herron v. Pittsburg, 204 Pa. St. 509, 54 Atl. 311, 93 Am. St. Rep. 798; Daltry v. Media Elec. Lt., etc., Co., 208 Pa. St. 403, 57 Atl. 833; Emery v. Philadelphia, 208 Pa. St. 492, 57 Atl. 977; Sorrell v. Titusville Elec. Traction Co., 23 Pa. Supr. Ct. 425; Miles v. Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493; Wilbert v. Sheboygan, 121 Wis. 518, 99 N. W.

330; Newark Elec. L. T. Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649.

66—Potts v. Shreveport Belt Ry Co., 110 La. 1, 34 So. 107, 98 Am. St. Rep. 452.

67—Lexington Ry. Co. v. Fain, 24 Ky. L. R. 1443, 71 S. W. 628; Owensboro v. Knox, 25 Ky. L. R. 680.

68—Miller v. Ouray Elec. L. & P. Co., 18 Colo. App. 131, 70 Pac. 447.

69—Yates v. S. W. Brush Elec. L. & P. Co., 40 La. Ann. 467, 4 So. 250.

70—Gilbert v. Duluth General Elec. Co., 93 Minn. 99, 100 N. W.

the company was held liable.⁷¹ The evidence tended to show that there were devices for arresting atmospheric electricity which the defendant had failed to use and this tended to show negligence.

Where a gas company supplied current to an electric street railway, and, owing to the wires of the latter being out of repair, a traveler was killed by contact with a loose wire charged by the current, the gas company was held liable, on the ground that the defendant was bound to see that the wires into which it sent the current were in proper condition to carry it.⁷² One who creates electricity on his own premises and discharges it into the ground is responsible for injuries to others thereby.⁷³

Gas Works. Gas is a dangerous substance and a high degree of care is necessary in dealing with it.⁷⁴ It is held that a higher degree of care is required in dealing with such an agency than is necessary in the ordinary affairs of business.⁷⁵ It follows that reasonable care, in view of the dangers incident to the business, should be exercised in the construction and maintenance of mains, pipes and other apparatus for its distribution, and in the inspection and repair of the same, and if, by

653, 106 Am. St. Rep. 430; *Alexander v. Nanticoke Lt. Co.*, 209 Pa. St. 571, 58 Atl. 1068, 67 L. R. A. 475; *Crowe v. Nanticoke Lt. Co.*, 209 Pa. St. 580, 58 Atl. 1071. See *United States Elec. Lt. Co. v. Sullivan*, 22 App. D. C. 115.

71—*Griffith v. New England Tel. & Tel. Co.*, 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919,

72—*Thomas v. Maysville Gas Co.*, 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 147. “Considering the dangerous character of the force produced by the gas company, there was a duty imposed on each to see that the wires into which it was sent were properly insulated. The danger was exactly the same whether the wires were owned by one or by both of the companies. When one through

the instrumentality of machinery can accumulate or produce such a deadly force as electricity, he should be compelled to know that the means of its distribution are in such condition that those whose business or pleasure may bring them in contact with it may do so with safety.” A light company was held not liable for the burning of the plaintiff’s house by reason of defective wiring done by a third party. *National Fire Ins. Co. v. Denver Con. Elec. Co.*, 16 Colo. App. 86, 63 Pac. 949.

73—*National Tel. Co. v. Baker*, (1893) 2 Ch. 186.

74—*Heh v. Consolidated Gas Co.*, 201 Pa. St. 443, 50 Atl. 994, 88 Am. St. Rep. 819.

75—*United Oil Co. v. Roseberry*, 30 Colo. 177, 69 Pac. 588.

reason of negligence in any of these respects, gas escapes and causes damage to person or property, the company supplying the gas will be liable.⁷⁶ In many of the cases cited the damage was caused by explosions. In such cases it is no defense that the explosion was caused by the negligent act of a third party,⁷⁷ but otherwise if caused by the negligence of the plaintiff.⁷⁸ It is not negligence as matter of law to look for a leak with a light.⁷⁹ It is no defense that the leak was caused by the act of a third party if the defendant was negligent in not discovering and repairing the leak.⁸⁰ The escape of gas from the defendant's mains or apparatus has been held to be *prima facie* evidence of negligence.⁸¹

76—*Koelsch v. Philadelphia Company*, 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759; *Pine Bluff W. & L. Co. v. Schneider*, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; *Pine Bluff W. & L. Co. v. McCain*, 62 Ark. 118, 34 S. W. 549; *Chisholm v. Atlantic Gas Co.*, 57 Ga. 28; *Consumers Gas Co. v. Perrego*, 144 Ind. 350, 43 N. E. 306; *Emerson v. Lowell Gas Co.*, 3 Allen, 410; *Holly v. Boston Gas Co.*, 8 Gray 123, 69 Am. Dec. 233; *Butcher v. Providence Gas Co.*, 12 R. I. 149, 34 Am. Rep. 626; *United Oil Co. v. Roseberry*, 30 Colo. 177, 69 Pac. 588; *Washington Gas Lt. Co. v. Eckloff*, 4 App. D. C. 174; *Washington Gas Lt. Co. v. Eckloff*, 7 App. D. C. 372; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203; *Richmond Gas Co. v. Baker*, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683; *Consolidated Gas Co. v. Crocker*, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785; *Consolidated Gas Co. v. Getty*, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603; *Greaney v. Holyoke Water Power Co.*, 174 Mass. 437, 54 N. E. 880; *Garner v. Citizens' Nat. Gas Co.*, 198 Pa.

St. 16, 47 Atl. 965; *Heh v. Consolidated Gas Co.*, 201 Pa. St. 443, 50 Atl. 994, 88 Am. St. Rep. 819.

77—*Pine Bluff W. & L. Co. v. McCain*, 62 Ark. 118, 34 S. W. 549; *Consolidated Gas Co. v. Getty*, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603; *Koplan v. Boston Gas Lt. Co.*, 177 Mass. 15, 58 N. E. 183; *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355, 25 Atl. 522, 34 Am. St. Rep. 653, 18 L. R. A. 759.

78—*Pine Bluff W. & L. Co. v. Schneider*, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; *Triple State Nat. Gas Co. v. Wellman*, 114 Ky. 79, 70 S. W. 49.

79—*Pine Bluff W. & L. Co. v. Schneider*, 62 Ark. 109; 34 S. W. 547, 33 L. R. A. 366; *Consolidated Gas Co. v. Crocker*, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785; *Schmeer v. Gas Lt. Co.*, 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653.

80—*Pine Bluff W. & L. Co. v. Schneider*, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366. Otherwise if there was no negligence on the part of the defendant. *McKenna v. Bridgewater Gas Co.*, 193 Pa. St. 633, 45 Atl. 52, 47 L. R. A. 790.

81—*Smith v. Boston, Gas Co.*, 129 Mass. 318; *Carmody v. Boston*

Where gas escaped into a greenhouse and injured plants the company was held liable.⁸² So where trees were damaged.⁸³ Where a company permitted gas to be turned on to an apartment building to supply two apartments in which it had set meters, without inspecting other parts of the building to see if the openings were properly capped, and gas escaping from an uncapped opening in an upper hall, exploded and injured the plaintiff, it was held a question for the jury whether the defendant was negligent in failing to make such inspection.⁸⁴ While a company is not liable for defects in gas fixtures which it has not supplied and does not control, yet if it undertakes to repair leaks therein it must exercise due diligence in doing so or answer for its neglect.⁸⁵

A gas company may be negligent in its management of the supply of gas or in the regulation of its pressure. Where an excessive pressure was given to the gas whereby the plaintiff's stoves were overheated and his house burned, the company was held liable.⁸⁶ It is negligent to turn the gas off from an apartment building and then to turn it on without warning.⁸⁷

Where a company was engaged in supplying gas for fuel and in cold weather shut off the supply from the plaintiff's house without warning, whereby her husband, who was convalescent from typhoid fever, contracted pneumonia and died, the company was held liable in tort for his death.⁸⁸ So where

Gas Co., 162 Mass. 539, 39 N. E. 184. 86—Indiana, etc., Gas Co. v. Long, 27 Ind. App. 219, 59 N. E. 410.

82—Dow *v.* Winnipesaukee Gas, etc., Co., 69 N. H. 312, 41 Atl. 288, 76 Am. St. Rep. 173, 42 L. R. A. 569; Siebrecht *v.* East River Gas Co., 21 App. Div. 110, 47 N. Y. S. 262. 87—Beyer *v.* Consolidated Gas Co., 44 App. Div. 158, 60 N. Y. S. 628. Here the plaintiff had lain down leaving her stove lighted and was injured by the escaping gas.

83—Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651.

84—Schmeer *v.* Gas Lt. Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653.

85—Ferguson *v.* Boston Gas Lt. Co., 170 Mass. 182, 49 N. E. 115. 88—Hoehle *v.* Allegheny Heating Co., 5 Pa. Supr. Ct. 21. The court says: "The defendant company was engaged in the business of supplying natural gas as a fuel to residents of the city of Allegheny, through pipes laid under

there was a failure to keep up the supply and in consequence sick children had a relapse and died.⁸⁹

Street Railways. Street railway companies, by the grant of a franchise to construct and operate a railway in a street for the accommodation of street traffic, do not acquire any rights superior to the public. The grant is to use the street in common with the public, and street cars, however propelled, have simply equal rights with other vehicles, and each must exercise its right with due regard to the equal right of the other.⁹⁰ The

the public highways. It undertook to furnish gas to heat the plaintiff's house, and it is not intimated that she had failed to comply with every reasonable regulation of the company necessary to entitle her to a continuance of the supply. From the nature of the business, and out of the relations thus established between the parties, the law, independent of the contract, implied certain duties on the part of the company. A breach of its duty by turning off the supply of gas in cold weather capriciously or without reasonable notice or attempt to give notice to the plaintiff, when such notice was possible, followed up by a neglect or refusal to turn it on upon being notified and requested to do so, was a distinct wrong, and the right to recover compensation for the tortious injury was neither dependent upon the existence of a specific contract nor subject to be defeated by proof that there was a contractual relation between the parties." p. 25.

89—*Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535. And see *Indiana, etc., Gas Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868.

90—*Mahoney v. San Francisco, etc., Ry. Co.*, 110 Cal. 471, 42 Pac.

968; *Clark v. Bennett*, 123 Cal. 275, 55 Pac. 908; *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533; *Flewelling v. Lewiston, etc., Horse R. R. Co.*, 89 Me. 585, 36 Atl. 1056; *Cooke v. Baltimore Traction Co.*, 80 Md. 551, 31 Atl. 327; *Lake Roland El. Ry. Co. v. McKewen*, 80 Md. 593, 31 Atl. 797; *Baltimore Traction Co. v. Appel*, 80 Md. 603, 31 Atl. 964; *Rascher v. East Detroit, etc., Ry. Co.*, 90 Mich. 413, 51 N. W. 463, 30 Am. St. Rep. 447; *Lorthem v. Fort Wayne, etc., R. R. Co.*, 100 Mich. 297, 58 N. W. 996; *Shea v. St. Paul R. R. Co.*, 50 Minn. 395, 52 N. W. 902; *Watson v. Minneapolis R. R. Co.*, 53 Minn. 551, 55 N. W. 742; *Omaha St. R. R. Co. v. Cameron*, 43 Neb. 297, 61 N. W. 606; *Newark R. R. Co. v. Block*, 55 N. J. L. 605, 27 Atl. 1067; *Buttelli v. Jersey City, etc., Elec. Ry. Co.*, 59 N. J. L. 302, 36 Atl. 700; *New Jersey Elec. Ry. Co. v. Miller*, 59 N. J. L. 423, 36 Atl. 885, 39 Atl. 645; *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577, 37 Atl. 135; *Atlantic Coast Elec. R. R. Co. v. Rennard*, 62 N. J. L. 773, 42 Atl. 1041; *Woodland v. North Jersey St. Ry. Co.*, 66 N. J. L. 455, 49 Atl. 479; *Conrad v. Elizabeth, etc., Ry. Co.*, 70 N. J. L. 676, 58 Atl. 376; *O'Neil v.*

Supreme Court of Maryland says: "Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not to unreasonably abridge or interfere with the rights of the other."⁹¹ It is held or intimated in some cases that street cars have a superior or paramount right to so much of the street as is occupied by their tracks.⁹² But it is doubtful whether anything more is meant than that other vehicles may not delay or obstruct their passage. A person has a right to drive along the tracks and cars coming up behind must be operated with due care to avoid injury.⁹³ Even if the vehicle unnecessarily obstructs the car, the company has no right to take the law into its own hands and force the vehicle out of the way.⁹⁴ In Illinois, where the plaintiff was driving on the track in front of a car and was injured by a collision, it was held to be negligence in the plaintiff to obstruct the car and that, if such negligence contributed to the injury, he could not recover.⁹⁵ One about to cross or

Dry Dock, etc., R. R. Co., 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512; Saunders *v.* City, etc., R. R. Co., 99 Tenn. 130, 41 S. W. 1031; Bass *v.* Norfolk Ry. & Lt. Co., 100 Va. 1, 40 S. E. 100; Danville Ry. & Elec. Co. *v.* Hodnett, 101 Va. 361, 43 S. E. 606; Richmond Traction Co. *v.* Clarke, 101 Va. 382, 43 S. E. 618; Spurrier *v.* Front St. Cable Ry. Co., 3 Wash. 659, 29 Pac. 346; Thoresen *v.* La-Crosse City Ry. Co., 87 Wis. 597, 58 N. W. 1051, 41 Am. St. Rep. 64; Tesch *v.* Milwaukee Elec. Ry. & Lt. Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618.

91—Lake Roland El. Ry. Co. *v.* McKewen, 80 Md. 593, 607, 31 Atl. 797. And see Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533; Omaha St. R. R. Co. *v.* Cameron, 43 Neb. 297, 61 N. W. 606.

92—North Chicago Elec. Ry. Co. *v.* Penser, 190 Ill. 67, 60 N. E. 78; Moore *v.* Kansas City, etc., R. R. Co., 126 Mo. 265, 29 S. W. 9; Fleckenstein *v.* Dry Dock, etc., R. R. Co., 105 N. Y. 655, 11 N. E. 951; O'Neil *v.* Dry Dock, etc., R. R. Co., 129 N. Y. 125, 29 N. E. 84.

93—Mahoney *v.* San Francisco, etc., Ry. Co., 110 Cal. 471, 42 Pac. 968; Hicks *v.* Citizens' St. Ry. Co., 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508; Camden, etc., Ry. Co. *v.* Preston, 59 N. J. L. 264, 35 Atl. 1119.

94—Camden, etc., Ry. Co. *v.* Preston, 59 N. J. L. 264, 35 Atl. 1119. And see Consolidated Traction Co. *v.* Haight, 59 N. J. L. 577, 37 Atl. 135.

95—North Chicago Elec. Ry. Co. *v.* Penser, 190 Ill. 67, 60 N. E. 78.

drive on to a street car track must exercise due care to avoid a collision, but the same degree of care is not required as in crossing the tracks of steam railroads.⁹⁶ In Wisconsin it is held that a different rule applies to the driver of a hose cart going to a fire than in case of ordinary vehicles.⁹⁷

Pedestrians have the same rights as vehicles, and the same rules in general apply as between them and the street railways.⁹⁸ It was held negligence in Pennsylvania to run a car along a narrow, unlighted alley in a dark night at a speed which would not permit of its being stopped within the distance illuminated by its head light.⁹⁹ In operating a car through a street where small children are known to be playing, a high degree of care and vigilance must be exercised to avoid injury.¹

96—*Lake Roland El. Ry. Co. v. Ry. & Elec. Co.*, 126 Ala. 135, 28 So. 87.

Baltimore Traction Co. v. Appel, 98—*Driscoll v. Market St. Cable Ry. Co.*, 97 Cal. 553, 32 Pac. 591,

33 Am. St. Rep. 203; *Hayden v. Fair Haven*, etc., R. R. Co., 76 Conn. 355, 56 Atl. 613; *Louisville Ry. Co. v. Colston*, 117 Ky. 804;

Baltimore Traction Co. v. Helms, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215; *Deitring v. St. Louis Transfer Co.*, 109 Mo. App. 524,

85 S. W. 140; *Cincinnati St. Ry. Co. v. Snell*, 54 Ohio St. 197, 43 N. E. 702, 32 L. R. A. 276; *Gilmore v. Federal St.*, etc., Ry. Co.,

153 Pa. St. 31, 25 Atl. 651, 34 Am. St. Rep. 682; *Burgess v. Salt Lake City R. R. Co.*, 17 Utah, 406, 53 Pac. 1013.

99—*Gilmore v. Federal St.*, etc., Ry. Co., 153 Pa. St. 31, 25 Atl. 651, 34 Am. St. Rep. 682.

1—*Bergen Co. Traction Co. v. Heitman*, 61 N. J. L. 682, 40 Atl. 651. And see *Passamaneck v. Louisville Ry. Co.*, 98 Ky. 195, 32 S. W. 620.

97—*Hanlon v. Milwaukee Elec. Ry. & Lt. Co.*, 118 Wis. 210, 95 N. W. 100 But see *Birmingham*

THE PLACE OF EVIL MOTIVE IN THE LAW OF TORTS.

When a Bad Motive Important. In the course of the preceding pages it has been made very manifest that when the question at issue is, whether one person has suffered legal wrong at the hands of another, the good or bad motive which influenced the action complained of is generally of no importance whatever. What was said in the opening chapter of the work, that the exercise by one man of his legal right cannot be a legal wrong to another, has been abundantly shown to be justified by the authorities, even if it were not in itself a mere truism. "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."¹ "Any transaction which would be lawful and proper, if the parties were friends, cannot be made the foundation of an action merely because they happened to be enemies. As long as a man keeps himself within the law by doing no *act* which violates it, we must leave his motives to Him who searches the heart."² To state the point in a few words, whatever one has a right to do another can have no right to complain of.³

. Damage at the Hands of Government. It has been shown, also, that when a government official assumes an authority which

1—PARKE, B., in *Stevenson v. Frazier*, 373; *Frazier v. Brown*, 12 Ohio St. Newnham, 13 C. B. 285, 297. See 294; *Thomasson v. Agnew*, 24 *Floyd v. Barber*, 12 Co. 23; *Stowball v. Ansell*, Comb. 11; *Taylor v. Henniker*, 12 Ad. & El. 488; *Heald v. Carey*, 11 C. B. 977.

2—BLACK, J., in *Jenkins v. Fowler*, 24 Pa. St. 308, 310. See *Fowler v. Jenkins*, 28 Pa. St. 176;

Covanhovan v. Hart, 21 Pa. St. 495, 60 Am. Dec. 57; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep.

See cases *infra* 1505 *et seq.*

3—Cited and approved. *Brewster v. Miller's Sons*, 19 Ky. L. R. 593, 598, 41 S. W. 301.

the law does not warrant him in exercising, he is personally responsible, whatever may have been his motive. The discussions

[*831] in *Milligan's* case cover this point very fully.⁴ But if

held responsible, as may be the case where the injury was done in time of war, in the exercise of orders from a superior authority, which the agent was powerless to resist, the wrong may be the same; but the remedy is by an appeal to the justice of the government, or to such court of claims or auditing board as the government may empower to hear and allow claims against itself.⁵ There can be no other under such circumstances.

It has also been stated that an exercise of legislative authority can afford no ground for legal complaint. A strong illustration of this is afforded by the grant by the government of a new franchise which has the effect to destroy or render useless a prior grant of a like franchise.⁶ If the first grant was not in terms exclusive, the second is perfectly lawful, and no inquiry into the motives for making it will be suffered. The rule is

4—*Ex parte Milligan*, 4 Wall. 3. See *Planters' Bank v. Union Bank*, 16 Wall. 483; *Mitchell v. Harmony*, 13 How. 115; *Griffin v. Wilcox*, 21 Ind. 370; *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 192; *Hough v. Hoodless*, 35 Ill. 166; *Wilson v. Franklin*, 63 N. C. 259; *Hogue v. Penn*, 3 Bush, 663. If persons while claiming to act as State officers, invade private rights under color of authority unconstitutional and void, they are liable. *U. S. v. Lee*, 106 U. S. 196; *Cunningham v. Macon, &c., Co.*, 109 U. S. 446; *Poindexter v. Greenhow*, 114 U. S. 270.

5—*Durand v. Hollins*, 4 Blatch. 451; *Ford v. Surget*, 46 Miss. 130; *Sutton v. Tiller*, 6 Coldw. 593; *Despan v. Olney*, 1 Curt. C. C. 306. If a suit against officers is really to enforce the performance of an obligation of the State in its po-

litical capacity, courts of the United States will not entertain it. *Louisiana v. Jumel*, 107 U. S. 711; *Hagood v. Southern*, 117 U. S. 52. In Great Britain it is customary, after times of civil commotion, to pass acts of indemnity and oblivion to heal the disorders which may have sprung up while alarm prevailed, and to protect officials who in good faith exceeded their authority in attempts to prevent or suppress breaches of the law. There is an enumeration of such acts in *Phillips v. Eyre*, L. R. 4 Q. B. 225. Something similar was done by provisions in some of the revised State constitutions after the recent civil war in this country. See *Drehman v. Stifle*, 8 Wall. 595.

6—See *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

universal, that legislation shall not be assailed in the courts on an allegation of malice, bad faith or corruption in passing it; and it is manifest that if the allegation, when established, could not affect the validity of the legislation, permitting it to be made could only be an impertinence and an affront.⁷

One department of the government is not at liberty to [*832] assail another department in this manner, or to suffer its machinery to be employed by individuals for such a purpose. But legislation exceeds its limits when it orders a trespass upon the property or persons of individuals, or when it provides for taking individual property for the public use without making compensation. Legislatures, like courts, must keep within the limits of their lawful authority.

The General Rule. Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.⁸ "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."⁹ "Where one exercises a legal right only, the motive which actuates him is immaterial."¹⁰ When in legal pleadings the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation, and amount to noth-

7—Sunbury, &c., R. R. Co. v. 882, 33 L. R. A. 225. And see Cooper, 33 Pa. St. 278; Baltimore Chipley v. Atkinson, 23 Fla. 206, v. State, 15 Md. 376; *Ex parte* Mc-Cardle, 7 Wall. 506; Doyle v. Insurance Co., 94 U. S. 535; *Ex parte* Newman, 9 Cal. 502; Slack v. Jacob, 8 W. Va. 612, 635; Flint & F. P. Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; State v. Fagan, 22 La. Ann. 545. If a municipality has authority to impose taxes, its motives are immaterial. Brown v. Cape Girardeau, 90 Mo. 377.

8—Jenkins v. Fowler, 24 Pa. St. 308, 310, per BLACK, J.

9—Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

10—Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. pp. 607, 608.

ing unless a cause of action is otherwise alleged.¹¹ The principle is forcibly illustrated by the case of *Mahan v. Brown*. In that case the plaintiff declared against the defendant for wantonly and maliciously erecting on his own premises a high fence, near to and in front of the plaintiff's windows, without benefit or advantage to himself, and for the sole purpose of annoying the plaintiff, thereby obstructing the air and light from entering her windows, and rendering her house uninhabitable. It was held that the action would not lie. "The defendant has not so used his property as to injure another. No one, legally speaking, is injured or damaged unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of that which did not belong to her; and whether the motives of the defendant were good or bad, she had no legal cause of complaint."¹² The decision is important, not only as an illustration

of the general rule, but also because it is opposed to the [*833] doctrine which prevailed in the *common law of Eng-

land, that one, by the uninterrupted enjoyment of the privilege of receiving light and air into his buildings over the contiguous land of another, might acquire a prescriptive right thereto; a doctrine which almost universally has been considered in this country unsuited to our condition and circumstances.¹³

11—WILLES, J., in *Gerard v. Hochrein*, 107 Wis. 267, 83 Lewis, L. R. 2 C. P. 305.

12—*Mahan v. Brown*, 13 Wend. 261, 265, 28 Am. Dec. 461. See *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Harwood v. Tompkins*, 24 N. J. 425; *Jenks v. Williams*, 115 Mass. 217; *Thornton v. Thornton*, 63 N. C. 211; *Burke v. Smith*, 69 Mich. 380, 37 N. W. 838; *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381, 21 Am. St. Rep. 510, 8 L. R. A. 183; *Kirkwood v. Fennegan*, 95 Mich. 543, 55 N. W. 457; *Peek v. Roe*, 110 Mich. 52, 67 N. W. 1080; *Horan v. Byrnes*, 70 N. H. 531, 49 Atl. 569; *Levy v. Brothers*, 4 Misc. 48, 23 N. Y. S. 825; *Metz-* ger v. *Foote*, 19 Wend. 309; *Myers v. Gemmel*, 10 Barb. 537; *Rogers v. Sawin*, 10 Gray, 376; *Carrig v. Dee*, 14 Gray, 583; *Randall v. Sanderson*, 111 Mass. 114; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Jenks v. Williams*, 115 Mass. 217; *Ward v. Neal*, 37 Ala. 500; *Cherry v. Stein*, 11 Md. 1; *Powell v. Sims*, 5 W. Va. 1; *Keiper v. Klein*, 51 Ind. 316; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Napier v. Bulwinkle*, 5 Rich. 312; *Pierre v. Fernald*, 26 Me. 436, 46 Am. Dec. 573;

So it has been held that no action would lie for maliciously conspiring as insurance officers to refuse insurance on the plaintiff's property;¹⁴ or for maliciously collecting the notes of a bank and presenting them for redemption;¹⁵ or for maliciously adopting a trade mark to the prejudice of a plaintiff who has no exclusive right to appropriate it;¹⁶ or for throwing open one's land to the public, so that they may pass over it, thereby avoiding a toll gate;¹⁷ or for maliciously throwing down

Hubbard v. Town, 33 Vt. 295; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Ray v. Sweeney*, 14 Dec. 196. See *Morrison v. Mar-*

quardt, 24 Iowa, 35, 92 Am. Dec. 444; and compare *Robeson v. Pit-*

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leans, &c., R. R. Co., 2 La. Ann. 80; *Haverstick v. Sipe*, 33 Pa. St. 368; *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Parker v. Foote*, 19 Wend. 309. As to what comes

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Bush, 1, 29 Am. Rep. 388; *Lapere v. Luckey*, 23 Kan. 534, 33 Am. Dec. 196. See *Morrison v. Mar-*

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14—Hunt v. Simonds, 19 Mo. 583.

15—South Royalton Bank v. Suf-

folk Bank, 27 Vt. 505.

16—Glendon Iron Co. v. Uhler, 75 Pa. St. 467, 15 Am. Rep. 599.

17—Auburn, &c., P. R. Co. v. Douglass, 9 N. Y. 444, 450, per SELDEN, J.: "Independent of author-

ity, if a malignant motive is suffi-

cient to make a man's dealings,

with his own property, when ac-

companied by damage to another,

actionable, where is the principle

to stop? For instance, if a man

sets up a trade, not with a view

to his own profit, but solely to in-

jure one already in the same

trade, how can the case be distin-

guished in principle from this?

So, if one compels his debtor to

pay, not because he wants the

money, but that the latter may call

upon his debtor and thus ruin

him; or if one who holds stock

in an incorporated company, with

a view to depreciate the stock and

thus injure some other holder,

throws his stock upon the market

and sells at a great sacrifice,

would not these cases fall within

the same principle? and yet no

one would contend that an action

would lie in these or similar

[*834] *fences put up through one's land to mark the lines of a road which has never lawfully been laid out.¹⁸ Illustrations might be multiplied indefinitely, but it is needless.¹⁹ And, on the other hand, the cases are equally numerous which show that the most correct motive, or even an inability to indulge a motive, will not protect one who invades the right of another.

cases." See, also, Stearns *v.* Sampson, 59 Me. 568, 572, 8 Am. Rep. 442. The malice of a witness in giving injurious testimony, or of a party in making injurious allegations in his pleadings, &c., cannot be the foundation of a suit. Damport *v.* Simpson, Cro. Eliz. 250; Revis *v.* Smith, 18 C. B. 125; Henderson *v.* Broomhead, 4 H. & N. 569; Cunningham *v.* Brown, 18 Vt. 123, 46 Am. Dec. 140; Dunlap *v.* Glidden, 31 Me. 435, 52 Am. Dec. 625; White *v.* Carroll, 42 N. Y. 161, 1 Am. Rep. 503.

18—Fowler *v.* Jenkins, 28 Pa. St. 176; Jenkins *v.* Fowler, 24 Pa. St. 308. If one maliciously throw down a fence erected as a boundary fence, but on his side of the line, this is no wrong, for the other was a trespasser in building it. Smith *v.* Johnson, 76 Pa. St. 191. Where a railroad agent maliciously notified its employees that any one dealing with plaintiff, a store-keeper, would be discharged, it was held that there could be no recovery. Payne *v.* Railroad Co., 13 Lea, 507. So where the employer maliciously threatened to refuse to employ any one who hired plaintiff's premises as a dwelling thereby greatly diminishing their value, the plaintiff was held to have no remedy against the employer, if the employee, a tenant at will, abandoned the premises. Heywood *v.* Tillson, 75 Me. 225. So where a bank about

a spring in defendant's land caused an increase of water in a well on plaintiff's land, the latter has no remedy if the former by cutting the bank diminishes the water in the well. Phelps *v.* Nowlen, 72 N. Y. 39. But in Maine in a carefully considered case it is held that if one digs a well upon his own land not for the benefit of his own estate but maliciously and for the sole purpose of cutting off water percolating to a spring, from which another has a right to draw water, an action will lie. "We think," says the court, "it cannot be regarded as a maxim of universal application that malicious motives cannot make that a wrong, 'which in its own essence is lawful.'" Chesley *v.* King, 74 Me. 164, 43 Am. Rep. 569. The same doctrine has been applied where the owner of a dam privilege by letting out water, when ice was forming, prevented the riparian owner from harvesting the ice. If the act was malicious and solely to injure, an action lies. Stevens *v.* Kelly, 78 Me. 445, 57 Am. Rep. 813; otherwise not. Stevens *v.* Kelly, 13 Atl. Rep. 45.

19—See Raycroft *v.* Tayntor, 68 Vt. 219, 35 Atl. 53, 54 Am. St. Rep. 882, 33 L. R. A. 225. Where the defendant appropriated the subterranean waters on his land maliciously and for the sole purpose of injuring the plaintiff, he was enjoined. Springfield W. W. Co.

The legal wrong is found in the injury done and not in motive.²⁰

***Apparent Exceptions.** Some cases are apparent exceptions to the general rule. Thus, we have seen that malice is said to be an ingredient in the wrong of slander and libel. But in most cases the exception is only apparent. If the damaging imputation is false, the law supplies the malice, and will neither require it to be proved, nor give immunity because it is disproved. That malice is an element of the wrong in a case in which the proof of it is unimportant, must be purely a legal fiction.

Real Exceptions. The cases in the law of slander and libel in which the actual existence of malice is essential to constitute an actionable wrong, are those in which the law gives a privilege to speak or otherwise publish what at the time the party believes, provided it is done in good faith. Many such cases of privilege have been given in preceding pages,²¹ and it has been shown that the party is protected, even though what he published is false, if he published only what he honestly believed. But in such cases the law itself sets bounds to the right; it gives a privilege with

v. Jenkins, 62 Mo. App. 74. But seemed to need it, and the improvised lynch courts which exercise jurisdiction on the borders of civilization in some cases would become perfectly lawful tribunals.

20—The servant who innocently converts the property of another when acting for and in the interest of his master, is nevertheless liable personally. Porter *v.* Thomas, 23 Ga. 467. The army officer who undertook to remedy the wrong done to a loyal man in the taking of his property by seizing and handing over to him the property of a confederate, was of course liable as a trespasser. Moran *v.* Smell, 5 W. Va. 26. If good motive could render an otherwise illegal act lawful, one might justify inflicting punishment by way of discipline on his neighbor's children when they

It is held in Indiana that if one appropriates subterranean waters maliciously and for the sole purpose of injuring his neighbor and does so injure him, he will be liable to an action. Gagnon *v.* French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. 849. So in Springfield W. W. Co. *v.* Jenkins, 62 Mo. App. 74. And see Stillwater Water Co. *v.* Farmer, 89 Minn. 58, 93 N. W. 907, 99 Am. St. Rep. 541, 60 L. R. A. 875; Miller *v.* Black Rock, etc., Co., 99 Va. 747, 40 S. E. 27.

21—*Ante*, p. 420 *et seq.*

a limit plainly defined; a privilege to speak in good faith, but not otherwise, and the party who maliciously publishes what proves to be untrue, does not avail himself of the privilege, and, therefore, cannot claim its protection.

Precisely the same may be said of the cases of malicious prosecution. Every man is at liberty to make use of the machinery of the law in the assertion of any legal demand which he has probable cause to believe exists in his favor against another, and also in the prosecution of any criminal charge against another which he has probable cause to believe is well founded. This is his lawful privilege, and he is protected in its exercise

notwithstanding the demand or the criminal charge
[*836] proves on investigation to be unfounded. But *he is not

privileged to seize property of another upon legal process for a demand which he has no reasonable ground for asserting, or to defame another by a criminal prosecution on a charge which he has no reason to believe was well founded. Good faith in these cases is the limit of the privilege. It would be monstrous if one might with impunity make use of the process of the law for the sole purpose of wreaking his malice upon his fellows; and it would, perhaps, be equally destructive of social order if every man were subject to be called to account for the motives with which his legal rights were exercised.

Bad Motive Increases Necessity for Caution. But it cannot be said that motive is entirely unimportant when one is exercising undoubted legal rights. All rights must be exercised with due regard to the rights of others, and action becomes unlawful when it becomes negligent. It may be that if one shall assert his rights with no other object than annoyance, he should be put to the observance of a higher degree of care than if what he was doing had in view a beneficial purpose. Suppose, for instance, he were to make an excavation in his grounds for the mere purpose of annoying his neighbor and compelling him to be at the expense of supports for his building, would not his motive demand of him the observance of more than ordinary care to avoid injury? Suppose he were to build a fire on his own premises for the sole purpose of incommodeing a neighbor with the smoke and dust, and the fire should spread to the neighbor's

premises, would not the motive itself strengthen greatly any other evidence that might exist of the want of proper care to prevent the fire spreading? The point is not without interest, and it would seem that there must certainly be some difference between the man who proposes to keep within the limits of legal right, and also to cause no annoyance, and the man who proposes to cause what annoyance he may find possible without exceeding those limits.

Motive generally becomes important only when the damages for a wrong are to be estimated. It then comes in as an element of mitigation or aggravation, and is of the highest importance.²² The unintended blow, though negligent, is excused, when the blow meant for an affront, though no heavier, is *justly punished with heavy damages. The justice of [*837] this is universally and spontaneously conceded in private life and acted upon everywhere.²³

22—"Where a tort is committed Gulf, etc., Ry. Co. v. Reed, 80 Tex. with a bad motive, or so recklessly 262, 15 S. W. 1105, 26 Am. St. Rep. 749; Wood v. Am. Nat. Bank, 100 Va. 306, 40 S. E. 931; Spokane Truck & Dray Co. v. Hooper, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L. R. A. 689.

23—if the following anecdote shall at first blush seem a little out of place in a law treatise, the aptness and force with which it illustrates the point of the text must excuse its introduction:

In his early years Mr. Macaulay has a curiosity to see how an election is conducted, and goes out for the purpose. As he approaches the place of voting he is struck in the face by the carcass of a dead cat which some one has thrown in his direction. This certainly is unpleasant; the missile is unsavory and the victim is proportionally enraged. No money just then would have compensated satisfactorily for the outrage. It is an unprecedented affront and insult.

But the guilty party soon appears merely the occasion for a jocose and apologizes. The missile was remark, and the trespass which, if not intended for Mr. Macaulay, intended, would have been for a but for another person against considerable period a source of irritation whom it had been thought to be a and annoyance, is all removed by an explanation and a proper political argument. The slight ablution, and good nature injury is almost redressed at once. is restored. A tort was of course "Well," says Mr. Macaulay, "please committed, but the damage was next time intend the missile for me and hit the other man." nominal.

Thus a grievous injury becomes

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